UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPUBLIC OF KAZAKHSTAN and OUTRIDER MANAGEMENT, L.L.C., Plaintiffs, v. DANIEL CHAPMAN; ARGENTEM CREEK HOLDINGS LLC; ARGENTEM CREEK PARTNERS LP; PATHFINDER ARGENTEM CREEK GP LLC; and ACP I TRADING LLC, Defendants.	**Civil Action No. 1:21-cv-03507-JGK** *Removed from:* Supreme Court of New York, County of New York State Court Index No. 652522/2020 **ORAL ARGUMENT REQUESTED**

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION AND DISMISS OUTRIDER'S CLAIMS

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Defendants Argentem Creek Holdings LLC; Argentem Creek Partners LP; Pathfinder Argentem Creek GP LLC; ACP I Trading LLC (collectively, the "Argentem Entities"); and Daniel Chapman (together with the Argentem Entities, "Argentem") respectfully submit this Memorandum of Law in Support of their Motion to Compel Arbitration and Dismiss Outrider's Claims in accordance with the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1–16, and the written arbitration agreement between Argentem and Plaintiff Outrider Management, L.L.C.

PRELIMINARY STATEMENT

This case is part of Plaintiff Republic of Kazakhstan's years-long attempt to evade payment on a $500 million arbitration award that was entered against it in Sweden in 2013 (the "SCC Award"). Kazakhstan's harassment campaign started with lawsuits against the prevailing parties in the Swedish arbitration, non-parties Anatolie Stati, Gabriel Stati, and various companies controlled by them (collectively, the "Statis") whose assets in oil and gas development were expropriated by Kazakhstan through, as one U.S. Court held, "a string of measures of coordinated harassment." Now, Kazakhstan has turned its litigious eye to Argentem, which includes ACP I Trading LLC ("ACP"), which holds an interest in publicly-traded notes (the "Notes") that were issued for the Statis' activities in Kazakhstan and that will be repaid by funds collected on the SCC Award.

While Kazakhstan was initially the sole plaintiff, it subsequently filed an Amended Complaint that adds Outrider as a plaintiff. Like ACP, Outrider[1] purchased the Notes. After Kazakhstan expropriated the Statis' assets, the Statis and various noteholders (including Outrider

[1] The Amended Complaint asserts that Outrider purchased the Notes. Because Outrider purchased the Notes through its Caymans-based fund Outrider Master Fund, L.P., Argentem reserves it right to challenge Outrider being the proper plaintiff in this action in the event that the Court determines this is the proper forum for this matter.

and ACP) became party to an agreement (the "Sharing Agreement") restructuring the Notes' repayment terms. Under the Sharing Agreement, the noteholders will be repaid by funds collected on the SCC Award. Despite the fact that Outrider sold its Notes nearly five years ago, it recently joined Kazakhstan's complaint and sued Argentem in its capacity as fellow noteholder. Outrider alleges, without any factual basis, that Argentem conspired with the Statis to fraudulently induce Outrider to enter into the Sharing Agreement, and parrots Kazakhstan's baseless fraud allegations against the Statis. Courts around the world have rejected Kazakhstan's allegations as a transparent and meritless attempt to relitigate the Swedish arbitration proceedings, and Outrider's new allegations in this action are equally doomed to fail.

Just as importantly, however, this Court is not an appropriate forum to adjudicate Outrider's claims because Outrider agreed to resolve this kind of dispute in binding arbitration. Specifically, the parties clearly and unambiguously agreed in the Sharing Agreement to arbitrate "any suit, action or proceeding" between or among the Statis or any of the participating noteholders "arising out of or based upon [the Sharing] Agreement" (the "Arbitration Clause"). The parties also agreed that arbitration "shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC Rules')," thereby referencing and explicitly incorporating the ICC Rules. By explicitly incorporating the ICC Rules into the Arbitration Clause, the parties agreed that an arbitrator, not a court, would resolve questions of arbitrability. Thus, the Court should immediately refer this dispute to arbitration, without assessing the substantive merits of arbitrability.

Even if the Court considers threshold arbitrability questions, Outrider's claims must be compelled to arbitration because, under the FAA, the Arbitration Clause is a valid arbitration agreement and the Arbitration Clause's broad scope undoubtedly covers all of Outrider's claims

in this action. The FAA's strong policy favoring arbitration strengthens this conclusion because the policy applies with special force to international business contracts, like the Sharing Agreement.

To be clear, ACP being the only defendant party to the Sharing Agreement does not change this analysis. Mr. Chapman is entitled to enforce the Arbitration Clause as a corporate officer, and the other Argentem Entities are entitled to enforce the Arbitration Clause under the alternative estoppel theory because, among other reasons, Outrider treats the entities as though they are interchangeable.

Accordingly, Argentem respectfully requests that this Court enforce the Arbitration Clause, compel Outrider to arbitrate its dispute with Argentem, and dismiss Outrider's claims.

BACKGROUND

I. Outrider's Claims Are Another Medium For Kazakhstan To Repeat Baseless, Rejected Fraud Assertions And To Avoid Satisfying A Judgment Rendered Against It

Outrider's allegations of the Statis' fraud are not new. In fact, Outrider's co-plaintiff, Kazakhstan, has unsuccessfully asserted the same fraud allegations against the Statis for years. Kazakhstan's claims have been considered and rejected by numerous tribunals around the world, including a federal court in the United States.

The Statis invested more than a billion dollars in the development of oil and gas fields in Kazakhstan. *Anatolie Stati v. Republic of Kazakhstan*, 302 F. Supp. 3d. 187, 192 (D.D.C. 2018). However, between 2008 and 2010, Kazakhstan "engaged in a campaign of harassment and illegal acts" that expropriated the Statis' oilfield facilities, causing hundreds of millions of dollars in damages. *Id*. In response to Kazakhstan's egregious misconduct, the Statis filed an arbitration claim in July 2010 in the Stockholm Chamber of Commerce ("SCC") under the Energy Charter Treaty. *Id.* at 192–93. In 2013, the SCC agreed with the Statis that Kazakhstan had "engaged in a campaign of harassment and illegal acts" and issued the SCC Award in favor of the Statis,

finding, among other things, that Kazakhstan had breached its duty to provide fair and equitable treatment as required by the Energy Charter Treaty. *Id*. at 193. The SCC awarded the Statis nearly $500 million as compensation for Kazakhstan's expropriation of its assets. *Id.* The SCC's ruling was upheld by the Svea Court of Appeal and the Swedish Supreme Court. *See id.* at 195–196.

In the seven years since the SCC Award was issued, Kazakhstan has not paid a dime to the Statis. Instead, Kazakhstan has fought enforcement and collection proceedings in jurisdictions across the world by asserting frivolous allegations that the SCC Award was procured by fraud. Kazakhstan has previously asserted the same underlying fraud allegations it and Outrider assert in this action: that the Statis engaged in fraudulent related-party transactions and defrauded the SCC tribunal. However, those arguments have been decisively and consistently rejected. *See id.* at 198–201. The SCC Award has been confirmed by Swedish, Dutch, Italian, Belgian, and U.S. courts, all of which rejected Kazakhstan's fraud allegations. In fact, this is not the first time that Kazakhstan has asserted these fraud claims in the U.S. In 2014, the Statis petitioned the District Court for the District of Columbia ("D.C. Court") to confirm the SCC Award. Petition to Confirm Arbitral Award, *Stati v. Republic of Kazakhstan*, No. 1:14-cv-1638-ABJ-DAR (D.D.C. Sept. 30, 2014), ECF No. 1. After the petition was fully briefed, but before the court ruled, Kazakhstan moved for leave to supplement the record and supply new grounds for its opposition. *See* Order, *Stati v. Republic of Kazakhstan*, C.A. No. 1:14-cv-1638-ABJ-DAR (D.D.C. May 11, 2016), ECF No. 36. In its motion, Kazakhstan alleged that nearly $200 million of the SCC Award "'represented compensation for a liquefied petroleum gas plant'" in the Kazakh oilfields, but that in the arbitration, the Statis "'fraudulently and materially misrepresented the [] Plant construction costs for which they claimed reimbursement[.]'" *Id*. at 2. The court denied Kazakhstan's motion, rejecting the argument that the SCC Award had been procured by fraud. *Id*. at 3–4. The court

explained that "it ha[d] reviewed the arbitration award, and it [was] clear that the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision" because "the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material" that the Statis had submitted to them. *Id*. The D.C. Court then finally and squarely rejected the fraud allegations when it confirmed the SCC Award in 2018.[2] *See Stati*, 302 F. Supp. 3d. 187.

II. ACP And Outrider Are Parties To The Sharing Agreement

The Amended Complaint acknowledges that ACP and Outrider are parties to the Sharing Agreement. Plaintiffs allege that "Defendants and several other (but not all) [] Noteholders, including Plaintiff Outrider, signed [the Sharing Agreement] with the Statis to share in the proceeds of any arbitral award against Plaintiff Kazakhstan." Am. Compl. ¶ 31; *see also id.* ¶ 142 ("Defendants negotiated and entered into the 2012 Sharing Agreement with the Statis."). Plaintiffs further allege that "'Defendants,' unless otherwise indicated, shall include the named Defendants and their predecessor in interest, Black River" and that "Defendants now hold all the rights, responsibilities, and interests that Black River used to hold with regard to this matter." Am. Compl. ¶ 15 n.2. According to Plaintiffs, "Defendants later assumed Black River's interest in the Sharing Agreement," making them parties to the Sharing Agreement. Am Compl. ¶ 31 n.3.

Plaintiffs further acknowledge that the Notes were issued pursuant to an Indenture and its amendments. Am Compl. ¶ 52. One of those amendments was a Supplemental Indenture dated

[2] The Honorable Amy Berman Jackson denied Argentem's Motion for Leave to File a Motion for Preliminary and Permanent Injunction in the same action. As discussed more thoroughly in Argentem's simultaneously-filed Motion to Dismiss Plaintiff Republic of Kazakhstan's Claims, Judge Jackson's order denying injunctive relief did not hold that the fraud claims had not been adjudicated, but deferred the decision to the courts in New York.

as of February 15, 2013 (the "Supplemental Indenture"). *See* Baldini Decl., Ex. A, ¶ 7, Supplemental Indenture. The Supplemental Indenture confirms that all noteholders are subject to the terms of the Sharing Agreement:

> Each Sharing Global Note (and any such Note in certificated form) shall include the following legend (the "Sharing Agreement Legend"):
>
> **"THIS NOTE IS SUBJECT TO THE TERMS AND CONDITIONS OF THAT CERTAIN SHARING AGREEMENT AND ASSIGNMENT OF RIGHTS, DATED AS OF DECEMBER 17, 2012, BY AND AMONG TRISTAN OIL LTD. AND THE OTHER PARTIES NAMED THEREIN (THE "SHARING AGREEMENT") . . . ANY TRANSFEREE OF THIS NOTE WILL TAKE THE NOTE SUBJECT TO THE TERMS AND CONDITIONS OF THE SHARING AGREEMENT. ACCORDINGLY, THE HOLDER OF THIS NOTE AND ANY PROPOSED TRANSFEREE THEREFORE IS URGED TO READ THE SHARING AGREEMENT IN ITS ENTIRETY, A COPY OF WHICH IS AVAILABLE UPON REQUEST FROM THE TRUSTEE AND TRISTAN OIL LTD."**

Id. at Section 1.4 (emphasis in original). Accordingly, and as the Amended Complaint concedes, there can be no dispute that holders of the Notes are, by their terms, subject to the provisions of the Sharing Agreement.[3]

After the initial issuance of the Notes in 2006, an after-market developed in which Notes were bought and sold, including to new investors such as Outrider and ACP. Am Compl. ¶ 55. Outrider is an investment advisor that, through its Cayman Islands-based fund, purchased Notes from October 2009 through 2014. *Id.* Outrider no longer holds any Notes, selling the last of its

[3] While Argentem does not concede the validity of the legal conclusions in the Amended Complaint, including that Black River is Argentem's "predecessor in interest" or that Argentem "assumed" Black River's interest in the Sharing Agreement, Argentem does not contest, at this time, that ACP and Outrider are parties to the Sharing Agreement because, based on the allegations in the Amended Complaint, both parties purchased the Notes that bind them to the Sharing Agreement.

Notes in September 2016. *Id.* ¶¶ 16, 55. ACP also purchased Notes in the after-market.[4] *Id.* ¶ 44. Unlike Outrider, ACP remains a holder of the Notes. *See* Baldini Decl., Ex. A, ¶ 6; Ex. 5, Certificate of Proof of Holding. By purchasing the Notes, Outrider and ACP became parties to the Sharing Agreement. Am Compl. ¶ 142; Ex. 3, Sharing Agreement at § 18(c) ("This Agreement shall be binding upon and inure to the benefit of . . . the Participating Noteholders and the Participating Noteholders Representative and their respective successors and permitted assigns."); Ex. 6, Supplemental Indenture, Section 1.4 (subjecting those who acquire Notes to the Sharing Agreement).

III. Outrider's Claims Are Based On The Sharing Agreement

Despite its full participation in the negotiation of the Sharing Agreement, Outrider apparently views the underlying litigation as a free option to align itself with Kazakhstan's ill-founded and unsupported claims. More than eight years after entering into the Sharing Agreement and nearly five years after selling all of its Notes, Outrider now alleges that Argentem "induced" it to enter into the Sharing Agreement. Am Compl. ¶ 144. According to Outrider, Argentem "led" some kind of unspecified "investigation" into the Statis' business activities at some unspecified period of time. *Id.* ¶ 32. Then, Argentem allegedly uncovered the Statis' fraud and, instead of informing Outrider and the other Noteholders, "decided to conspire with and support the Statis in an effort to perpetuate their fraudulent scheme," by entering, and inducing Outrider to enter into, the Sharing Agreement. *Id*. ¶ 30. There are no allegations as to who allegedly conducted this operation, when it specifically occurred, or how specifically Argentem allegedly became aware of the fraud. Outrider declares, without any factual support, that Argentem led the negotiations with the Statis over the Sharing Agreement and were "in direct contact with the Statis throughout the

[4] ACP's Note purchase is separate from, and not related to, Black River's purchase(s), if any.

negotiations," allegedly maintaining "independent lines of communications" with the Statis that Outrider did not have. *Id*. ¶¶ 32, 138.

Outrider's claims are meritless for numerous reasons. Moreover, it is clear that Outrider is simply parroting Kazakhstan's rejected fraud allegations as a cover for Kazakhstan's attempt to evade the judgment rendered against it, including using U.S.-based Argentem as leverage in its unrelenting scheme to delay compliance with orders from several jurisdictions and continue to thwart the rule of law. While Kazakhstan's claims should be rejected on the merits, this Court is not the appropriate forum to resolve Outrider's claims.

IV. The Sharing Agreement Mandates That Parties Arbitrate "Any" Dispute "Arising Out Of Or Based Upon" The Sharing Agreement

The Sharing Agreement, to which the parties consented, includes an agreement to arbitrate all claims arising out of or based upon the Sharing Agreement. *See* Baldini Decl., Ex. A, ¶ 4; Ex. 3, Sharing Agreement §18(k):

> Each of the Parties agrees that any suit, action or proceeding arising out of or based upon this Agreement or the transactions contemplated hereby shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules"). The place of arbitration shall be New York, New York. Each of the Parties waives any objection which it may now or hereafter have to the laying of venue of any such proceeding, and irrevocably submits to the exclusive jurisdiction of such arbitration in any suit, action or proceeding.

Id. The Sharing Agreement defines "Party" to include the Statis and the Participating Noteholders. *Id.* § 1 at A-7. Participating Noteholders include those Noteholders that consented to the Note Exchange and originally entered into the Sharing Agreement as well as any party that acquires Notes from a Participating Noteholder. *Id.* Thus, the Sharing Agreement provides that any dispute between or ACP and Outrider that arises out of or is based upon the Sharing Agreement must be arbitrated.

V. Relevant Procedural History

On June 16, 2020, Kazakhstan filed the Complaint against Argentem in the Supreme Court of the State of New York. On December 31, 2020, Outrider joined the action, and Kazakhstan and Outrider filed the First Amended Complaint. On April 20, 2021, Argentem removed the action from the Supreme Court of the State of New York to this Court under §§ 201–205 of the FAA. On May 18, 2021, the Court granted Argentem permission to file this motion.

VI. Outrider's Claims Against Argentem

Outrider asserts three claims against Argentem: civil conspiracy to commit fraud, aiding and abetting wrongful conduct, and unlawful means conspiracy under English law. Outrider's claims are based on allegations that Argentem supported the Statis' alleged fraud by concealing the alleged fraud from Outrider, inducing Outrider to enter into the Sharing Agreement, and providing funding to the Statis to enforce and collect on the SCC Award, which is the primary source of recovery on the Notes under the Sharing Agreement. Am. Compl. ¶ 287. Outrider alleges that, due to Argentem's conduct, Outrider suffered damages by "continuing to act as a Noteholder without knowledge of the Statis' fraud," "entering into the Sharing Agreement," "incurring legal fees and other expenses," "waiving legal rights against the Statis" pursuant to the Sharing Agreement's terms, and not exercising "alternative options" with regard to the Notes other than entering into the Sharing Agreement. Am. Compl. ¶¶ 36, 289, 301.

In short, all of Outrider's claims against Argentem are based on the alleged harm it suffered as a result of entering into the Sharing Agreement and, thus, "aris[e] out of" the Sharing Agreement and must be arbitrated.

ARGUMENT

I. Outrider Must Arbitrate Its Claims Against Argentem

The Arbitration Clause in the Sharing Agreement is clear and unmistakable evidence that the parties agreed to resolve this dispute before an arbitrator, and not a court. By incorporating the ICC Rules, moreover, the parties even agreed that threshold arbitrability issues would be resolved by an arbitrator, not this Court. Even if this Court decides arbitrability itself, however, Outrider's claims fall within the Arbitration Clause's broad scope covering "any suit, action or proceeding," relating to the Sharing Agreement, including this one.

A. The FAA Applies To The Arbitration Clause

Arbitration agreements must meet only two conditions for the FAA to apply: (1) they must be in writing; and (2) they must be part of "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Agreements that satisfy these two requirements are "valid, irrevocable, and enforceable." *Id*. Here, the Arbitration Clause unequivocally meets these two conditions. First, the Arbitration Clause is in writing. *See* Baldini Decl., Ex. A, ¶ 4; Ex. 3, Sharing Agreement. Second, the Arbitration Clause is part of the Sharing Agreement, which evinces a transaction involving commerce; namely, it governs the exchange and payment of notes affecting international commerce. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (explaining that the term "involving commerce" in the FAA means "affecting commerce," which is extremely broad and covers a "wide[] range of transactions"); *Adams v. Suozzi*, 433 F.3d 220, 225 (2d Cir. 2005) (same). The FAA therefore applies.

B. Given The FAA's Strong Policy Favoring Arbitration And The Arbitration Clause's Plain Language, Outrider's Claims Must Be Arbitrated

The FAA "embodies a strong federal policy favoring arbitration" which is binding on all courts, "notwithstanding any state substantive or procedural policies to the contrary." *Thomas*

James Assocs., Inc. v. Jameson, 102 F.3d 60, 65 (2d Cir. 1996) (internal citation omitted); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In reviewing arbitration agreements under the FAA, generally, "the role of courts is 'limited to determining two issues: (i) whether a valid agreement or obligation to arbitrate exists, and (ii) whether one party to the agreement has failed, neglected or refused to arbitrate.'"[5] *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003) (quoting *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996)). Because an arbitration agreement is a "creature of contract," courts apply ordinary state law principles governing contract formation to determine whether a valid agreement or obligation to arbitrate exists. *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002); *see also Bybyk*, 81 F.3d at 1198 ("As an initial matter, in interpreting an arbitration agreement we apply the principles of state law that govern the formation of ordinary contracts."). However, if the parties have "explicitly incorporate[d] rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator" and a court must refer the threshold question of arbitrability to arbitration. *Contec Corp. v. Remote Sol. Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (citation omitted).

Here, the Arbitration Clause incorporates the ICC Rules, which empower an arbitrator to decide arbitrability, thus evincing the parties' clear and unmistakable intent to arbitrate the threshold arbitrability question. Therefore the Court must refer the question to arbitration.

1. The Parties Agreed To Arbitrate Arbitrability

Courts in this Circuit have found that arbitration agreements that "explicitly incorporate" arbitration rules that empower an arbitrator to decide arbitrability issues sufficiently evince the

[5] The second issue is satisfied because Outrider filed a complaint to be reviewed by the court, instead of submitting a request for arbitration with the ICC.

parties' "clear and unmistakable" intent to delegate such issues to an arbitrator. *See, e.g.*, *1199SEIU United Healthcare Workers E. v. PSC Cmty. Servs.*, 2021 WL 708584, at *12 (S.D.N.Y. Feb. 19, 2021) (recognizing that the parties delegated arbitrability issues to an arbitrator by referencing arbitration rules); *Contec Corp.*, 398 F.3d at 208 (finding that the parties' incorporation of arbitration rules showed the parties' "clear and unmistakable" intent to arbitrate arbitrability issues); *Citi Connect, LLC v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 2020 WL 5940143, at *6 (S.D.N.Y. Oct. 7, 2020) (same). And specifically, courts in this Circuit have held that referral of "all disputes" to the ICC for arbitration under the ICC rules was sufficiently "plain and sweeping" to indicate the parties' intent to have arbitrators decide arbitrability. *Shaw Grp. Inc.*, 322 F.3d at 121 (internal citations omitted). Likewise, courts in other Circuits have held that arbitration agreements incorporating ICC Rules demonstrate the parties' "clear and unmistakable" intent to have an arbitrator resolve arbitrability. *See, e.g.*, *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472–73 (1st Cir. 1989) (holding that parties who contracted to have disputes resolved under the ICC rules "clearly and unmistakably" agreed to have the arbitrator determine arbitrability); *Daiei, Inc. v. U.S. Shoe Corp.*, 755 F. Supp. 299, 303 (D. Haw. 1991) (same).

Parties incorporate terms by reference to a separate, noncontemporaneous document by clearly referencing the document and "describ[ing] it in such terms that its identity may be ascertained beyond doubt." *Revis v. Schwartz*, 192 A.D.3d 127, 138 (2d Dep't 2020) (citing Restatement (Second) of Contracts § 132)); *see also Shaw Grp. Inc.*, 322 F.3d at 120, 122 (holding that the parties "understood the 'rules' to include those of the ICC itself" when an agreement referred "[a]ll disputes" to ICC arbitration in accordance with the ICC Rules).

Where, as here, the parties' arbitration agreement explicitly incorporates arbitration rules that delegate arbitrability to an arbitrator, "a court possesses no power to decide the arbitrability

issue," even if the court were to believe that "the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The court should not "inquire into the scope of the arbitration agreement," "apply the arbitration clause at issue . . . to the facts alleged in the complaint," or "otherwise determine whether the numerous causes of action asserted by [the plaintiff] fall within its scope." *Revis*, 192 A.D.3d at 142 (citing *Schein*, 139 S. Ct. at 530); *see also Contec Corp.*, 398 F.3d at 211 (holding that it is the "province of the arbitrator to 'decide whether a valid arbitration agreement exists.'") (internal citations omitted). Instead, the court should compel arbitration and leave those questions to be decided by an arbitrator.

Here, the Arbitration Clause explicitly incorporates the ICC Rules. Under the Arbitration Clause, "any suit, action or proceeding" "arising out of or based upon" the Sharing Agreement "shall be finally settled under the [ICC Rules]." Ex. 3, Sharing Agreement § 18(k). This clear reference to the Rules is sufficient to demonstrate that the parties "understood the 'rules' to include those of the ICC itself" and thus incorporated the Rules into the Arbitration Clause. *See Shaw Grp. Inc.*, 322 F.3d at 122.

The ICC Rules, in turn, empower an arbitrator to decide arbitrability. The Rules state that "[b]y agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the [ICC]." *See* Baldini Decl., Ex. A, ¶ 5; Ex. 4, ICC Rules, Art. 6.2. Under the Rules:

> if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal . . . .

Id., Art. 6.3. Also under the Rules, "any decision as to the jurisdiction of the arbitral tribunal" will "be taken by the arbitral tribunal itself." *Id*., Art. 6.5. The ICC Rules further specify that only after a determination by the ICC that a claim is not arbitrable may a party "ask any court having jurisdiction" whether a binding arbitration agreement exists. *Id*., Art. 6.6. Accordingly, there can be no question that the ICC Rules empower an arbitrator to decide issues of arbitrability.

By explicitly incorporating the ICC Rules into the Arbitration Clause to govern any dispute "arising out of or based upon" the Sharing Agreement, the parties "clearly and unmistakably" agreed to arbitrate threshold arbitrability questions. This Court therefore need not, and should not, decide whether the Arbitration Clause is valid or whether Outrider's claims fall within the Arbitration Clause's scope.

2. Even If This Court Determines Arbitrability, Outrider's Claims Must Be Arbitrated

Even if this Court were to consider the question of arbitrability, Outrider's claims must be arbitrated because the Arbitration Clause is a valid arbitration agreement and Outrider's claims, which "aris[e] out of" the Sharing Agreement, fall within the Arbitration Clause's broad scope.

a. The Arbitration Clause Is A Valid Arbitration Agreement

Federal courts apply ordinary state law principles governing contract formation to determine whether a valid arbitration agreement exists. *Bell*, 293 F.3d at 566. Under New York law, if a contract contains an arbitration agreement and it "'is evident that the parties intended to be bound by the contract,'" the arbitration agreement is valid and enforceable. *Crawley v. Macy's Retail Holdings, Inc.*, 2017 WL 2297018, at *5 (S.D.N.Y. May 25, 2017) (quoting *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144 (2008)). In signing a contract, parties demonstrate their intent to be bound by said contract "unless [they] can show special circumstances that would relieve [them] of

such obligation." *Weiss v. Travex Corp.*, 2002 WL 1543875, at *2 (S.D.N.Y. July 12, 2002) (internal citation omitted).

Here, there can be no dispute that ACP and Outrider are parties to the Sharing Agreement and bound by it. Am. Compl. ¶¶ 31, 32, 36. Outrider concedes in the Amended Complaint that it signed the Sharing Agreement. *See id*. ¶ 31. Outrider thus agreed to be, and is in fact, bound by the Sharing Agreement's terms, including the Arbitration Clause. *See* Ex. 3, Sharing Agreement § 18(k). Similarly, when ACP purchased its Notes, it agreed to be bound by the Sharing Agreement and the Arbitration Clause.

The Arbitration Clause's validity is not compromised by Outrider's unfounded allegations that the Sharing Agreement was procured by fraud. "Claims regarding fraud in a contract containing an arbitration clause are . . . subject to arbitration." *Garten v. Kurth*, 265 F.3d 136, 142 (2d Cir. 2001) (internal citation omitted). A court may retain jurisdiction over an arbitrable dispute only if a party sufficiently demonstrates "'some substantial relationship between the fraud or misrepresentation and the arbitration clause in particular.'" *Weiss*, 2002 WL 1543875, at *2 (quoting *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 667 (2d Cir. 1997)). Here, there are no allegations of fraud specific to, or with "some substantial relationship" to, the Arbitration Clause. As such, Outrider's signature on the Sharing Agreement is sufficient to demonstrate that it intended to be bound by the contract and the Arbitration Clause therein. Accordingly, the Arbitration Clause is a valid arbitration agreement, and the parties must comply with its terms.

b. This Action Falls Within The Arbitration Clause's Scope

All of Outrider's claims fall within the Arbitration Clause's broad scope. The Supreme Court has recognized that, given the "strong federal policy favoring arbitration," "any doubts

concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Thomas James Assocs.*, 102 F.3d at 65; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25; *see also AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (requiring arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and clarifying that "[d]oubts should be resolved in favor of coverage") (internal citation omitted); *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 129–31 (2d Cir. 2015). This policy "applies with [a] 'special force'" where the dispute arises "in the field of international commerce." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (emphasizing the vital interest arbitration provisions serve in international transactions as "indispensable precondition[s] to achievement of the orderliness and predictability essential to any international business transaction[s]").

Following Supreme Court guidance, Second Circuit courts "construe arbitration clauses as broadly as possible." *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991) (internal citation omitted). Broadly construed arbitration provisions contain phrases such as "any dispute," "arising out of," or "in relation to any contract." *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (construing broadly provision requiring arbitration for "[a]ny controversy or claim arising out of or relating to" the agreement); *Robinson Brog Leinwand Greene Genovese & Gluck P.C. v. John M. O'Quinn & Assocs., L.L.P.*, 523 F. App'x 761, 764 (2d Cir. 2013) (holding that an arbitration provision covering "any and all disputes, controversies, claims or demands" encompassed "any disputes that touch matters covered by the contract in which the arbitration provision [was] found") (internal citations omitted);

Metallgesellschaft, 923 F.2d at 251 (construing broadly clause requiring arbitration of "all disputes arising out of or in relation to" the contract) (internal citations omitted); *Fleck v. E.F. Hutton Grp., Inc.*, 891 F.2d 1047, 1049–52 (2d Cir. 1989) (construing broadly clause requiring arbitration for "[a]ny controversy . . . arising out of the employment or termination of employment" to encompass post-termination torts which involve significant aspects of the prior employment).

Based on Supreme Court and Second Circuit guidance, the Arbitration Clause must be construed broadly. In the Arbitration Clause, the parties agreed to arbitrate "***any suit, action or proceeding arising out of or based upon [the Sharing] Agreement or the transactions contemplated [t]hereby***." Ex. 3, Sharing Agreement § 18(k) (emphasis added). As such, the Arbitration Clause encompasses all actions arising out of, based on, touching on matters covered by, or involving aspects of, the Sharing Agreement.

All of Outrider's claims against Argentem are encompassed by the Arbitration Clause. Specifically, Outrider alleges that Argentem: (i) supported the Statis' fraud by **entering into the Sharing Agreement**; (ii) failed to disclose the alleged fraud to Outrider in the **negotiation of the Sharing Agreement**; (iii) induced Outrider to **enter into the Sharing Agreement**; and (iv) funded the Statis' efforts to enforce and collect on the SCC Award, which is the primary source of recovery of the Notes **pursuant to the Sharing Agreement**. *See* Am. Compl. ¶¶ 274–75, 286–87, 295, 299, 300 (emphasis added). In addition, Outrider alleges that it suffered damages because it "**enter[ed] into the Sharing Agreement**," "waiv[ed] legal rights against the Statis" **pursuant to the terms of the Sharing Agreement**, and did not exercise "other alternative options" with regard to the Notes **as opposed to entering into the Sharing Agreement**. Am. Compl. ¶¶ 277, 289, 301 (emphasis added). Each of Outrider's claims is based on Argentem's alleged conduct relating to

the Sharing Agreement and undoubtedly "aris[es] out of" or is "based on" the Sharing Agreement. As such, Outrider's claims squarely fall within the Arbitration Clause's broad scope.

That Outrider asserts tort claims as opposed to contract claims does not alter this analysis. A party cannot avoid an obligation to arbitrate claims "arising out of or related to" a contract "by casting its complaint in tort." *Altshul Stern & Co. v. Mitsui Bussan Kaisha, Ltd.*, 385 F.2d 158, 159 (2d Cir. 1967); *see also Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 23 (2d Cir. 1995) ("The mere fact that this is a tort claim, rather than one for breach of the Contracts, does not make the claim any less arbitrable."). Broad arbitration agreements, like the Arbitration Clause, therefore apply equally to claims alleging tortious conduct. *See Norcom Elecs. Corp. v. CIM USA Inc.*, 104 F. Supp. 2d 198, 204 (S.D.N.Y. 2000) (finding that an arbitration clause requiring arbitration of "[a]ny controversy or claim arising out of or relating to" the distribution agreement encompassed collateral tort issues).

Moreover, Outrider's claims are still subject to arbitration even though it alleges that Argentem "induced" it to enter into the Sharing Agreement. The Supreme Court has held that arbitration clauses apply to claims that one party engaged in tortious conduct in the negotiation of the relevant agreement. *See Prima Paint Corp.*, 388 U.S. at 404 (holding that under the FAA, a claim of fraud in the inducement of the contract generally is for the arbitrator and not for the court); *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir. 2002) (explaining that it is "well settled" that a fraudulent inducement claim challenging the general enforceability of a contract containing an arbitration clause, rather than specifically the arbitration clause itself, may be subject to arbitration). Thus, any claim Argentem fraudulently induced Outrider to enter into the Sharing Agreement must be arbitrated.

c. Outrider Must Arbitrate Its Claims Against All Defendants, Including Mr. Chapman And The Other Argentem Entities

All Defendants are entitled to compel Outrider to arbitrate its claims even though ACP is the only Defendant who is a party to the Sharing Agreement. Mr. Chapman is entitled to enforce the Arbitration Clause as a corporate officer, and the Argentem Entities are entitled to enforce the Arbitration Clause under the alternative estoppel theory.

Under New York law, non-signatory corporation officers are entitled to compel arbitration against a signatory to an arbitration agreement with the corporation where the signatory asserts claims against the officers based on the officers' "alleged misconduct" or "behavior" in their "capacities as agents of the corporation." *Hirschfeld Prods. v. Mirvish*, 88 N.Y.2d 1054, 1056 (1996). *See also Huntsman Int'l LLC v. Albemarle Corp.*, 163 A.D.3d 420, 421 (1st Dep't 2018) (corporation officers entitled to enforce an arbitration provision on the corporation's behalf because any agreement breach would have resulted from the officers' actions or inactions); *Degraw Constr. Grp., Inc. v. McGowan Builders, Inc.*, 152 A.D.3d 567, 569–70 (2d Dep't 2017) (holding that officers were entitled to enforce an arbitration provision even though the officers were not signatories to the arbitration agreement); *Highland HC, LLC v. Scott,* 113 A.D.3d 590, 594 (2d Dep't 2014) (same); *Campaniello Imports, Ltd.*, 117 F.3d at 668 ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement.") (internal citations omitted). Such rule prevents "circumvention of arbitration agreements" and "effectuate[s] the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement." *Hirschfeld Prods.*, 88 N.Y.2d at 1056.

Here, all of Outrider's claims against Mr. Chapman are based on Mr. Chapman's alleged actions as a member of Black River's management or as CEO of certain of the Argentem Entities.

Outrider also alleges that each of the defendants, including Mr. Chapman, is "jointly and severally" liable to Outrider. *See* Am. Compl. ¶ 303. As an officer and agent of the Argentem Entities, Mr. Chapman is entitled to the benefits of the Arbitration Clause. Thus, Outrider cannot avoid arbitrating its claims here by naming Mr. Chapman as a defendant.

Likewise, the Argentem Entities are entitled to compel arbitration against Outrider. A non-signatory may compel a signatory to arbitration under the "alternative estoppel theory." *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995); *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163 (2d Cir. 2004) (permitting non-signatory to compel arbitration under the alternative estoppel theory); *Choctaw Generation Ltd. P'ship v. Am. Home. Assur. Co.*, 271 F.3d 403 (2d Cir. 2001) (same); *Carroll v. Leboeuf, Lamb, Greene & MacRae, L.L.P.,* 374 F. Supp. 2d 375, 377–78 (S.D.N.Y. 2005) (same).

The alternative estoppel theory covers circumstances in which: (1) "the subject matter of the dispute" is "intertwined with the agreement that the estoppel party has signed"; and (2) a close "relationship among the parties" shows either that the party opposing arbitration consented to arbitration or it would be inequitable for that party to avoid arbitration. *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127 (2d Cir. 2010). *See also Matter of DeNobile v Panetta*, 166 A.D.3d 769 (2d Dep't 2018) (preventing nonparty from avoiding arbitration based on the relatedness of the parties and the controversy being intertwined with the arbitration agreement). A close relationship includes a non-signatory having some sort of corporate relationship to the signatory party, *e.g.*, a subsidiary, affiliate, agent, or other related business entity. *See Contec Corp.*, 398 F.3d at 209 (holding that post-merger corporation could invoke arbitration agreement signed by corporation subsumed in merger); *JLM Indus.*, 387 F.3d at 178 (holding that plaintiffs could not avoid arbitration of antitrust conspiracy claim where plaintiffs argued that the

conspiratorial conduct giving rise to claim was undertaken by non-signatory parent companies rather than contracting subsidiaries). A close relationship also includes when a plaintiff "treat[s] a group of related [entities] as though they [are] interchangeable." *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc*., 198 F.3d 88, 99 (2d Cir. 1999). *See also Astra Oil Co., Inc. v. Rover Navigation, Ltd.*, 344 F.3d 276 (2d Cir. 2003) (allowing non-signatory entity that was closely affiliated with a signatory and that plaintiff referred to interchangeably, to compel arbitration under the alternative estoppel theory); *Gabriel Capital, L.P. v. CAIB Investmentbank AG*., 28 A.D.3d 376 (1st Dep't 2006). In essence, the alternative estoppel theory precludes arbitration agreement parties from avoiding that agreement by "suing a related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration." *Smith/Enron Cogeneration*, 198 F.3d at 98 (quotation omitted)).

The relationship among the parties demonstrates that Outrider agreed to, and should not be allowed to avoid, arbitration. As stated in the Amended Complaint, the Argentem Entities are closely-related entities founded by Mr. Chapman. *See* Am. Compl. ¶¶ 5–9. The Amended Complaint specifically alleges that certain Argentem Entities are controlled by Mr. Chapman and Argentem Creek Partners. *See id.* ¶ 45. The close relationship between the Argentem Entities demonstrates that the Argentem Entities should be permitted to compel arbitration. Additionally, throughout the Amended Complaint, Outrider refers to the Defendants interchangeably. In fact, Outrider fails to allege a single overt act against any specific Argentem Entity. *See, e.g.* Am. Compl.

¶¶ 32, 36, 275, 286, 300. Instead, Outrider alleges that all of the Argentem Entities participated in the same alleged conduct relating to inducing Outrider to enter into the Sharing Agreement.

Here, there is no doubt that a close relationship exists among the Argentem Entities. Outrider makes categorical allegations against the Argentem Entities in the Amended Complaint, treating them as one and the same. It would be inequitable for Outrider to be permitted to avoid arbitration with some of the Argentem Entities when all of its claims are encompassed by the Arbitration Clause and relate to the Sharing Agreement. Accordingly, Argentem is entitled to compel Outrider to arbitrate its claims arising out of and based on the Sharing Agreement.

II. Outrider's Claims Should Be Dismissed In Favor Of Arbitration

This Court has discretion to dismiss a case in favor of arbitration. *See Benzemann v Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (holding that a dismissal in favor of arbitration was not erroneous where no party requested a stay because "absent a statutory mandate to stay proceedings, district courts 'enjoy an inherent authority to manage their dockets'") (quoting *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015)); *Dylan 140 LLC v. Figueroa as Tr. of Bldg. Serv. 32BJ Health Fund*, 982 F.3d 851, 858 n.2 (2d Cir. 2020) (finding dismissal in favor of arbitration was appropriate to promote "efficient docket management") (internal citations omitted); *Aleksanian v. Uber Techs. Inc.*, 2021 WL 860127, at *9 (S.D.N.Y. Mar. 8, 2021) (same); *Am. E Grp. LLC v. Livewire Ergogenics Inc.*, 432 F. Supp. 3d 390, 401 (S.D.N.Y. 2020) (same). Because all of Outrider's claims must be compelled to arbitration, keeping Outrider in this action would be inefficient for the Court and the parties. Accordingly, upon compelling Outrider's claims to arbitration, this Court should dismiss Outrider's claims.

In the event that the Court declines to compel Outrider's claims to arbitration, Outrider's claims must be dismissed on the merits. As such, Argentem reserves its rights and defenses relating

to the merits of Outrider's claims, including its ability to challenge whether Defendants and Outrider are proper parties to this suit.

CONCLUSION

For the foregoing reasons, Argentem respectfully requests that the Court compel Outrider's claims to arbitration and dismiss Outrider's claims. Should the Court deny this motion and retain jurisdiction over this matter, Argentem respectfully requests leave to move to dismiss Outrider's claims on the merits.

[Signatures Follow]

Respectfully submitted,

Dated: 5/28/2021

New York, New York

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ Stephen M. Baldini
Stephen M. Baldini
Shanna L. Miles (*pro hac vice* pending)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1062
Facsimile: (212) 872-1002
sbaldini@akingump.com
smiles@akingump.com

-and-

Paul Butler
20001 K Street N.W.
Washington, DC 20006
Telephone: (202) 887-4069
Facsimile: (202) 887-4288
pbutler@akingump.com

FAEGRE DRINKER BIDDLE & REATH LLP

/s/ Clay J. Pierce
Clay J. Pierce
Andrew L. Van Houter
1177 Avenue of the Americas
New York, NY 10036
(212) 248-3186
clay.pierce@faegredrinker.com
andrew.vanhouter@faegredrinker.com

-and-

Randall E. Kahnke (*pro hac vice*)
Peter C. Magnuson (*pro hac vice*)
Nathaniel J. Zylstra (*pro hac vice*)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000
peter.magnuson@faegredrinker.com
nathaniel.zylstra@faegredrinker.com

Attorneys for Defendants Argentem Creek Holdings LLC, Argentem Creek Partners LP Pathfinder Argentem Creek GP LLC, ACP I Trading LLC, and Daniel Chapman

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the length limits permitted by Your Honor's Individual Practices pursuant to Rule IID. The brief is 6,991 words, excluding the cover page, certificate of compliance, table of contents, and table of authorities per Rule IID. The brief complies with Rule IID's formatting rules.

Dated: 5/28/2021

/s/ Stephen M. Baldini

STEPHEN M. BALDINI
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
sbaldini@akingump.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 28, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send a notification of such filing to all attorneys of record.

Dated: 5/28/2021

/s/ Stephen M. Baldini

STEPHEN M. BALDINI
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
sbaldini@akingump.com