No. 23-cv-1046

District of Columbia Court of Appeals

BDO USA, P.C., *et al.*,
Appellants,

v.

Eric Jia-Sobota, *et al.*,
Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Action No. 2020 CA 2600 B
Judge Neal E. Kravitz

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY

The BDO partnership agreement in this case provided for a six-month garden leave before a partner could depart the partnership. App. 79a (§ 11.2). The leave provision was intended to ensure that disgruntled partners could not depart abruptly, taking clients and luring away employees on the way out. To the same end, the partnership agreement contained a non-compete clause that prohibited any departing partner, for a period of two years following a separation, from attempting to solicit BDO clients or recruit away BDO employees. App. 89a (§ 14.5).

BDO alleges that, in early 2020, Eric Jia-Sobota launched a competing consulting firm while still a partner at BDO, on garden leave. In connection with that launch, Jia-Sobota schemed to lure away a dozen BDO employees and millions of dollars' worth of BDO's business. BDO thus alleges a clearcut violation of Jia-Sobota's fiduciary duties and the express terms of the partnership agreement. Indeed, sections 11.2 and 14.5 were drafted for situations precisely like this one.

It would be difficult to imagine a more straightforward example of a dispute "relating to this Agreement or the Partnership and its affairs" within the meaning of the partnership agreement's arbitration clause. *See* App. 90a (§ 14.7). But the trial court held that this dispute does not fall within that language—not because the dispute doesn't relate to the partnership agreement, but because Jia-Sobota has since been terminated from the firm, rendering him a former (rather than current) partner. That makes no sense. No one would write an arbitration clause that implicitly ceases to apply in circumstances where its application is most important—those involving

departing partners who breach their duties and steal clients and employees. It is thus unsurprising that the arbitration clause at issue here says no such thing.

In plain words, Section 14.7 states that *any* "dispute relating to this Agreement or the Partnership and its affairs" is subject to arbitration, without regard for whether the breaching defendant is a current or former partner. That is likely why Jia-Sobota, during four long years of litigation, never once raised this argument despite his relentless efforts to avoid the arbitration clause. But that did not stop the trial court from ruling on this theory anyway—no matter that it was never briefed by the parties. Now, for the first time on appeal, Jia-Sobota argues in writing that the arbitration clause does not apply. His effort is not persuasive. Neither is his half-hearted defense of the trial court's decision not to appoint a substitute arbitrator. A reversal and remand for appointment of the AAA is now warranted.

A. The trial court's determination that the arbitration clause does not apply was both erroneous and an abuse of discretion

1. The arbitration clause covers this dispute

a. Section 14.7 of the partnership agreement states that "any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership" shall be resolved in arbitration. We demonstrated in the opening brief (at 14-17) that this dispute is one "relating to this Agreement or the Partnership and its affairs." The phrase "relating to" is capacious, covering any dispute that bears any substantive connection with the partnership agreement. The breadth of the clause is confirmed further by the word "any"

appearing before "controversy or dispute," indicating that the clause covers any dispute related to the partnership agreement, *of whatever kind*.

The phrase "or otherwise arising between a Partner and the Partnership" does not alter the analysis. That phrase enlarges the scope of the arbitration clause by adding an alternative condition, so that the clause applies not only to disputes relating to the partnership agreement, but also to disputes that arise between a partner and the partnership *not* so relating.

b. Taking an eleventh-hour cue from the trial court, Jia-Sobota now disagrees with these points—albeit for the first time in four years. He begins his rejoinder by noting (at 18-20) that the partnership agreement elsewhere distinguishes between partners and former partners. He asserts (*id.*) that there is a "multitude of other 'explicit references to *former* partners' in the partnership agreement." In his view (*id*.), this implies that the omission of an explicit reference to "former partners" in Section 14.7 must mean that section applies only to current partners.

That is wrong for at least two reasons. *First*, the phrase "any controversy or dispute relating to this Agreement or the Partnership and its affairs" is not limited by its terms to the status of either party. As we explained (Opening Br. 15), the word "any" means "indiscriminately of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008). It is therefore wholly irrelevant whether Jia-Sobota is a current partner or a former partner—the arbitration clause applies to *all* disputes that relate to the partnership agreement or the affairs of the partnership, "of whatever kind."

Second, and regardless, Section 14.5—which establishes Jia-Sobota's duties not to lure away clients or employees from the firm—states expressly that "[t]he term 'Partner' herein includes 'former Partner.'" App. 90a. Thus, as far as disputes involving breaches of Section 14.5 are concerned, the partnership agreement expressly disclaims any difference between partners and former partners. That makes sense, because to be effective, the duty not to lure away clients and employees must apply not only to current partners who are contemplating a departure, but also former partners who already have separated from the firm. Thus, Section 14.7 applies even under Jia-Sobota's reading of the arbitration clause—he is undeniably a "partner" for purposes of Section 14.5, which is the provision BDO seeks to enforce.

The agreement's reference to "former partners" in Section 14.6 does not change matters. That provision concerns former partners' continuing obligation to assist BDO with "matters in which [the] former Partner may have been involved or of which he/she may have information" of a sensitive nature, even "after his/her interest in the Partnership terminates." App. 90a. Logically, that provision cannot apply to current partners. To draft it as applying to partners generally, without distinguishing former partners from current partners, would not have made sense. The opposite is true with respect to Section 14.7 and its arbitration requirement.

c. Like the trial court, Jia-Sobota argues that the words "or otherwise" appearing before the second condition for arbitration somehow limit the first condition. He thus disagrees (at 23) that "the words 'or otherwise' in Section 14.7 disjoins the section into two phrases, creating alternative applications on either side

of separation." But his effort to explain that position is challenging to understand, and it misconstrues the rules of grammar.

At the outset, it bears repeating that "[t]he word 'or' is generally disjunctive, and the word 'and' is generally conjunctive." *People v. Busch*, 187 N.E.3d 74, 83 (Ill. App. Ct. 2020); *accord Pine Belt Chevrolet v. Jersey Center Power*, 626 A.2d 434, 441 (N.J. 1993) ("The word 'and' carries with it natural conjunctive import while the word 'or' carries with it natural disjunctive import."). Jia-Sobota thus seems to be confused when he observes (at 24) that "a comma must be placed before a conjunction introducing an independent clause." The relevant language here does not contain a conjunction (and), but rather a disjunction (or). It also does not contain an independent clause, which requires a subject and verb. *See Clauses*, Cambridge Dictionary, https://perma.cc/7X9C-7SWA. The rule that Jia-Sobota has referenced is simply the rule against run-on sentences—one must say "Joe threw the ball**,** and Jane caught the ball" and not "Joe threw the ball and Jane caught the ball." That rule has no relevance here.

d. Nor is it accurate to say—as Jia-Sobota does at page 24 & n.5—that a "serial-type comma" is necessary, or that our interpretation of Section 14.7 "renders the *absence* of a comma grammatically incorrect." The relevant phrase is:

> Any controversy or dispute relating to this Agreement or the Partnership and its affairs or otherwise arising between a Partner and the Partnership, including but not limited to . . .

In this phrase, the words "controversy or dispute" are disjunctive subjects of the sentence, both nouns. They are modified by two adjective phrases, which likewise

are disjunctive. The first adjective phrase is "relating to this Agreement or the Partnership and its affairs." In that phrase, "relating" is the adjective and "to this Agreement or the Partnership and its affairs" is the complement, required to complete the adjective's meaning. *See Adjective phrases*, Cambridge Dictionary, perma.cc/ACE3-GDG9. The second adjective phrase is "otherwise arising between a Partner and the Partnership," in which "arising" is the adjective, "between a Partner and the Partnership" is the complement, and "otherwise" is an adjective modifier. *Id*. That is all—the relevant language contains just two disjunctive subjects ("controversy or dispute") and two disjunctive adjectives ("relating" or "arising"). There is no series containing more than two elements requiring serial commas.

That makes *People v. Alford*, 2024 WL 1868901 (N.Y. Sup. Ct.), inapposite. There, the court held that, in the phrase "thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment," the word "impairment" functions as part of a single element with the words "physical injury." *Id*. at *3. If the legislature had intended to provide for "impairment" separately from "physical injury," the court explained (*id.*), it would have omitted the first "or" and placed an Oxford comma after "injury," so the statute read: "thereby causes stupor, loss of consciousness for any period of time, ~~**or**~~ any other physical injury**,** or impairment." But the dispute here does not concern a compound element in a series of three or more, so that reasoning again has no relevance.

Jia-Sobota is thus wrong when he says (at 25) that "the Court must go beyond the realms of ordinary rules of construction and literary meaning" to accept our

interpretation of Section 14.7. In fact, our interpretation is the only interpretation consistent with the basic rules of grammar and ordinary usage. In contrast, Jia-Sobota's interpretation offends multiple rules of language and interpretation:

First, the basic rule is that "[w]here two conditions are joined by the word 'or,' they are deemed to be alternative conditions, and the occurrence of one is sufficient to trigger the operative contract provision even where the other has not occurred." Opening Br. 19 (quoting 22 N.Y. Jur. 2d Contracts § 240). Jia-Sobota's reading ignores that maxim. Indeed, it requires converting the disjunction (or) between the two adjective phrases into a conjunction (and). Such a revision of language would license an alteration of the parties' meaning and "work wondrous mischief" with all other legal instruments that deliberately employ *or* and not *and*. *In re Duffy's Will*, 256 N.Y.S. 743, 746 (N.Y. Sur. Ct. 1932).

Second, it is a "standard principle[] of contract interpretation" that every phrase in a contract should be given meaning and not rendered "superfluous." *Lawyers' Fund for Client Protection of State of N.Y. v. Bank Leumi Trust Co*., 727 N.E.2d 563, 567 (N.Y. 2000). Yet the trial court's and Jia-Sobota's interpretation of Section 14.7 could just as well strike the words "relating to this Agreement or the Partnership and its affairs or otherwise" as unnecessary. The clause would have the exact same meaning and scope if it covered simply "any controversy or dispute arising between a Partner and the Partnership." Jia-Sobota does not disagree with this critical observation, which we made at page 20 of the opening brief. That alone is reason to reject the trial court's holding.

At bottom, the trial court's holding and Jia-Sobtoa's newly minted arguments before this Court are unpersuasive. They offend the rules of grammar and ordinary English usage, and they rewrite the contract. The decision below must be reversed.

2. The trial court abused its discretion by grounding the decision below on a waived issue that was never briefed

As we demonstrated in the opening brief (at 24-25), the federal courts must sit "as arbiters of legal questions presented and argued by the parties before them," and not as "self-directed boards of legal inquiry and research." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). They accordingly must "rely on the parties to frame the issues for decision" and assume only "the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). Against the back-drop, the trial court's decision just hours before the hearing and after the completion of briefing to insert an all-new contract-interpretation defense into the case—one that Jia-Sobota himself had long ago waived—was an abuse of discretion.

a. Jia-Sobota begins his response with a stunning misrepresentation. Citing his October 6, 2023, opposition brief before the trial court, he implies (at 29) that he raised the contract-interpretation defense on which the trial court based its decision. That is false. In fact, the exact opposite is true—Jia-Sobota's brief *took as given* that the arbitration clause covers disputes involving former partners. He argued that the clause was unconscionable *because* it created "a conflict of interest, especially in a dispute between BDO and a former partner." Jia-Sobota 10/6/23 Br. 8. On the next

page of his brief, Jia-Sobota made the point even more clearly: "BDO's mandate that it comprise the arbitration panel for any dispute between itself and its partners (*including former partners*) makes the arbitration provision unconscionable as a matter of law." *Id*. at 9 (emphasis added). That argument accepts, and does not challenge, that the provision applies to former partners.

Before the November 2023 hearing below, there had not been even a hint in any of Jia-Sobota's briefs or oral arguments that, if the arbitration clause was not unconscionable, it was inapplicable to disputes involving former partners. His first argument on this score came at the judge's prompting during the November 2023 oral argument, after four years of long litigation. And his first written presentation of these arguments appear now, in his brief before this Court.

b. Jia-Sobota attempts to defend the merits of the trial court's decision to eschew four years' worth of party briefing in favor of its own one-sided theory of the case. On that front, Jia-Sobota cites (at 30-31) the Supreme Court's decision in *Kamen v. Kemper Financial Servies*, 500 U.S. 90 (1991), for the proposition that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." Jia-Sobota twists that observation by taking it out of context.

To begin with, the substantive issue presented in *Kamen* was one of federal common law. It thus required the court to settle broadly applicable public rights. The Court confirmed that, even then, if a party fails to make a "timely presentation of arguments," the court rightly may "treat an unasserted claim as waived" and "deny

[the] party the benefit of favorable legal authorities." *Id*. at 100 n.5. But if it does so, "the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided." *Id*. In other words, the court should decide the dispute for the parties only and not settle the requirements of the federal common law for all.

Alternatively, if the court wishes to settle "the proper construction of governing law" in a precedential opinion, it must independently confirm the source of its power to do so and select the best overall rule. 500 U.S. at 99. That makes sense. When a court settles the substance of *public* law, it issues a rule for the entire population, not just the parties before it. It thus has an obligation to resolve the issue *correctly*, no matter how the parties have briefed the issue.

That is not remotely this case. Here, BDO and Jia-Sobota are engaged in a private contract dispute n which the rights and obligations at issue are all a matter of contract, and the contract is no longer in force for anyone. The court is not settling the meaning of a statute, the requirements of a regulation, or the substance of the federal common law in a way that will affect the public at large. As we noted in the opening brief (at 25), the rule that courts must neutrally resolve the claims and defenses presented to them "has special purchase in private contract cases like this one, where only private rights are at stake." Jia-Sobota declines to acknowledge this critical distinction.

This Court's decision in *Outlaw v. United States*, 632 A.2d 408 (D.C. 1993), is equally unhelpful to Jia-Sobota. There, the defendant had raised a sufficiency-of-

the-evidence challenge on appeal. At oral argument, "members of the court raised, on their own initiative, the question whether the evidence was sufficient to support [the] conviction" for a related but different reason than the one raised by the defense. *Id*. at 410. Critically, "[a]fter argument, the court entered an order inviting the parties to file supplemental memoranda addressing this issue." *Id*. That case is thus distinguishable on multiple grounds: (1) It involved an issue of criminal justice, as to which steadfast judicial passivity is less apt; (2) the issue raised by the court was not a new, standalone defense, but instead a variation of a defense fully pressed by the defendant's counsel; and (3) the parties were given a chance to brief the issue. None of that can be said of this case.

At the end, Jia-Sobota does not expressly deny the basic facts: He had four years to come up with his best defenses against arbitration if he preferred to keep the case in court. In all that time, he never once argued that Section 14.7 cannot be construed as applying to disputes with former partners. At this late stage, any such argument has been waived. For its part, the trial court's job was to neutrally "decide only [the] questions presented by the parties," not to introduce an all-new contract defense at the eleventh hour in an effort to bail out its favored party. *Sineneng-Smith*, 590 U.S. at 375. It abused its discretion doing otherwise.

B. A remand with instructions to compel arbitration before a substitute arbitrator is appropriate

On remand before the district court, BDO determined that the more efficient path forward would be simply to relent with respect to that element of the arbitration

clause to which Jia-Sobota had objected: the panel-selection process. Jia-Sobota argued from the start that an arbitral panel comprised of BDO partners was so inherently conflicted as to be substantively unconscionable. To this day, BDO disagrees. But that disagreement is beside the point, because BDO waived its right to enforce that part of the clause and agreed instead to arbitrate before the AAA.

Jia-Sobota's response—which has been to refuse arbitration before the AAA and to continue resisting arbitration in any form—lays bare that his real objection is to arbitration full stop, and not to any particular aspect to the arbitration agreement. But the written agreement that he signed requires arbitration. In circumstances like these, a court is empowered not only to compel the parties to arbitrate, but to compel them before a substitute arbitrator. The trial court's refusal to do so was reversible error, and Jia-Sobota's defense of the decision below is unpersuasive.

1. Section 5 of the FAA applies in these circumstances

a. As a threshold matter, Section 5 of the FAA and N.Y. CPLR § 7504 both apply here. The trial court invoked the so-called *Marchant* rule for the proposition that the parties to an arbitration clause must demonstrate a "dominant intent to arbitrate" before Section 5 will apply. *See* App. 534a. In the trial court's view, any time an arbitration clause uses "mandatory language" in defining the method for selecting an arbitrator, there is no such "dominant intent," and a failure of the selection method requires cancellation of the arbitration clause altogether. *See* App. 537a-538a. Jia-Sobota defends that reasoning on page 45 of his answering brief.

That position finds no basis in the text of either FAA Section 5 or N.Y. CPLR § 7504. Those provisions make clear that when an agreement's specification of "a method of naming or appointing an arbitrator or arbitrators" has "fail[ed]" because the parties have not "avail[ed] [themselves] of such method" or there otherwise has been "a lapse in the naming of an arbitrator or arbitrators," the court "*shall* designate and appoint an arbitrator or arbitrators or umpire" to resolve the case "with the same force and effect as if he or they had been specifically named" by the parties "in the agreement." 9 U.S.C. § 5 (emphasis added).

There is no exception in that language for "mandatory" arbitrator-selection clauses. Indeed, to say otherwise would render FAA Section 5 a dead letter. Any and every time an arbitration clause identifies a particular arbitral forum or defines a method for selecting an arbitrator, it uses mandatory language; contracts do not leave such things to mere discretion. If the trial court were correct that such language defeats application of Section 5, the law would never apply. We made this point in the opening brief (at 37), and Jia-Sobota does not disagree.

Other courts have applied Section 5 without regard for the "mandatory" nature of the arbitrator-selection requirement. In both *Brower* and *Filias*, for example, the Gateway 2000 customer service contract *required* arbitration before the International Chamber of Commerce. *See Brower v. Gateway 2000, Inc*., 246 A.D.2d 246, 248 (1998) ("The arbitration *shall* be conducted . . ") (emphasis added); *Filias v. Gateway 2000*, 1998 U.S. Dist. LEXIS 20358 (N.D. Ill. Jan. 15, 1998). But in both cases, the court relied on Section 5 to appoint a substitute arbitrator to avoid a

potential unconscionability problem. In *BP Exploration Libya v. ExxonMobil Libya*, 689 F.3d 481 (5th Cir. 2012), the arbitration clause likewise specified a mandatory process for naming a panel of arbitrators, much like the clause in this case. *Id*. at 484 ("Each Party *shall* appoint . . .") (emphasis added). When that method failed, the court did not conclude that the mandatory nature of the process barred application of Section 5; instead, it held that because "there was a lapse in the naming of arbitrators under the parties' arbitration agreement, . . . the district court properly exercised its jurisdiction under 9 U.S.C. § 5 to intervene in the arbitrator appointment process." *Id*. at 496. That is what Section 5 clearly requires. Again, were it otherwise, Section 5 never would apply.

b. Jia-Sobota denies (at 42) that his refusal to participate in the arbitrator-nomination process led to the provision's failure. He says (*id*.) that "BDO's own drafting decisions, creating an unconscionable agreement under New York law, is responsible for the provision's 'failure.'" That puts the cart before the horse. To be sure, Jia-Sobota refused to participate because he *asserted* the selection rules were unconscionable—but the trial court did not resolve that claim. And every court that *has* resolved the enforceability of the particular clause at issue here has held that it is not unconscionable. *E.g.*, *BDO Seidman, LLP v. Bee*, 970 So. 2d 869 (Fla. Dist. Ct. App. 2007); *Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004).

Anyway, Jia-Sobota's reason for refusing the participate is immaterial. The fact is, he wouldn't (and still won't) nominate anyone to the panel, and the arbitration thus couldn't (and still can't) proceed. This was precisely the scenario that con-

fronted the court in *Brower.* The court's solution was to remand for substitution of an alternative arbitral forum that would resolve the plaintiffs' basis for objection. That same outcome is warranted here.

Jia-Sobota implies (at 42) that it makes a difference that the plaintiffs in *Brower* objected only to the cost of the forum, rather than raising an asserted conflict of interest. But there is no reason why that distinction should make a difference—if the cost of arbitrating before the ICC was greater than the value of the plaintiffs' claims, the effect was to nullify the claims entirely. That's at least as bad as an allegedly non-neutral arbitrator. And because the plaintiffs' objection in *Brower* could be and was resolved by the appointment of a new arbitral forum, Section 5 was properly applied. Just so here.

c. Jia-Sobota next asserts (at 43) that, although "relevant law enables waiver of elements within an agreement," BDO is barred from waiving enforcement of the arbitral selection process because BDO has "unclean hands." He cites no case for that novel theory, which gets matters backwards. Again, no court has resolved the unconscionability claim in Jia-Sobota's favor, so he again has put the cart before the horse. But more fundamentally, "[b]ecause unconscionability is an equitable defense to the enforcement of harsh or unreasonable contract terms, a party cannot complain when the defendant through its waivers declines to enforce any potentially unconscionable term." *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 124 (2d Cir. 2010). We made this point (and cited *Ragone*) in the opening brief (at 30), and Jia-Sobota offers no response.

Jia-Sobota is wrong to say (at 40) that appointing a substitute arbitral panel would "allow BDO to escape its own bad act" for another reason: Arbitration before an alternative panel is all that Jia-Sobota could ask for, even if he were to prevail on his unconscionability claim. The law is clear the "[t]he unconscionability of the terms regarding [selection of] the arbitrator [would] not invalidate the entire agreement to arbitrate" altogether. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 813 (Mo. 2015). Instead, it would require invalidation only of the selection method. Again, in *Brower* the court held that requiring arbitration before the ICC was unconscionable; the remedy was not invalidation of the provision overall, but instead remand to the trial court "so that the parties have the opportunity to seek appropriate substitution of an arbitrator pursuant to" Section 5. *Brower*, 246 A.D.2d at 255.

Other courts have held the same. *See Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 85 n.14 (S.D.N.Y. 2012) ("Where the parties have agreed to arbitrate but cannot agree on a substitute arbitrator, both the FAA and New York law provide" that the court will select the arbitrator.) (citing 9 U.S.C. § 5; NY. C.P.L.R. § 7504); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779, 785 (Ala. 2002) (upholding the trial court's appointment of an arbitrator under 9 U.S.C. § 5 where the parties' agreement unfairly granted one party the sole authority to appoint the arbitrator).

Jia-Sobota explicitly concedes (at 40) "that New York law and FAA Section 5 both permit substitution of arbitrators" in the cases just described. But he insists (*id*.) that, here, the "*entire* provision is itself unconscionable," not just the method of

selecting arbitrators. That assertion goes largely unexplained, however, and it is not consistent with how Jia-Sobota has litigated this case. His position all along has been only that the provision is substantively unconscionable because it requires appointing BDO partners to the arbitral panel. He now says (*id.*) that the clause's requirement for the appointment of partners is more than "a singular line-item" and it is not an "easily severable methodology portion of an otherwise enforceable arbitration agreement."

That is obviously wrong. The portion of Section 14.7 to which Jia-Sobota objects calls for appointment of a five-member panel "consisting of two (2) members of the Board of Directors (other than the Chief Executive Officer) selected by the Board of Directors and three (3) Partners from the Partnership's practice offices who are not members of the Board of Directors." App. 90a. That is all. In *BP Exploration Libya*, the contract contained a very similar panel-appointment process, and the Fifth Circuit had no trouble calling for appointment of a substitute arbitration panel, instead. 689 F.3d 481 at 491-492.

In any event, severability is not the appropriate doctrinal framework for resolving the question presented. "Severability is largely a matter of [the parties'] intent," turning on what they "would have intended" in the absence of an invalidated provision. *BellSouth Corp. v. F.C.C.*, 144 F.3d 58, 66 n.8 (D.C. Cir. 1998). Nothing has been invalidated here. Meanwhile, Section 5 and N.Y. C.P.L.R. § 7504 are both express grants of judicial power, mandating court action independent of any counterfactual inquiry into the hypothetical intentions of the parties.

This really is not so complicated. Jia-Sobota has objected to the panel selection process because it limits panel members to BDO partners. To resolve the parties' disagreement on that point, BDO has waived its right to strict application of the panel selection process. The parties are thus *aligned* on the core issue—the panel selection process to which Jia-Sobota has objected should not be enforced. The upshot is thus straightforward: The agreement's specification of "a method of naming or appointing an arbitrator or arbitrators" has "fail[ed]" because the parties have not "avail[ed] [themselves] of such method," and there accordingly has been "a lapse in the naming of an arbitrator or arbitrators." 9 U.S.C. § 5. In this circumstance, "the court *shall* designate and appoint an arbitrator or arbitrators or umpire" to resolve the case "with the same force and effect as if he or they had been specifically named" by the parties in the agreement. *Id*. (emphasis added). Period.

2. JSCo should be compelled to arbitrate as well

Jia-Sobota argues (at 48-49) that JSCo should not be compelled to arbitrate its counterclaims against BDO because JSCo "was formed after Jia-Sobota's employment with BDO ceased, it thus has no connection with the Partnership Agreement." That JSCo is not a signatory to the partnership agreement is not dispositive of the arbitration inquiry. Non-signatories can be bound to arbitration agreements under various theories, including agency, alter ego, and estoppel. *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 259 (S.D.N.Y. 2018) (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999)). Holding JSCo to the agreement to arbitrate is justified under each of those theories.

JSCo brought just two counterclaims in this action: defamation and interference with business expectation. *See* Answer & Amd. Counterclaim ¶¶ 141-153. Both claims rely exclusively on alleged statements that BDO made before JSCo's predecessor, EverGlade, even "came into existence," including statements by "BDO's leadership . . . to Mr. Jia-Sobota's clients." *Id*. ¶ 119. JSCo is thus seeking entitlement to relief with respect to statements that (1) BDO allegedly made about Jia-Sobota, not JSCo; (2) before JSCo or its predecessor were even created; (3) that could have caused JSCo injury only by causing Jia-Sobota injury; and (4) that plainly would be covered by the arbitration clause if brought by Jia-Sabota himself, as he has in this very case.

Because JSCo does not allege any false statements about, injuries to, or interference with its affairs distinct from false statements about, injuries to, or interference with Jia-Sobota's affairs, it cannot avoid arbitration. *See, e.g., Graves v. BP Am. Inc.*, 568 F.3d 221, 223-24 (5th Cir. 2009). So far as the counterclaims are concerned JSCo's claims *are* Jia-Sobota's. It would blow a gaping hole in the arbitration clause—and common sense—to allow a departing partner to avoid arbitration through the simple expedient of bringing claims identical to his own, concerning injuries exclusively to himself, but simply in the name of the company that he forms at his departure. The law requires no such result.

CONCLUSION

The Court should reverse the order denying BDO's motion to compel arbitration, and it should remand with instructions to compel the parties to arbitrate before the AAA.

July 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, I electronically filed the foregoing document using the Court's e-filing system, which will send notice of the filing to counsel of record.

/s/ Michael B. Kimberly