UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-15-9976-MWF (AFMx) **Date: April 21, 2016**

Title: Amergence Supply Chain Management Inc. -*v*- Changhong (Hong Kong) Trading Ltd.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY THE ACTION [9]

Before the Court is Defendant Changhong (Hong Kong) Trading Limited's Motion to Compel Arbitration and Stay the Action (the "Motion"). (Docket No. 9). Plaintiff filed an Opposition (Docket No. 11), to which Defendant filed a Reply. (Docket No. 12).

The Court has read and considered the parties' submissions, and held a hearing on **April 18, 2016**. The Motion is **DENIED** because Defendant does not have standing to invoke the arbitration clause as a nonsignatory to the Mutual Nondisclosure and Confidentiality Agreement between Plaintiff and Guangdong Changhong Electronics Company Ltd. The agreement's arbitration clause does not contemplate binding the signatories to arbitration with nonsignatories. Furthermore, equitable estoppel does not apply because Plaintiff's claims neither rely on nor are intimately intertwined with the terms of the agreement. The Motion is **DENIED *without prejudice***, however, because the Court will allow Defendant to renew its argument based on equitable estoppel.

I. BACKGROUND

The following facts are alleged in the Complaint:

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Plaintiff is an assembler and supplier of electronic equipment headquartered in Diamond Bar, California. (Complaint 1-1 ¶ 9 (Docket No. 1-1)). Defendant is a Hong Kong limited liability company that sells unassembled television parts. (*Id.* ¶¶ 4, 9). In 2014, Plaintiff purchased thousands of unassembled televisions from Defendant. (*Id.* ¶ 9). Although Plaintiff paid in full for these television parts, Defendant did not deliver all parts Plaintiff had paid for and therefore breached the parties' agreement. (*Id.*). Plaintiff seeks to recover its payment for (1) the undelivered parts ("Undelivered Parts"), as well as (2) the delivered parts that cannot be used in the absence of the undelivered parts ("Unusable Parts"). (*Id.*).

More specifically, in October and November 2014, Plaintiff issued to Defendant two purchase orders for parts sufficient to assemble 10,000 televisions: (1) Purchase Order AS-S008657 for 5,000 units; and (2) Purchase Order AS-S008663 for 5,000 units. (*Id.* ¶ 10). In response, Defendant issued three separate invoices: (1) Invoice No. 14CHK704397-GD02A for 2,500 units; (2) Invoice No. 14CHK704397-GD02C Rev. 1 for 2,500 units; and (3) Invoice No. 14CHK704397-GD05 for 5,000 units. (*Id.* ¶ 11). The terms allegedly negotiated by the parties called for a 20% down payment and the remaining balance to be paid upon delivery of the parts to the Port of Long Beach. (*Id.* ¶ 12). Thereafter, Defendant would release title to the parts, which would then be delivered to Plaintiff's assembly factory in Mexico. (*Id.*).

Plaintiff paid the down payment on the invoices on or before March 11, 2015. (*Id.*). Defendant shipped the parts in multiple shipments with the final shipment arriving in Long Beach in March 2015. (*Id.* ¶ 13). According to the Complaint, Plaintiff made final payment by March 11, 2015, but Defendant "demanded further payment on an unrelated claim before it would release the parts." (*Id.*). The parties reached a standstill: Plaintiff refused to make additional payments and Defendant refused to release the final shipment. (*Id.*). When attempts failed to resolve the dispute informally, Plaintiff demanded (and Defendant refused) the return of money paid for the Undelivered Parts. (*Id.* ¶ 14). The Complaint alleges that Defendant attempted to tender the remaining Unusable Parts to recover its payment on the

Unusable Parts, but Defendant refused to accept tender or refund the demanded money. (*Id.*).

On November 12, 2015, Plaintiff initiated this action in Los Angeles County Superior Court asserting claims for breach of contract and money had and received. (*Id.* ¶¶ 16–25). On December 30, 2015, Defendant removed the action to federal court on the basis of diversity jurisdiction. (Notice of Removal (Docket No. 1)).

The declarations submitted in support of Defendant's Motion provide a different narrative of the events leading up to this action. The Court summarizes Defendant's recount here as it relates to the issues disputed in the Motion:

According to Defendant, Plaintiff placed the following purchase orders in the fall of 2014:

- ***Order for 24-inch parts***: On September 3, 2014, Plaintiff places an order for 150,000 units of 24-inch television parts (PO AS-S008644). (Declaration of Yali Xie in Support of Defendant Changhong (Hong Kong) Trading Limited's Motion ("Xie Decl."), Docket No. 9-2 Ex. G). On September 17, 2014, Plaintiff revises the above order to reflect a purchase of 158,000 units (PO AS-S008646). (*Id.* Ex. H). In February 2015, Plaintiff cancels this order, even though Defendant had already expended more than $1 million to purchase materials to fulfill the order. (Xie Decl. ¶ 6).

- ***Order for 50-inch parts***: On October 12, 2014, Plaintiff places an order for 5,000 50-inch television parts (PO AS-S008656). (*Id.* Ex. D). On October 16, 2014, Defendant issues a Proforma Invoice reflecting Invoice No. 14CHK704397-3, which calls for payment of the balance owed within two days of receipt of a copy of the bill of lading. (Xie Decl. ¶ 5).

- ***Order for 40-inch parts***: On November 4, 2014, Plaintiff places an order for 5,000 units of 40-inch television parts (PO AS-S008663). (*Id.* Ex. A). On

> November 5, 2014, Defendant issues a Proforma Invoice reflecting Invoice No. 14CHK704397-05, which calls for payment of the balance owed within two days of receipt of a copy of the bill of lading. (Xie Decl. ¶ 4).

According to Defendant, Defendant provided Plaintiff with the bills of lading and final invoices for the 40-inch and 50-inch orders after loading in December 2014. (*Id.* ¶ 4). Plaintiff, however, failed to pay the balances for either order at the time the balances became due. (*Id.*).

Defendant shipped the 50-inch parts in multiple shipments. (*Id.* ¶ 5). In January 2015, Defendant's last shipment of the 50-inch parts and all of the 40-inch parts arrived at the Port of Long Beach. (*Id.* ¶¶ 4–5). Defendant asserts that, "[a]fter extensive correspondence and demands for payment," Plaintiff finally paid the balance owed on the 40-inch parts in March 2015. (*Id.* ¶ 4). The parties "agreed that [Defendant] would hold back four containers of [the] 40 inch TV parts as security for [Plaintiff's] long overdue payment of the balance due on the order for 50 inch TV parts." (Xie Decl. ¶ 5).

According to Defendant, to date, Plaintiff has not paid the outstanding balance on the 50-inch parts. (*Id.*). Therefore, Defendant has not released the four containers of 40-inch parts. (*Id.*).

On June 2, 2015, Plaintiff sent a letter entitled "Breach of Confidential Information and Circumvention" (the "June 2 Letter"), addressed to:

> Ms. Helen Zhang
> Guangdong Changhong Electronics Co., LTD
> C/O Changhong Hong Kong Trading Limited
> Unit 1412, 14F, West Tower Shun Tak Center, 168-200,
> Connaught Road, Central, Hong Kong

(*Id.* Ex. J).

According to the declaration submitted by Helen Zhang, she is the Director of OEM Business at Guangdong Changhong Electronics Company, Ltd. ("Guangdong Changhong"). (Declaration of Zhang Ying in Support of Defendant Changhong (Hong Kong) Trading Limited's Motion ("Zhang Decl."), Docket No. 9-15 ¶ 2). Guangdong Changhong and Defendant Changhong (Hong Kong) Trading Limited "are affiliated with the Changhong Group." (Xie Decl. ¶ 7).

The June 2 Letter accused Ms. Zhang's "firm and staff" of "breaching [Plaintiff's] proprietary information and circumvention," and identified specific instances of the improper disclosures of Plaintiff's proprietary information to Comarket, Kilppad LLC and Global Video LLC. (*Id.* Ex. J at 1). The June 2 Letter stated, "[b]ased upon your breach, we formally request cancellation of open order [] Purchase Order no. AS-S008644 [the order for 24-inch parts], AS-S008656 [the order for 50-inch parts], and 4 containers as listed below for full refund by June 9th, 2015." (*Id.* Ex. J). According to the declaration submitted by Defendant's Sales Manager with personal knowledge of transactions with Plaintiff, the "4 containers" listed corresponded with the Undelivered Parts (held back as security) as well as some of the Unusable Parts for which Plaintiff seeks a refund in this action. (Xie Decl. ¶ 8).

Guangdong Changhong and Plaintiff had previously entered into a "Mutual Nondisclosure and Confidentiality Agreement" ("NDA"). (Zhang Decl. Ex. A). The NDA provides for the use and disclosure of confidential information exchanged between the parties for a term three years following the effective date of August 1, 2014. (*Id.* at 1). Three provisions within the NDA relate to the issues disputed in this Motion: Paragraph 9 ("Injunctive Relief"), Paragraph 12 ("Governing Law"), and Paragraph 13 ("Dispute Resolution"):

> 9. Injunctive Relief
> Receiving Party acknowledges that the unauthorized use or disclosure of the Confidential Information would cause irreparable harm to the Disclosing Party.

> Accordingly, the Receiving Party agrees that the Disclosing Party will have the right to obtain an injunction or other equitable relief from a court in Hong Kong SAR against any breach or threatened breach of this Agreement, as well as the right to pursue any and all other rights and remedies available at law or in equity for such a breach.
>
> . . .
>
> 12. Governing Law
> This Agreement shall be governed by the laws of Hong Kong.
>
> 13. Dispute Resolution
> This Agreement is prepared in and shall be interpreted in accordance with American English. Any dispute arising from or in connection with this agreement shall be submitted to CIETAC Hong Kong Arbitration Center for arbitration which shall be conducted in accordance with the CIETAC's arbitration rules in effect at the time of applying for arbitration. The arbitral award shall be final and binding upon both parties.

(*Id.* ¶¶ 19, 12–13).

On February 25, 2016, Defendant filed this Motion, seeking to compel Plaintiff to arbitrate its breach of contract claims under the arbitration clause of the NDA entered into between Plaintiff and Guangdong Changhong. (Motion at 1).

II. DISCUSSION

The parties do not dispute the validity of the NDA or its arbitration clause. As a threshold issue, however, the Court first examines whether Defendant has standing to invoke the NDA's arbitration clause, despite not being a signatory to the NDA. Defendant argues (Motion at 1) that it has standing to enforce the arbitration clause for two independent reasons:

First, according to Defendant, "the plain language of the arbitration clause requires arbitration of 'any dispute,' regardless of whether it involves [Plaintiff] and Changhong Guangdong or a related person or entity." (*Id.* at 2).

Second, Defendant argues that Plaintiff "is equitably estopped from refusing to arbitrate" when Plaintiff "invoked [Defendant's] alleged breach of the Nondisclosure Agreement both to seek the same refund it now requests in the Complaint and to excuse its breach of the contracts for 50 inch and 24 inch TV parts that forms the basis of [Defendant's] forthcoming counterclaims." (*Id.*).

Neither argument is persuasive in providing standing to Defendant.

A. The Plain Language of the Arbitration Clause

Defendant argues that a nonsignatory can "enforce the arbitration agreement if the language of the agreement is broad enough to encompass claims involving the nonparty." (Reply at 2–3). According to Defendant, because the arbitration clause provides that "[a]ny dispute arising from or in connection with this agreement" shall be submitted for arbitration, it does not limit the agreement to disputes between Plaintiff and Guangdong Changhong only. (*Id.* at 3).

The two cases Defendant cites, however, are inapposite because the arbitration clauses in these cases contained explicit language requiring arbitration of disputes between signatories and nonsignatories. For example, in *Selby v. Deutsche Bank Trust*

Company Americas, the district court focused on the fact the arbitration clause required arbitration of any dispute between the signatories and "any involved third party or employees, agents, representatives or assigns of either you or us or that third party . . . ." No. 12CV01562 AJB BGS, 2013 WL 1315841, at *7 (S.D. Cal. Mar. 28, 2013). Therefore, the district court reasoned that "the language of the Agreement is broad and allows 'any involved third party' to elect binding arbitration." *Id.* Similarly, in *Sherer v. Green Tree Servicing LLC*, the arbitration clause provided for arbitration of "any claims arising from 'the relationships which result from th[e] [a]greement." 548 F.3d 379, 382 (5th Cir. 2008) (alterations in original). The Fifth Circuit reasoned that, a loan servicer like Green Tree would necessarily fall within the contemplated "relationship" given that, without the loan agreement providing for arbitration, there would be no loan for Green Tree to service. *Id.* (holding that the borrower had "validly agreed to arbitrate with a nonsignatory, such as the loan servicer Green Tree, and the language is sufficiently broad to permit Green Tree to compel arbitration").

The arbitration clause in the NDA does not contain any comparable language that demonstrates an intent to bind the signatories to arbitration with nonsignatories. Without any case law in support of Defendant's argument, the Court rejects Defendant's contention that, because the arbitration clause did not explicitly exclude non-signatories, non-signatories are somehow contemplated as a party with standing to enforce the arbitration clause.

At the hearing, counsel for Defendant argued that the last sentence of the arbitration provision demonstrates the parties' intent to bind signatories to arbitration with nonsignatories: "The arbitral award shall be final and binding upon both parties." (Zhang Decl. Ex. A ¶ 13). Relying on the fact that "Party" and "Parties" are defined as "either or both (as appropriate) [Plaintiff] and/or [Guangdong Changhong]," counsel for Defendant argued that the use of "parties" with a lowercase "p" reveals that the parties contemplated that entities other than Plaintiff and Guangdong Changhong would be similarly bound to arbitrate. This argument is betrayed by Paragraph 2 of the NDA, which also uses the lowercase form of "parties" in reference to Plaintiff and Guangdong Changhong: "The parties for their mutual benefit desire to disclose to each

other Confidential Information so as to enable the parties to evaluate whether they wish to enter into a transaction, business relationships or commercial arrangement." (*Id.* ¶ 2).

At the hearing, counsel for Defendant also argued that, in the absence of any explicitly limiting language, the arbitration provision language that "[a]ny dispute arising from or in connection with this agreement shall be submitted to . . . arbitration," suggests that the requirement to arbitrate is not confined to the signatories only. The Court disagrees. In the context of the entire agreement, the Court believes that the plain meaning is that the provision applies to the Parties. Even under the most generous view for Defendant — that the arbitration provision is ambiguously silent on the subject — the Court will certainly not read the provision as imposing an unusual obligation inconsistent with the notion of consent.

B. Equitable Estoppel

A non-party to an arbitration agreement "may invoke arbitration under the [Federal Arbitration Act] if the relevant state contract law allows the litigant to enforce the agreement." *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009)). Defendant assumes that California law applies (Reply at 4), but the Court is not so certain when the contract providing for arbitration requires that the agreement "be governed by the laws of Hong Kong." (Zhang Decl. Ex. A). *Compare Norfolk S. Ry. Co. v. Trinity Indus., Inc.*, No. 3-07-CV-1905F, 2009 WL 856340, at *4 (N.D. Tex. Mar. 31, 2009) (applying Illinois law based on choice-of-law provision because "equitable estoppel should be viewed as a substantive claim"), *with Sicily by Car S.p.A. v. Hertz Glob. Holdings, Inc.*, No. CIV.A. 14-6113 SRC, 2015 WL 2403129, at *4 (D.N.J. May 20, 2015) (applying law of the forum because the district court exercises diversity jurisdiction over the action despite the choice-of-law clause providing for Oklahoma law). Nevertheless, the Court does not reach this issue because, even assuming California law applies, Defendant has not established that Plaintiff should be equitably estopped from resisting the arbitration clause.

Under California law, a non-signatory can enforce an arbitration provision under five theories: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing or alter-ego, and (5) equitable estoppel. *See Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 219–20, 92 Cal. Rptr. 3d 534 (2009).

"In such cases, where the question is whether a particular party is bound by the arbitration agreement, the liberal federal policy favoring arbitration agreements, which is 'best understood as concerning 'the scope of arbitrable issues,'' is inapposite." *Id.* at 220 (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.1 (9th Cir. 2006)); *see also Kramer*, 705 F. 3d at 1126 ("Accordingly, [t]he strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." (internal quotations marks and citation omitted)).

The rationale behind equitable estoppel in contract law is built on the principle that it "would be inequitable for [plaintiffs], as parties to arbitration agreements with [defendants], to use the substantive terms of those agreements as a foundation for their claims against nonsignator[y] [defendants], and at the same time to disavow the arbitration clauses of those very agreements." *See Goldman*, 173 Cal. App. 4th at 221.

The Ninth Circuit has outlined the requirements of equitable estoppel as follows:

> Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of equitable estoppel applies in two circumstances: (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract . . . and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in

> or intimately connected with the obligations of the underlying agreement.

Kramer, 705 F.3d at 1128 (citations and internal quotation marks omitted).

Because Plaintiff brings no claims against signatories to the NDA, the second circumstance does not apply. *See id.* The only issue to resolve therefore is whether Plaintiff "must rely on the terms of the written agreement in asserting its claims against [Defendant] or the claims are intimately founded in and intertwined with the [NDA]." *Id.*

The Court notes that Defendant faces an uphill battle. The Ninth Circuit has observed that "We have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff, and we decline to expand the doctrine here." *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (holding that the district court properly concluded that the defendant could not invoke the arbitration clause on the basis of equitable estoppel when the plaintiff's statutory claims did not arise out of or relate to the contract that contained the arbitration agreement).

1. "Reliance on"

Plaintiff does not "rely on the terms of the [NDA] in asserting its claims against" Defendant. *Id.* The Complaint alleges that Defendant breached the parties' agreement concerning the 40-inch order based on Defendant's alleged non-performance (*i.e.*, delivery of the remaining parts) after Plaintiff had fully performed (*i.e.*, fully paid for the 40-inch parts). (Complaint ¶ 12). According to the Complaint, Plaintiff made final payment by March 11, 2015, but Defendant "demanded further payment on an unrelated claim before it would release the parts." (*Id.*). The dispute in the Complaint, therefore, centers on the parties' disagreement over whether other orders (*i.e.*, the 50-inch order) should be considered a related transaction that undermines Plaintiff's contention that it had fully performed. Nowhere in the Complaint does Plaintiff reference the NDA or rely on its terms to assert its claims against Defendant. Indeed,

as to Plaintiff's claim, the terms of the NDA are irrelevant to the issues of whether Plaintiff had fully performed and whether Defendant had failed to perform. *See Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1231 (9th Cir. 2013) ("In short, Plaintiffs rely not on the Customer Agreement, but on Best Buy's' alleged words and deeds in the course of transactions leading to the acquisition of equipment they believed they purchased, but in fact leased . . . . 'Thus, the inequities that the doctrine of equitable estoppel is designed to address are not present.'" (citation omitted)); *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009) ("Mundi's claim that USLIC breached the insurance policy is not 'intertwined with the contract providing for arbitration'—the EquityLine Agreement. Nor does her claim 'arise[ ] out of' or 'relate[ ] directly to' the EquityLine Agreement. ***The resolution of her claim does not require the examination of any provisions of the EquityLine Agreement***." (emphasis added and citations omitted)); *Goldman*, 173 Cal. App. 4th at 230 ("These allegations reveal no claim of any violation of any duty, obligation, term or condition imposed by the operating agreements. Nor is there any claim founded in or even tangentially related to any duty, obligation, term or condition imposed by the operating agreements. On the contrary, the claims are fully viable without reference to the terms of those agreements.").

Therefore, Plaintiff's claims do not rely on the terms or obligations under the NDA.

2. "Intimately founded in and intertwined with"

Defendant argues that Plaintiff's claims are intimately founded in and intertwined with the NDA because (1) Plaintiff seeks the same remedy that Plaintiff sought in its June 2 Letter based on an alleged breach of the NDA; and (2) Defendant's "forthcoming counterclaims against [Plaintiff] is completely intertwined with the Nondisclosure Agreement." (Reply at 4–6).

a. *June 2 Letter*

As to Defendant's first contention, it is true that Plaintiff's June 2 Letter sought to cancel the open orders based on alleged breaches of the NDA. But the June 2 Letter was directed at Ms. Zhang as a representative of ***Guangdong Changhong***. Defendant argues that Plaintiff implicitly conceded in its Opposition that the June 2 Letter "pertained to [Plaintiff's] disputes with Changhong (Hong Kong), notwithstanding that it was addressed to Guangdong Changhong 'c/o' Changhong (Hong Kong)." (Reply at 5 n.1). Even accepting this argument as true, it is far from clear—in fact, rather unlikely—that Plaintiff has standing to assert ***causes of action*** arising under the NDA to recover prior payment provided under a contract ***independent*** of the NDA. As discussed above, the NDA contemplates "the right to obtain an injunction or other equitable relief from a court in Hong Kong SAR against any breach or threatened breach of this Agreement, as well as the right to pursue any and all other rights and remedies available at law or in equity for such a breach." (Zhang Decl. Ex. A ¶ 9).

Furthermore, the Ninth Circuit's decision in *Kramer* is instructive. In *Kramer*, the plaintiffs were owners of Toyota vehicles, who brought a class action against the car manufacturer, Toyota Motor Corporation ("Toyota"). 705 F.3d at 1124. The plaintiffs brought false advertising and breach of warranty claims relating to alleged defects in the vehicles. *Id.* at 1130–31. Toyota was a non-signatory to purchase agreements between the plaintiffs and car dealerships, which contained arbitration provisions. *See id.* at 1126. Toyota invoked the equitable estoppel doctrine, arguing that the plaintiffs' claims were "intertwined" with the purchase agreements because the relief sought constituted a "revocation of acceptance of the [p]urchase [a]greement." *Id.* at 1131. The Ninth Circuit found that the "correct analysis" was whether "the ***causes of action*** against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations, not whether the court must look to the [p]urchase [a]greement to ascertain the requested relief." *Id.* (emphasis in original) (citations and internal quotation marks omitted).

Similarly here, the basis of Defendant's argument that Plaintiff's claims are inextricably intertwined with the NDA is that a breach of the NDA served as an alternative legal basis for the ***same relief*** sought by Plaintiff. This argument is without merit—"[t]he emphasis of the case law is unmistakably on the claim itself, not the relief." *Id.* at 1132.

b. *Defendant's forthcoming counterclaims*

Alternatively, Defendant argues that Plaintiff's defense to Defendant's forthcoming counterclaim "will necessarily involve determination of whether [Defendant] breached the Nondisclosure Agreement." (Reply at 7). Specifically, Defendant argues that it intends to countersue for Plaintiff's alleged breach of contract for failure to pay for the 50-inch and 24-inch orders. (Motion at 10 n.1). Therefore, according to Defendant, Plaintiff "will place in issue (i) whether [Defendant] was bound by non-disclosure obligations under the [NDA]; and (ii) if so, whether [Defendant] violate[d] those obligations; and (iii) if so, whether [Defendant's] breach released [Plaintiff] from its obligation to pay [Defendant] for the 50 inch and 24 inch TV parts." (Reply at 7).

The Court rejects Defendant's argument for four independent reasons:

First, the Court notes that this argument rests on the assumption that Plaintiff will indeed place at issue the NDA and alleged breach when Defendant countersues for breach of contract. Therefore, it appears to raise prematurely an issue that is not before the Court. At the hearing, Plaintiff's counsel indicated that it is far from undisputed that Plaintiff will certainly introduce the NDA as an affirmative defense against Defendant's contemplated counterclaims.

Second, in this contemplated scenario, the case law cited by the parties would be inapposite. If Plaintiff were to raise the NDA breach as a ***defense*** to Defendant's counterclaim, the relevant facts would be whether a nonsignatory counterclaim-plaintiff would have standing to compel arbitration against a signatory counterclaim-defendant. Where a nonsignatory seeks to enforce an arbitration agreement against a

signatory, the Ninth Circuit recognizes a distinction between whether the signatory is the party bringing or defending against the lawsuit. *Mundi*, 555 F.3d at 1046 (distinguishing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 202 (3d Cir. 2001), on the basis that, in *DuPont*, "it was a nonsignatory who brought claims against the signatory, rather than the signatory bringing claims against a nonsignatory"). In *DuPont*, the Third Circuit recognized, but ultimately rejected the application of, the theory that a signatory may be "bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations." 269 F.3d at 201.

Indeed, Defendant cites no case law for its contention that a ***defense***, rather than claim, may serve as a basis for equitable estoppel. The Court has not identified any cases exactly on point, but the closest case appears to be *In re Carrier IQ, Inc. Consumer Privacy Litigation*, where the district court observed that "[d]efendants have cited no case where ***defendant's*** reliance on a contract justifies the application of equitable estoppel against the ***plaintiff*** who does not rely on the contract." No. C-12-MD-2330 EMC, 2014 WL 1338474, at *8 (N.D. Cal. Mar. 28, 2014). By analogy, in Defendant's contemplated counterclaim scenario, Defendant has offered no support for the idea that a counterclaim-***defendant's*** reliance on a contract justifies the application of equitable estoppel when the counterclaim itself does not rely on the contract.

Third, a contrary holding would be divorced from the basic principles underlying the equitable doctrine. *See Murphy*, 724 F.3d at 1229 ("This rule reflects the policy that a ***plaintiff*** may not, 'on the one hand, seek to hold the non-signatory ***liable*** pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory.'" (emphasis added)).

Fourth, the only cases that Defendant cites are inapposite. The California Court of Appeal in *Goldman* actually affirmed the trial court's holding that equitable estoppel did not apply. 173 Cal. App. 4th at 233 ("Again, we are returned to the fundamental point: Goldman and Haines are *not* relying in any way on the operating agreements to make their claims against KPMG and Sidley, while at the same avoiding the arbitration clauses of those agreements—and, at bottom, that is the only basis upon which they may be equitably estopped from refusing to arbitrate when they have not agreed to do so."). Unlike the issue of whether Defendant, a nonsignatory to the NDA, can compel arbitration against Plaintiff, the Ninth Circuit in *Comer* actually addressed whether a ***signatory*** to an arbitration agreement could enforce the arbitration agreement against a nonsignatory. 436 F.3d at 1101. Finally, the district court's holding in *Mance v. Mercedes-Benz USA* is no longer good law in light of the Ninth Circuit's decisions in *Mundi* and *Kramer*. *See Soto v. Am. Honda Motor Co.*, No. C 12-01377 SI, 2012 WL 5877476, at *3 (N.D. Cal. Nov. 20, 2012) ("The *Mance* court and AHM's theory that, but for the sales contract there could be no warranty claim, is contradicted by *Mundi*. [The plaintiff's] claims against AHM for defects in his Honda Accord are not intertwined with the mere fact that [the plaintiff] purchased his vehicle with an installment sales contract."). *Compare Mance*, 901 F. Supp. 2d 1147, 1156 (N.D. Cal. 2012) (holding that a nonsignatory car manufacturer could enforce the arbitration provision in the plaintiffs' purchase agreements with dealerships because "had Mr. Mance not signed the [purchase agreement], he would not have received the warranty"), *with Kramer*, 705 F.3d at 1132 (rejecting nonsignatory manufacturer's argument that the plaintiffs' California consumer law claims were "intertwined" with the purchase agreements between the plaintiffs and the dealerships because they "rel[ied] on the existence of [p]laintiffs' vehicle purchase transactions").

For the reasons discussed above, Defendant failed to establish that Plaintiff should be equitably estopped from resisting the arbitration provision in the NDA. Because the Court concludes that Defendant does not have standing to invoke the NDA's arbitration clause to compel arbitration, the Court need not reach the remaining issues regarding whether Plaintiff's claims fall within the scope of the arbitration clause and whether Plaintiff would receive a "fair hearing" in Hong

Kong. However, because whether Plaintiff will raise the NDA as an affirmative defense remains disputed, the Court denies the Motion without prejudice to Defendant's renewing the Motion if Plaintiff raises the NDA as an affirmative defense to Defendant's contemplated counterclaims.

III. CONCLUSION

Defendant's Motion is **DENIED *without prejudice***. Defendant shall file an Answer to the Complaint by **May 2, 2016**. Should Plaintiff put at issue Defendant's obligations under the NDA as Defendant predicts, then Defendant may file a renewed Motion to Compel Arbitration based on the doctrine of equitable estoppel. Any renewed Motion to Compel Arbitration, however, must specifically discuss why the doctrine does or should extend to a party raising an affirmative defense rooted in the agreement requiring arbitration.

IT IS SO ORDERED.