In The

United States Court Of Appeals

For The Eleventh Circuit

Philippe Calderon and Ancizar Marin,

Plaintiffs – Appellees,

v.

SIXT RENT A CAR, LLC,

Defendant – Appellant.

On Appeal From Case No. 19-cv-62408-SINGHAL,
United States District Court For The Southern District Of Florida,
Fort Lauderdale Division (Hon. Anuraag Singhal)

BRIEF OF APPELLEE ANCIZAR MARIN

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APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Appellee Marin hereby states that the following individuals and entities have an interest in the outcome of this case, in addition to those listed in the Appellants' Opening Brief:

Public Justice, P.C.

Gilbride, Karla

Glaberson, Stephanie K.

/s/ Brian W. Warwick
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STATEMENT REGARDING ORAL ARGUMENT

Appellee Marin does not believe oral argument is warranted in this matter. Marin believes that the briefing in this case is adequate to show that the district court's decision denying Sixt's motion to compel arbitration should be affirmed.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Whether Sixt's imposition on Marin of a fully-integrated contract governing his car rental, which does not include an arbitration clause, supersedes any prior obligation Marin may have had to arbitrate disputes with Sixt relating to his car rental reservation.

II. Whether Marin's claims regarding Sixt's unlawful imposition of fees following his car rental fall within the scope of Orbitz's arbitration clause, which governs consumers' use of Orbitz's reservation-making services.

III. Whether Sixt can enforce Orbitz's arbitration agreement as a third-party beneficiary where the contract does not clearly evince the contracting parties' mutually-shared intent to benefit Sixt through their agreement.

IV. Whether Sixt can employ Florida's equitable estoppel doctrine to compel Marin to arbitrate where his breach of contract and statutory claims do not rely upon or seek to enforce any terms of the contract containing the arbitration provision.

V. Whether Marin should be forced to arbitrate his claims individually, as opposed to being permitted to proceed with his claims on a class basis in court.

STATEMENT OF THE CASE

This case is about whether Defendant-Appellant Sixt can use an arbitration agreement contained within Terms of Use on the reservation website Orbitz.com

and to which Sixt is not a party, to force Plaintiff Ancizar Marin ("Marin") to arbitrate his claims here, despite imposing on Marin its own contract governing the rental that does not provide for arbitration, and despite the fact that Marin's claims arise from damage allegedly caused to the rental vehicle during the rental period and after his assent to Sixt's contract—not his reservation on Orbitz.com.

I. Course of Proceedings and Disposition in the Court Below

Plaintiffs Marin and Philippe Calderon ("Calderon") filed their putative class action complaint against Sixt for imposing unauthorized charges on customers in breach of its rental contracts with customers and in violation of Florida law.[1] A. 7. Marin alleged that Sixt breached the terms of its Face Page contract by charging damage fees not included in that contract. A. 33. The one place Sixt mentioned these fees was in its "Rental Jacket," which is not incorporated by reference into the Face Page, and which Sixt delivers to customers only after they have signed the Face Page. A. 11–12. Marin also alleged that Sixt violated Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") and Consumer Collections Practices Act ("FCCPA") by charging and attempting to collect these unauthorized fees. A. 29–31, 34–36.

[1] The issues on appeal relate only to Marin, not Calderon. Calderon purchased directly from Sixt.com and Sixt has never asserted he is subject to any arbitration clause. Accordingly, Calderon is not an Appellee here.

Sixt moved to compel arbitration of Marin's claims. A. 75. Because Sixt's own rental contract does not contain an arbitration clause, Sixt relied on an arbitration clause found in the Terms of Use ("TOU") for the Orbitz website where Marin made his rental reservation, to which Sixt is not a signatory. A. 79. Sixt additionally relied on a document outlining "Rules and Restrictions" ("R&R") it claims Marin agreed to as a part of his Orbitz check-out process. A. 82, 94. Sixt argued that Marin's claims fall within the scope of the Orbitz arbitration clause, and that Sixt can enforce that clause because it is a third-party beneficiary and through equitable estoppel. A. 90-94.

Marin opposed Sixt's motion on a number of grounds. A. 135. Marin argued that Sixt's evidence in support of its claim that Marin agreed to the TOU was inadmissible because it was not based on personal knowledge and the screenshot Sixt submitted from 2019 failed to establish how the process functioned when Marin made his reservation nine months prior. A. 151–53. Marin contended that the Sixt Face Page, which contains no arbitration clause, supersedes Orbitz's arbitration clause to the extent it pertains to Sixt, and that the Face Page did not incorporate the Orbitz TOU. A. 147–51. Further, he argued that Orbitz's arbitration clause did not cover his claims in this case and that Sixt cannot enforce the arbitration clause. A. 139–47.

In reply, Sixt for the first time presented a sworn declaration from an unrelated case to depict the process through which it claims Marin made the rental reservation on the Orbitz website. A. 165–66, 176–209.

The district court denied Sixt's motion, holding that Marin's claims fall outside the scope of Orbitz's arbitration clause, and that Sixt is not a party to that agreement nor able to enforce it as a third-party beneficiary or through equitable estoppel. A. 223-31.

Examining the arbitration clause's scope, the court reasoned that the clause "applies only to 'Claims,'" and that Marin's claims here "do not qualify." A. 228-29. According to the court, "[t]he only arguable way to interpret Marin's cause of action as falling within the scope" of the agreement is to understand it as a dispute "'relating in any way to . . . service or products provided . . . by Orbitz.'" A. 229. The court found it could "not adopt this reading . . . because it belies the very definitions provided for" in the TOU. The term "Services," for example, "expressly includes only those things 'provided by Orbitz,'" and "expressly does not include any services or products provided by third parties." *Id*.

Even if Marin's claims were within the scope of the arbitration clause, the court found Sixt still could not enforce it. The court held that Sixt is not a third-party beneficiary under Florida law because the arbitration clause identified "Suppliers" as beneficiaries, but was "devoid of any mention of 'Travel

Services'"—the contract term under which Sixt "undeniably fits." A. 227. The court declined to "cherry-pick" only the provisions of the TOU that supported Sixt's position, and "[could]not find a way to read" the provision such that Sixt would qualify as a third-party beneficiary. *Id.*

The court found Sixt's equitable estoppel argument "equally unpersuasive." A. 230. Assessing Sixt's estoppel arguments against the standard this Court set out in *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), as described in *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1401 (S.D. Fla. 2014), the district court found that Marin's claims "are not—in any way—related" to the Orbitz TOU and that Marin was not "attempting to use *any* of" the provisions of the TOU, "much less using them to his benefit." A. 230.[2]

Sixt moved to amend or clarify the court's decision, asserting that the court had relied on Orbitz's 2019 TOU, instead of the 2016 version Sixt alleged was operative at the time Marin made his reservation. The court declined to amend its order, determining that the result "would have been the same regardless of which version of Orbitz's Terms of Use" it applied. A2. 138.[3]

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[2] Sixt additionally moved to dismiss plaintiff Calderon's claims, and the district court denied that motion as well. The court found that Calderon—whose claims are virtually identical to Marin's—stated causes of action for breach of contract and violation of the FDUTPA, in part because the Rental Jacket was not incorporated into the Face Page. A. 221.

[3] Marin here relies on the 2016 terms throughout. For the reasons outlined in this brief, those terms do not allow Sixt to compel arbitration. To the extent the district

This appeal followed.

II. Statement of the Facts

A. Marin contracted with Sixt for a rental car.

In February 2019, Marin made a reservation for a Sixt rental car through the Orbitz website. A. 20. The following month, he went to the Sixt kiosk at the Phoenix airport to pick up his vehicle. *Id*. There, Sixt presented Marin with a contract—the Face Page—and had him digitally sign it. A. 20. Only after he did so, in accordance with Sixt company policy, did the desk agent provide to Marin for the first time the "Rental Jacket," into which the agent folded the Face Page before handing a copy to Marin. A. 21.

The Face Page is the standard form contract Sixt requires its customers to sign before picking up their rental vehicles. A. 10. It contains the essential terms of the rental, including the cost and duration of the rental and various applicable taxes and fees. A. 132-34. It does not mention fees related to damage to the vehicle, including any of the fees Sixt imposed on Marin after his rental which are the basis for his claims. *Id*. Sixt instead mentions such additional fees only in the Rental Jacket. A. 11–12, 42, 44. The Face Page references the Rental Jacket just once, saying: "By signing below, you agree to the Terms and Conditions printed on the

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court relied on a later version at any point in its opinion, the error had no effect on the outcome.

rental jacket and to the terms found on this Face Page, which together constitute this agreement." A. 11, 59. The Rental Jacket, in turn, states "[t]his Agreement constitutes the entire agreement between you and us. All prior representations and agreements between you and us regarding this rental are void." A. 45. Neither the Face Page nor the Rental Jacket includes an arbitration clause. Nor does either make reference to the Orbitz website or any terms contained therein.

B. Sixt charged Marin for and sought collection of fees only mentioned in the Rental Jacket.

Marin returned the rental car to Sixt with no damage. A. 22. Nevertheless, Sixt later alleged the car had sustained damage and demanded payment of more than $700 for "[r]epair costs," "[l]oss of use," and an "[a]dministrative fee." *Id.* None of these fees are authorized by Sixt's Face Page. Each is mentioned only in the Rental Jacket. *Id*. Marin's insurance company paid $519, and Marin paid $189.62 out of pocket "to avoid credit issues with nonpayment." A. 23.

On September 26, 2019, Marin filed his complaint alleging that, by charging and collecting these fees, Sixt had breached the Face Page contract and violated Florida law.

III. Standard of Review

This court generally reviews orders denying motions to compel arbitration *de novo*. *E.g. Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011). However, the district court's decision not to apply equitable estoppel to

permit a nonsignatory to compel arbitration is reviewed for abuse of discretion. *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), rev'd on other grounds sub nom. *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Corp. Am. Credit Union v. Herbst*, 397 F. App'x 540, 542 (11th Cir. 2010); *Grigson v. Creative Artists Agency L.L.C.,* 210 F.3d 524, 528 (5th Cir. 2000); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395 (4th Cir. 2005).

SUMMARY OF THE ARGUMENT

In this case, Sixt disavows the terms of the agreement it drafted to govern Marin's car rental, and instead tries to substitute another contract it likes better. Not only did Sixt fail to prove the contract it tries to enforce—Orbitz's arbitration agreement—exists, but that contract also does not reach Marin's claims here and affords Sixt no rights.

Although Sixt ignores its own agreement with Marin, contemporaneous evidence proves that Sixt intended it to be the exclusive agreement covering his rental. By imposing this agreement on Marin, Sixt set the terms of his rental and extinguished any other rights it might previously have had. This Court need only look to that agreement—which does not contain an arbitration clause—to determine the parties' rights and obligations. Because there is no arbitration agreement between Sixt and Marin pursuant to that contract, the inquiry can end

there. Sixt cannot compel Marin to arbitrate his claims because it chose not to include an arbitration clause in its own contract.

Sixt, however, wishes to shift the Court's focus to a contract it asserts Marin entered into with Orbitz. This Court need not reach this issue, but if it does, it should find that Sixt cannot compel Marin to arbitrate under that agreement either.

First, Sixt failed to carry its burden below to establish that this agreement exists. Accordingly, there is nothing for the Court to enforce.

Second, even if that agreement exists, Marin's claims fall outside its scope, because that agreement is limited to "Claims" as defined therein, and Marin's claims here do not qualify. "Claims," as defined by the Orbitz clause, must relate to services over which *Orbitz* has control and does not expand to services controlled exclusively by Sixt, like the car rental at issue here. And even if the Orbitz clause did extend beyond conduct under Orbitz's control, it reaches only so far as Marin's reservation, which is not the subject of his claims. Accordingly, if this Court finds that Marin's claims do not fall within the scope of the Orbitz clause, it can, again, end its inquiry.

Even if Marin's claims did fall within the scope of Orbitz's clause, Sixt still may not prevail. Sixt is not a signatory to the Orbitz agreement. Sixt therefore may compel arbitration under that agreement only if it shows that this case is one of the "rare circumstances" in which "traditional principles" of state law that "arose to

govern issues concerning the validity, revocability, and enforceability of contracts generally" would allow a non-signatory to enforce a contract. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009); *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002). Sixt argues that two such principles apply: third-party beneficiary doctrine, and equitable estoppel. Neither does.

Sixt is not a third-party beneficiary of the Orbitz agreement. Florida law requires that a contract clearly express the parties' mutual intent to primarily and directly benefit a third party, and such intent is not clear from the Orbitz agreement. Nor can Sixt rely on the doctrine of equitable estoppel to compel Marin to arbitrate his claims. As an initial matter, this Court must apply Florida's traditional law of equitable estoppel to this question. *See Arthur Andersen,* 556 U.S. at 631. Sixt fails to so much as reference that doctrine, which requires elements that Sixt has not attempted to, and cannot, prove: a wrongful act on Marin's part, and Sixt's own detrimental reliance. Even under more recent Florida cases that have adopted *MS Dealer's* arbitration-centered formulation of that doctrine, Sixt still cannot prevail because Marin does not attempt to enforce the obligations of the Orbitz contract. There is thus no ground for Sixt to enforce the Orbitz agreement.

ARGUMENT

I. No arbitration agreement exists between Sixt and Marin.

Arbitration is a creature of contract. "[I]t is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). For this reason, the first question a court faced with a motion to compel arbitration must answer is whether any arbitration agreement exists. *See* 9 U.S.C. § 4; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). Courts "should apply ordinary state-law principles" governing the formation of contracts to this question, and look for evidence that the parties "objectively revealed an intent to submit the [dispute] to arbitration." *First Options*, 514 U.S. at 944.

The FAA puts a finger on the scale in favor of arbitration once it is clear that a valid arbitration agreement exists and the question merely concerns its scope. But this presumption of arbitrability does not apply to situations where no contract to arbitrate ever was formed, or where a later agreement supersedes the one containing the arbitration provision. *Granite Rock*, 561 U.S. at 303 ("We have applied the presumption favoring arbitration . . . only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and . . . is . . . best construed to encompass the dispute."); *Dasher v. RBC*

Bank (USA), 745 F.3d 1111, 1115 (11th Cir. 2014) (FAA's presumption inapplicable where parties "disagree about whether the [Arbitration] Agreement has been superseded such that it does not apply to any disputes"); *Jaludi v. Citigroup*, 933 F.3d 246, 255 (3d Cir. 2019) ("In applying state law [to the question of whether there is an agreement to arbitrate,] we do not invoke the presumption of arbitrability."). The question of which agreement controls is itself a question of state contract law, to be applied "without the FAA's presumption of arbitrability." *Dasher*, 745 F.3d at 1116.

Here, Marin and Sixt never entered into a contract to arbitrate any disputes between them. The only agreement to arbitrate is that which Sixt alleges exists between Marin and Orbitz. Sixt does not claim to be a party to that agreement, but claims rights under it. For the reasons set forth below, Sixt has no rights under that contract. But even if it once did, Sixt relinquished any such rights when it imposed on Marin its own agreement covering his rental. Sixt intended that contract to be the exclusive agreement covering Marin's use of his rental car. It is what controls here, and it is the contract from which Marin's claims in this matter arise. And other than an unsuccessful attempt to incorporate by reference Sixt's "Rental Jacket," that contract makes no attempt to incorporate by reference any other document or obligation—including Orbitz's TOU and arbitration agreement.

Florida's parol evidence rule operates on this agreement in two important ways. First, to the extent there is any question whether Sixt's Face Page is, in fact, a fully-integrated written agreement to which the rule applies, the Rental Jacket—though not incorporated by reference into the Face Page—is relevant evidence of Sixt's intent. And second, because the Face Page does not incorporate by reference any earlier agreements or obligations, it supersedes and precludes consideration of all earlier obligations between Marin and Sixt, including any that might have arisen from Orbitz's TOU.

The Face Page is a fully-integrated written agreement. It contains all the essential terms of Marin's rental: the price, duration, and other terms governing Marin's use of the car. A. 132-34. And it does not include an arbitration clause. *Id.* There is no ambiguity in its terms—it simply does not provide for disputes relating to it or the rental to be resolved in arbitration. The Face Page states that by signing, Marin agreed "to the Terms and Conditions printed on the rental jacket and to the terms found on this Face Page, *which together constitute this Agreement*." A. 59 (emphasis added). It makes no reference to the Orbitz TOU or R&R and does not attempt to incorporate them or to preserve prior obligations. Instead the contract between the parties limits the Agreement covering Marin's rental exclusively to the Face Page and Rental Jacket.

Of course, under Florida law, this vague reference to the Rental Jacket is insufficient to incorporate it into the Sixt Face Page contract. *See, e.g.*, *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590, 601 (3d Cir. 2020) (applying Florida law to find rental jacket not incorporated by reference into car rental agreement under virtually identical circumstances); *Lowe v. Nissan of Brandon, Inc.*, 235 So. 3d 1021, 1026 (Fla. 2d DCA 2018) ("the collateral document to be incorporated must be sufficiently described or referred to in the incorporating agreement so that the intent of the parties may be ascertained" (quotation omitted)). But, to the extent there is any ambiguity about whether Sixt intended its documents to serve as the sole and exclusive agreement governing Marin's rental, extrinsic evidence in the form of the Rental Jacket should be considered to clarify that question. *Farrey's Wholesale Hardware Co. v. Coltin Elec. Servs., LLC*, 263 So. 3d 168, 176-77 (Fla. 2d DCA 2018) (if there is disagreement whether a particular writing is a complete and accurate integration of the contract, rule against parol evidence not applied); *Burgan v. Pines Co. of Georgia*, 382 So. 2d 1295, 1296 (Fla. 1st DCA 1980) (same). And the Rental Jacket could not be clearer: "This Agreement constitutes the *entire agreement* between you and us. *All prior representations and agreements between you and us regarding this rental are void*." A. 45 (emphases added). To the extent Marin had any obligation to arbitrate with Sixt under

Orbitz's arbitration clause—which, as explained below, he did not—Sixt extinguished that obligation when it imposed the Face Page on him.[4]

By their own explicit terms, Sixt's contract documents evince Sixt's intention that its agreement should be the exclusive agreement governing Sixt's relationship with Marin without consideration of prior obligations. *See Centennial Mortg., Inc. v. SG/SC, Ltd.*, 772 So. 2d 564, 565 (Fla. 1st DCA 2000) (purpose of integration clause "to affirm the parties' intent to have the parol evidence rule applied to their contracts"). "[E]xtrinsic evidence" such as Orbitz's arbitration clause may not be used to contradict, modify, change, or "add to" such an "unambiguous written instrument." *J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So. 2d 484, 485-86 (Fla. 1957); *Duval Motors Co. v. Rogers*, 73

[4] Although Sixt conveniently ignores its own agreements on appeal, below, Sixt argued that its own contracts did not displace the Orbitz agreement because the case law on which Marin relied dealt only with multiple documents executed between the same parties, as opposed to here where Sixt and Marin entered into the Face Page contract, while Marin entered into the arbitration agreement with Orbitz. This is a distinction without a difference. *See Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999) (plaintiffs could not recover based on representations made by third parties before signing contract that contained clear terms on the point and integration clause extinguishing prior representations). Sixt's own contracts displace all other prior "representations." As written, the clause does not limit these "representations" to those made directly between Sixt and Marin—that modifier is only attached to "agreements." *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 641 (Fla. 1999) (contracts construed against drafter). Accordingly, the document voids all representations—including representations about dispute resolution Marin may have made in contracts entered into with third parties like Orbitz.

So. 3d 261, 265 (Fla. 1st DCA 2011) ("evidence outside the contract language, which is known as parol evidence, may be considered only when the contract language contains a latent ambiguity"). Florida treats merger clauses as valid and requires courts to eschew consideration of any prior agreements as a result.[5] *See Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. 1st DCA 2005) (merger clause "generally works to prevent a party from introducing parol evidence to vary or contradict the written terms").

Florida courts have specifically found similar merger clauses to preclude enforcement of pre-existing arbitration provisions, when the later-executed agreement contains none. *See, e.g.*, *Trinchitella v. D.R.F., Inc.*, 584 So. 2d 35, 35-

[5] Throughout this litigation the parties have looked to Florida law when interpreting or resolving questions relating to the Face Page and Rental Jacket. A. 150-51; 171. Accordingly, this Court should apply Florida law here. *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012) ("If the parties litigate the case under the assumption that a certain law applies, we will assume that that law applies."). Because Marin's Face Page contract was signed in Arizona, it is possible Arizona law may apply to questions of its interpretation. *Prime Ins. Syndicate, Inc. v. B.J. Handley Trucking, Inc.*, 363 F.3d 1089, 1091 (11th Cir. 2004) (Florida applies *lex loci contractus* to contract matters). Regardless, the outcome would be the same. *See, e.g.*, *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 153 (1993) ("extrinsic evidence that would vary or contradict the meaning of the written words" of contract not admissible); *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 482 (1977) (parol evidence rule "prohibits the use of extrinsic evidence to add to, subtract from, vary or contradict the terms of a complete and unambiguous written agreement" (citing *Richards Development Co. v. Sligh*, 89 Ariz. 100, 358 329 (1961)); *D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wis.*, 96 Ariz. 399, 403 (1964) (courts will not "add something to the contract which the parties have not put there").

36 (Fla. 4th DCA 1991) (agreement lacking arbitration clause and stating "[t]his instrument constitutes the entire agreement between the parties" superseded prior arbitration agreement); *Fowler v. Watts*, 659 So. 2d 374, 375 (Fla. 2d DCA 1995) (later agreement lacking arbitration clause superseded prior agreement between different combination of parties containing arbitration provision).

In *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st DCA 2011), the Florida court addressed a dispute between a Ford dealership and car buyers stemming from the purchase of a vehicle and the multiple documents the parties executed on the day of the purchase. These included a "Retail Installment Sales Contract" (RISC) and "Retail Buyer's Order" (RBO). *Id.* at 263-64. The RISC provided the essential terms of the sale, and stated: "This contract contains the entire agreement between you and us relating to this contract." *Id*. at 263. It did not contain an arbitration clause. The RBO, on the other hand, did. The *Duval* court found the RISC was a fully integrated document, because it contained all essential terms of the sale and the merger clause, and that the RBO was not a valid change to its terms. Accordingly, the court held that the dealership could not compel arbitration.

Similarly in *HHH Motors, LLP v. Holt*, 152 So. 3d 745, 748 (Fla. 1st DCA 2014) a car retailer and two buyers entered two successive agreements: a "Retail Purchase Agreement" (RPA) containing an arbitration clause, and a "Retail

Installment Sales Contract" (RISC), which did not. The RISC disclaimed any other contractual obligations: "This contract contains the entire agreement between you and us relating to this contract." *Id.* at 746. The buyers filed suit against the retailer alleging that certain fees violated FDUTPA. *Id.* at 747. Relying on *Duval Motors*, the Florida appellate court "held [the retailer] to the language of its own . . . documents," and found the execution of the later-signed document with its merger clause meant the courts could not consider the previously-signed document containing the arbitration clause.

So too here. Sixt drafted the Face Page without any arbitration clause, and intended for it to be the sole agreement between the parties. Sixt could have attempted to incorporate by reference the Orbitz agreement or drafted and included its own arbitration clause, but it chose not to.[6] That Sixt now regrets that decision does not change the fact that it imposed on its customers a contract of its own creation that does not provide for arbitration, does not so much as attempt to

[6] It appears Sixt recognized and later may have rectified this omission—in its Opening Brief, Sixt claims "the rental jacket Marin received may have included an arbitration provision." Sixt Br. at 14 n.3. It is unclear why Sixt—the entity responsible for drafting and in control of its own contracts, and with the burden on its own motion to compel arbitration below—does not know whether the version of its own documents provided to Marin included an arbitration provision. But the suggestion that it might makes clear Sixt is capable of drafting and including its own arbitration provision in its documents, should it wish for disputes to be resolved in that manner. Indeed, it may already have done so.

incorporate any other agreements save the Rental Jacket, and does not leave room for Sixt to draw upon its customers' preexisting agreements with other parties.

* * *

In sum, although there is a contract between Sixt and Marin, it does not provide for arbitration. Sixt's contract with Marin not only forms the basis of Marin's claims here, but also clearly evinces Sixt's intention that *it* should be the sole and exclusive agreement governing the relation between the parties as to Marin's car rental. For this reason alone, this Court can and should dismiss Sixt's appeal.

II. Sixt failed to prove that Marin entered into the Orbitz agreement.

To the extent this Court looks further, Sixt's attempt to compel Marin to arbitrate under his agreement with Orbitz must fail because Sixt did not prove that Marin in fact entered in to any arbitration agreement with Orbitz. The FAA requires that a court be "satisfied" that the agreement to arbitrate in fact exists. 9 U.S.C. § 4. On a motion to compel arbitration, state law governs that question. *E.g.*, *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329 (11th Cir. 2016). And under Florida law, the party seeking to enforce an agreement—here, Sixt—has the "burden of establishing" that agreement's existence. *CEFCO v. Odom*, 278 So. 3d 347, 352 (Fla. 1st DCA 2019) (collecting cases). As Sixt points out, a "summary judgment-like standard" applies. Sixt Br. at 19 (citing *Bazemore*,

827 F.3d at 1329). And in this Circuit, "[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the movant an opportunity to respond." *Atl. Specialty Ins. Co. v. Digit Dirt Worx, Inc.*, 793 F. App'x 896, 901 (11th Cir. 2019). Sixt failed to carry its burden in its moving papers.[7] It did not submit the *Dupler* declaration, on which it now relies to show the process it claims Marin followed when he checked out on the Orbitz website, until its reply. That declaration therefore was never properly before the district court.

Additionally, Sixt argues that Marin also agreed to abide by Sixt-specific rules and regulations (the R&R) when he made his Orbitz reservation. It also failed to carry its burden as to this document in its moving papers, and the *Dupler* declaration does nothing to show what that R&R document looked like on the date Marin made his reservation, as these Sixt-specific terms were not at issue in that case. Sixt therefore has not carried its burden of establishing that Marin agreed to the R&R as part of the reservation process.

[7] In *Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590 (3d Cir. 2020), rental car companies similarly attempted to enforce reservation-booking websites' arbitration clauses. The Third Circuit found the rental car companies "failed to produce admissible evidence concerning the layouts or contents of the websites Plaintiffs accessed" to make their car rental reservations, such that the district court "had no basis to determine whether Plaintiffs had assented to the websites' terms." *Id*. at 604. The rental car companies' evidence in *Bacon* mirrored that submitted by Sixt in its moving papers here.

Because Sixt failed to carry its burden on these threshold questions, this Court should dismiss its appeal.

III. Marin's claims are not within the Orbitz arbitration agreement's scope.

Although it need not do so, if this Court reaches the question of whether Marin's claims fall within the scope of Orbitz's arbitration clause, the answer must be no. Marin's claims in this case are not "Claims" subject to Orbitz's arbitration provision. As defined by Orbitz's own TOU, "Claims" relate only to disputes centering on conduct for which Orbitz is itself responsible. Even if Orbitz's clause is read to reach further, it can only be read to reach as far as Marin's *reservation*, and does not cover claims like those here, which arise from damage allegedly caused during his *use* of a Sixt rental car. Sixt cannot expand the scope of that agreement to suit its purposes. *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1354 (11th Cir. 2017) (nonsignatory cannot "alter and expand an arbitration clause that would not otherwise cover the claims asserted"). The district court reached the correct conclusion on this scope question.

A. Marin's claims in this case are not "Claims" as defined by Orbitz's Arbitration Agreement.

The Orbitz arbitration agreement only requires arbitration of "Claims." A. 105 ("Any and all Claims will be resolved by binding arbitration."). Terms that "commence with a capital letter" (like "Claims") are "defined." A. 104. The TOU define "Claims" as "any disputes or claims relating in any way to the Services, any

dealings with our customer service agents, any services or products provided, any representations made by us, or our Privacy Policy." A. 105.

Sixt characterizes the scope of the provision as "broad," relying on this definition of "Claims." Sixt Br. at 24. It is true that the phrase "relating to" may be broader than its cousin "arising from"—but it is not without limits. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 637, 638 (Fla. 1999). As this Court has said, the phrase "marks a boundary by indicating some direct relationship; otherwise, the term would stretch to the horizon and beyond." *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218–19 (11th Cir. 2011); *see also id.* ("'related to' is limiting language and if 'relate to' were taken to extend to the furthest stretch of its indeterminacy, it would have no limiting purpose because really, universally, relations stop nowhere." (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (internal quotations and alterations omitted)). Contrary to Sixt's contention that the clause sweeps in all disputes having anything whatsoever to do with Marin's car rental, the clause is limited to only those disputes having a sufficiently direct relationship to Marin's interaction with Orbitz and its services. Under Florida law, "the test for determining arbitrability of a particular claim under a broad arbitration provision is whether a 'significant relationship' exists between the claim and the agreement containing the arbitration clause." *Seifert*, 750 So. 2d at 637, 638. This means that

the claim must "emanate[] from an inimitable duty created by" that contract, and is not satisfied where the claim pertains to a duty founded in other sources. *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013). A mere "but-for" relationship between the contract and the claims will not draw the claim within the ambit of even a broad clause. *Seifert*, 750 So. 2d at 642.

In *Seifert*, for example, a couple entered in to a contract for the construction and purchase of their home. That contract required arbitration of "[a]ny controversy or claim arising under or related to this Agreement or to the Property." *Id.* at 635. After the couple moved into their home, their "car was left running in the garage, and the air conditioning system located in the garage picked up the carbon monoxide emissions from the car and distributed them into the house, killing" the husband. *Id.* Despite the broad language of the arbitration clause, and the fact that the couple would not have been in the home or had any relation to the defendants but for the contract, the Florida Supreme Court found that the resulting wrongful death claim was not within the scope of the arbitration clause because the required "significant relationship" was lacking. *Id*.

Here, as in *Seifert*, Sixt may have shown a but-for relationship: Marin might not have arrived at Sixt's check-out counter but for making his reservation on Orbitz. But it cannot show the required "significant relationship" to the services and representations to which disputes must relate in order to fall within the

definition of "Claims": "the Services, any dealings with our customer service agents, any services or products provided, any representations made by us, or our Privacy Policy." A. 105.

Sixt first argues that so long as Marin's claim "relates 'in any way' to a car rental reservation, it falls within the expansive definition of arbitrable 'Claims'" through the term "Services." Sixt Br. at 25. It arrives at this conclusion by taking a series of unsupported leaps through Orbitz's definitions: "Services" includes "services provided by Orbitz," and according to Sixt, the "primary service" Orbitz provides is "making reservations for 'Travel Services,' such as a 'car rental.'" *Id*. Orbitz's definitions do not support this conclusion. The TOU define "Services" as "the Web sites, mobile applications, call center agents, and other products and services provided by Orbitz, including any Content." A. 104. This term is focused on Orbitz's own online offerings and customer service personnel, and does not include any products or services provided by third parties. In other words, Sixt's car rentals are not "services provided by Orbitz."

Next, to use the district court's term, Sixt asks this Court to "cherry pick" helpful phrases from the midst of the clause, but to ignore the context and surrounding language which give those phrases meaning. A. 227. Sixt asserts that the dispute in this case is covered by the phrase "any services or products provided." Sixt Br. at 28, 30. But that phrase cannot be understood in isolation.

Florida courts apply the doctrine of "noscitur a sociis" to interpret contracts. *Aerothrust Corp. v. Granada Ins. Co.*, 904 So. 2d 470, 472 (Fla. 3d DCA 2005). Under that doctrine, "a word is known by the company it keeps, and one must examine the other words used in a string of concepts to derive the drafters' intent." *Id.*; *see also White v. Sunoco, Inc.*, 870 F.3d 257, 268 (3d Cir. 2017) ("Under the canon of *noscitur a sociis*, words take import from each other. This maxim of interpretation is wisely applied where a word or phrase is capable of many meanings in order to avoid the giving of unintended breadth to contract provisions." (citations, quotations, and alterations omitted)); *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934), aff'd, 293 U.S. 465 (1935) (L. Hand, J.) ("the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create"). Here, the term "services and products provided" can be understood only in relation to the content that surrounds it.

That context makes clear that the definition of "Claims" relates exclusively and directly to Orbitz. First, the sentence states that "You" (the consumer) agree to give "us" (Orbitz) the opportunity to resolve Claims in a specified manner. It makes no reference to third parties. That is because everything that follows relates to issues Orbitz has the power to resolve: disputes or claims relating to the

"Services, any dealings with [Orbitz's] customer service agents," and any "services or products provided" or "representations made" by Orbitz.

If "services or products provided" were divorced from Orbitz, and read to expand to any and all services or products provided by any entity in any way connected to the Orbitz process, the result would be absurd. And courts should avoid interpretation of contract provisions "that would lead to an absurd result." *Famiglio v. Famiglio*, 279 So. 3d 736, 740 (Fla. 2d DCA 2019) (citing *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962, 966 (11th Cir. 2014)). Every claim against any rental car company, airline or hotel would be engulfed within Orbitz' arbitration clause no matter how far removed from Orbitz.

The dispute resolution process outlined in Orbitz' arbitration clause makes the absurdity of Sixt's interpretation all the more apparent. Orbitz's clause requires consumers with Claims first to contact "Orbitz Legal." Only after giving Orbitz and its legal department 60 days to attempt to resolve the Claim may a consumer seek relief through arbitration or small claims court. It would make no sense for Orbitz to insert itself into the process in this way as to individuals who seek relief with respect to claims against third parties having nothing to do with Orbitz, as here.

Sixt's expansive reading of "services or products provided" would also fly in the face of Orbitz's own disclaimer of responsibility for setting the terms

governing "products or services that are provided by third parties." A. 105. Orbitz specifically clarifies that "[t]heir use is subject to the terms set forth by their respective owners or operations." *Id.*

B. Even if the Orbitz clause reaches beyond conduct for which Orbitz is responsible, it can be read to reach only so far as Marin's reservation, not his car rental.

Even if the "services or products provided" can be read to relate to services other than those provided by Orbitz, the phrase can only be understood to reach as far as the *reservation* for a rental car that Marin secured through Orbitz, not his subsequent rental and alleged damage to that car. As discussed above, that rental is governed by the contract terms Sixt imposed on Marin when he arrived at its rental counter. As Sixt itself claims, the services or products provided on the Orbitz site include, at most, the capability to make a reservation for a rental car. Sixt Br. at 25. But that rental—the actual item reserved through the Orbitz process—appears elsewhere in the Orbitz agreement: "car rentals" are "Travel Services." A. 104 ("Travel Services" means the airline travel, hotel accommodation, *car rental*, ground transportation, tours, theater tickets, attractions, travel insurance, and other items available through the Services." (emphasis added)).

When interpreting a contract, "it must be assumed that each clause has some purpose and the court should interpret the contract in such a way as to give effect to every provision." *Super Cars of Miami, LLC v. Jacques Bermon Webster*, No.

3D19-0826, 2020 WL 1160744, at *3 (Fla. 3d DCA Mar. 11, 2020) (internal quotation marks omitted); *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 203 (Fla. 1st DCA 2015) ("a cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless"). Orbitz went to the trouble of providing a specific defined term to cover the "items" such as car rentals that consumers could locate and reserve through its site. "Where the parties to a contract take pains to define a key term specially, their dealings under the contract are governed by that definition." *Fla. Inv. Grp. 100, LLC v. Lafont*, 271 So. 3d 1, 5 (Fla. 4th DCA 2019) (quoting *In re Blinds to go Share Purchase Litig.*, 443 F.3d 1, 7 (1st Cir. 2006)). The omission of this term from the arbitration clause therefore is conspicuous. Had Orbitz intended for Claims relating to "Travel Services," such as car rentals, to be covered by its arbitration agreement, it could have, and certainly would have, said so. It did not.

And Marin's claims are not founded on his reservation. They relate to his rental and the contract Sixt had him sign to govern it. Had Marin arrived at the reservation counter in Phoenix only to find that no reservation in fact existed and brought claims as a result, Sixt might be better positioned to argue that Orbitz's clause applies. But as things stand, Marin's reservation is a non-issue: it went off without a hitch. The problem is that Sixt chose to have him sign a new Face Page

Contract at the counter, a contract that did not include any terms allowing Sixt to charge him fees that Sixt later imposed for alleged damage to the vehicle.

Again, accepting Sixt's expansive and unsupported interpretation of Orbitz's agreement would lead to absurd results. *Contra Famiglio*, 279 So. 3d at 740. Sweeping all disputes relating to the use of any flight, hotel, or car rental into Orbitz's arbitration process just because a traveler happened to have made their reservation on Orbitz would mean that every family that lost a loved one drowning in an unsafe hotel pool would have to arbitrate their dispute with that hotel simply because of their relative's online shopping preferences. The aftermath of every deadly commercial plane crash would first have to go through Orbitz Legal and its Arbitration Claim Manager. Every ADA claim arising from inaccessible hotel or car rental infrastructure would be forced out of court and into arbitration with Orbitz. It would be absurd to read Orbitz's arbitration clause to require these drastic and destabilizing results.

For all these reasons, Marin's claims in this case do not fall within the scope of the Orbitz arbitration agreement. Accordingly, Sixt cannot compel Marin to arbitrate. *Kroma Makeup*, 845 F.3d at 1354. This Court can and should end the inquiry here.

* * *

Even if Marin's claims fell within the clause's scope, however, non-signatory Sixt would still have to show that it is entitled to enforce that agreement. The only way a non-signatory can get around the general "rule of contract law" that "one who is not a party to an agreement cannot enforce its terms against one who is a party," is to show that one of the recognized exceptions allowing a non-signatory to enforce another's contract applies. *Lawson*, 648 F.3d at 1167–68. The presumption in favor of arbitrability does not apply to this question. *See, e.g.*, *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017); *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014); *McKinstry Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 16*, 859 F.2d 1382, 1384 (9th Cir. 1988). The burden rests squarely with Sixt to show that this is one of the "rare circumstances" in which it can compel arbitration under an agreement to which it is not a signatory. *Westmoreland*, 299 F.3d at 465. Sixt makes two arguments as to why it is entitled to do so: it is a third party beneficiary, and it is entitled to enforce the agreement through equitable estoppel. Both are wrong.

IV. Sixt is not a third party beneficiary of the Orbitz TOU.

Sixt attempts to shoehorn itself into the third party beneficiary mold here, creating out of whole cloth two separate "grounds" under which a third party may become a beneficiary to another's contract. Sixt Br. at 40, 41. There is but one third party beneficiary "ground" under Florida law by which a non-signatory such

as Sixt may compel a signatory to arbitrate: that the parties clearly expressed a mutual intention to primarily and directly benefit the third party through their agreement. *See Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F.3d 1431, 1441 (11th Cir. 1996). Marin and Orbitz did not do so here. Accordingly, Sixt is not a third party beneficiary of their agreement and cannot compel Marin to arbitrate his claims.

A. Florida law requires that a contract clearly express the parties' mutual intent to primarily and directly benefit a third party.

Sixt attempts to invent a bifurcated standard, arguing that there are "two grounds" on which a non-signatory may gain the ability to enforce a contract as a third party beneficiary. Br. at 40, 46. Sixt cites no law for this assertion—because there is none. *See id*. Under Florida law, one standard governs third party beneficiary enforcement of contracts: "a third party may enforce an agreement between others *only if* [the third party] is an *intended beneficiary*, not an incidental beneficiary, of that agreement." *Maccaferri*, 91 F.3d at 1441 (citing *Metro. Life Ins. Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985)). "[A] party is an intended beneficiary *only if* the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party." *Id*. (quoting *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1031 (Fla. 4th DCA 1994)). The contract may clearly evince this intent by specifically naming the third party, or by making clear that some "limited class . . . was

intended to benefit from the contract." *Technicable Video Sys., Inc. v. Americable of Greater Miami, Ltd.*, 479 So. 2d 810, 812 (Fla. 3d DCA 1985).

The contract must also clearly demonstrate that the parties mutually shared this intent: "it must be shown that *both* contracting parties intended to benefit the third party. It is insufficient to show that only one party unilaterally intended" to do so. *Caretta Trucking*, 647 So. 2d at 1031; *see also Clark and Co. v. Department of Ins.*, 436 So. 2d 1013, 1016 (Fla. 1st DCA 1983).

What's more, any ambiguity as to the parties' intent must be resolved in Marin's favor. The presumption in favor of arbitrability does not apply. *E.g.*, *McKinstry*, 859 F.2d at 1384. To the contrary, Florida places the "heavy burden" of proving that a non-signatory is an intended third-party beneficiary of a contract on the non-signatory seeking enforcement. *FL-7, Inc. v. SWF Premium Real Estate, LLC*, 259 So. 3d 285, 287 (Fla. 2d DCA 2018), reh'g denied (Nov. 16, 2018).

Yet Sixt appears to argue that even if the agreement does not manifest the requisite clear intent of the signatories, the third party can still be a beneficiary if the contract manifests *any* intent and the third party in fact received some benefit. Sixt cites no Florida law to support this theory. Nor could it, for such a rule would fly in the face of Florida's actual requirements not only that the contracting parties' intent to benefit the third party be clear, but also that a party who only receives a consequential or incidental benefit cannot enforce a contract. *E.g. McCarson*, 467

So. 2d at 279 ("It is axiomatic in contract law that an incidental beneficiary cannot enforce the contract.").

It also would fly in the face of the established principle that arbitration is a matter of consent. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). The third-party beneficiary doctrine is not an exception to this rule, but a manifestation of it. Where contracting parties enter into an agreement to arbitrate with an intent that a non-signatory should also have rights to compel arbitration under that agreement, the doctrine allows for them to be held to that agreement. But where the contract does not make clear that the signatories shared that intent, consent to arbitrate is lacking. Compelling arbitration under such a circumstance merely because a third party ultimately received some benefit would eviscerate this "basic precept." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).

The district court did not, therefore, err in failing to consider the two separate "grounds" for third-party beneficiary status that Sixt advocates. To the contrary, the district court properly found that the language of Orbitz's arbitration clause does not clearly evince an intent to "primarily and directly" benefit Sixt or any class to which Sixt belongs. This Court should find the same.

Sixt further argues, without authority, that the "question is not whether Sixt is a beneficiary of the Terms of Use . . . . The real issue is whether Sixt is a

beneficiary of the Reservation Agreement, of which the Terms of Use are just one part." Sixt Br. at 46.[8] Sixt gets this wrong: the real question is whether the parties intended the *arbitration clause* to "primarily and directly" benefit Sixt. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (Section 2 of FAA "states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained" (emphasis is original)); *Peters v. The Keyes Co.*, 402 F. App'x 448, 451 (11th Cir. 2010) ("The agreement contained nothing to suggest that Peters and Bank United intended to benefit Keyes, much less that 'the arbitration clause was done for [Keyes's] primary and direct benefit.'"); *Morgan Stanley DW Inc. v. Halliday*, 873 So. 2d 400, 403 (Fla. 4th DCA 2004) ("More important, it does not indicate that the arbitration clause was done for her primary and direct benefit—as one would suppose would be the rule in order to make a non-signatory to an arbitration agreement bound by somebody else's manifestation of assent."). Neither the arbitration clause nor the larger agreement in which it is contained evince such an intent. Sixt is not a third-party beneficiary and cannot force Marin to arbitrate under this doctrine.

[8] In failing to meet its evidentiary burden, Sixt never proved Marin saw, let alone agreed to, the R&R. There is therefore no "Reservation Agreement" authenticated in the record.

B. The plain language of the Orbitz Arbitration Agreement does not clearly evince a mutual intent to "primarily and directly" benefit Sixt.

Orbitz's arbitration agreement does not clearly evince an intent on the part of both Marin and Orbitz to "primarily and directly" benefit Sixt or any class to which Sixt belongs. First, the only entity the clause specifically identifies as a beneficiary is "Suppliers," which Sixt is not. A. 104 (defining "Supplier" as "Orbitz's licensors, suppliers, information providers, and travel and leisure service providers"). Sixt attempts to string together a series of undefined terms from the TOU, leapfrogging from one to another in a tautological attempt to argue that it is a "Supplier," but none gets Sixt where it wants to go. *See* Sixt Br. at 43. The fact is that Sixt is a provider of "Travel Services." Orbitz defined that term and was capable of using it if it wanted to refer to car rental providers. Nowhere in the definition of "Supplier" or, for that matter, the arbitration clause, does that defined term appear.

Sixt further argues that it falls into the categories of "travel suppliers" and "companies offering products and services through" Orbitz which, it says, are additional beneficiaries of the arbitration clause. First, it is not at all clear that Orbitz's parenthetical identifying beneficiaries of the agreement applies to these phrases as well as to "Suppliers." And second, these phrases do not clearly implicate Sixt because they do not include the defined term "Travel Services"—which is what would be required to pull Sixt into the clause.

Even if it can be argued that *Orbitz* attempted to benefit Sixt as a third-party with its arbitration clause, the contract is not clear enough for this Court to conclude that *Marin* shared that intent. Under Florida law, it is not enough to show that "only one party unilaterally intended to benefit the third party." *Caretta Trucking*, 647 So. 2d at 1031. A consumer would not find a reference to Sixt, or car rental providers generally, among the classes of intended beneficiaries listed in the arbitration clause. Moreover, Orbitz repeatedly refers to itself—"we" and "us"—leading any reasonable consumer to understand the clause as primarily and directly benefitting themselves and Orbitz alone. The provision begins by announcing that "[y]ou" (the consumer) agree to give "us" (Orbitz) the opportunity to resolve disputes as set out therein. Only if "we" (Orbitz) are unable to resolve those disputes through Orbitz's own internal processes would arbitration become relevant. And when it comes to commencing an arbitration proceeding, the clause again refers only to "you" and "us": "To begin an arbitration proceeding *you* must send a letter requesting arbitration… to 'Orbitz Legal,'" and "If *we* request arbitration against you, *we* will give you notice…" A. 106 (emphases added). The arbitration clause clearly contemplates a bilateral process and nowhere mentions the involvement of third parties. Nothing in the arbitration agreement supports the conclusion that Marin sought to benefit Sixt.

Sixt urges this Court to look beyond the arbitration clause to what it calls the "Reservation Agreement" to find proof of third-party beneficiary status. Sixt Br. at 46. Not only is Sixt's attempt to broaden the inquiry unsupported by law, but it also does not get Sixt across the finish line. The mere fact that Sixt may have gained some benefit from Marin's *reservation* does not make it a third party beneficiary to the *contract*. Sixt points to no language in the larger TOU or "Reservation Agreement" that clearly evinces the parties' mutual intent to benefit Sixt or any other rental car company through arbitration. To the contrary, the Orbitz documents are focused on Orbitz's obligations—and the limits of those obligations—throughout. For example, Orbitz is clear that its TOU "constitutes the entire agreement *between you and Orbitz* with respect to the Services and your dealings and relationships *with us*," making no reference to obligations signatories may incur to third parties. A. 117. Sixt cannot use the third-party beneficiary doctrine to enforce Orbitz's clause against Marin.

V. Sixt cannot compel Marin to arbitrate through equitable estoppel.

A. This Court should clarify that traditional state law principles control and clearly disavow both estoppel theories laid out in *MS Dealer*.

The district court was within its discretion to find that Sixt cannot use equitable estoppel to compel arbitration. But the theory on which that decision is based does not comport with Supreme Court arbitration jurisprudence. For the

reasons that follow, this Court should clarify that traditional state law equitable estoppel principles control the question of when a non-signatory may compel arbitration, and clearly disavow the estoppel theories laid out in *MS Dealer*. In doing so, this Court should not disturb the district court's determination that Sixt cannot employ equitable estoppel here, because that conclusion is sound and in accordance with traditional principles of Florida law.[9]

1. Traditional state law principles control non-signatory enforcement of arbitration clauses.

In *MS Dealer*, 177 F.3d 942, this Court laid out two conditions under which a non-signatory is entitled to compel arbitration: (1) "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory"; and (2) "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *MS Dealer*, 177 F.3d at 947 (citations, internal quotations and alterations omitted). This Court subsequently abandoned the "concerted misconduct" prong as an independent ground for allowing nonsignatories to compel arbitration, holding three years later that the "purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his

[9] This Court may affirm the judgment on any basis supported by the record. *E.g.*, *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001).

cake and eat it too" and that the "plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel." *In re Humana Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), rev'd on other grounds, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

MS Dealer has had far-ranging effects, with both estoppel theories seeping into the jurisprudence of federal and state courts across the country. *See, e.g.*, *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 399 (5th Cir. 2006) (affirming district court order compelling arbitration with nonsignatory because "the complaint asserts concerted misconduct"); *Tobel v. AXA Equitable Life Ins. Co.*, No. 298129, 2012 WL 555801, at *11-*12, 2012 Mich. App. LEXIS 326, at *11-*12 (Mich. Ct. App. 2012) (allegations of concerted misconduct among defendants permitted nonsignatories to enforce arbitration provision); *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 101 (Ga. App. 2003) (finding both of *MS Dealer*'s estoppel tests consistent with Georgia law).

But since *MS Dealer*, the Supreme Court made clear that it is not for the federal courts to create substantive law governing the enforceability of arbitration agreements. Instead, "traditional principles of state law" must control whether a non-signatory can enforce an arbitration clause against a signatory. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). Accordingly, this Court has

already said that its previous decisions—including *MS Dealer*—"are overruled or at least undermined to the point of abrogation." *Lawson*, 648 F.3d at 1171. And yet the estoppel theories *MS Dealer* promulgated live on, even though they bear little relation to traditional concepts of the doctrine.

As a traditional matter, equitable estoppel required a few key elements in all cases: a false statement, misleading action or material omission by the party to be estopped (wrongful act), and a change in position by the party seeking estoppel based on believing the false statement or wrongful act to be true (detrimental reliance). *See, e.g.*, *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) ("Of course, detrimental reliance is one of the elements for the usual application of equitable estoppel."); T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 Rev. Litig. 377, 386-87 (2008) (same essential elements characterized the doctrine since its 18th-century introduction into English law). These elements appear in the formulation of the doctrine announced by the high courts of nearly every state. *See, e.g.*, *MB Indus., LLC v. CAN Ins. Co.*, 74 So.3d 1173, 1180 (La. 2011) ("equitable estoppel applies only where a party has made false or misleading representations of fact and the other party justifiably relied on the representation"); *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.,* 7 N.Y.3d 96, 106, 107 (2006) (in absence of evidence of misleading conduct or detrimental reliance, essential

element lacking); *Celentano v. Oaks Condominium Ass'n*, 830 A.2d 164, 186 (Conn. 2003) (describing wrongful act and detrimental reliance as "two essential elements" of equitable estoppel under Connecticut law); *Zitelli v. Dermatology Educ. & Research Found.*, 633 A.2d 134, 139 (Pa. 1993) ("There are two essential elements to estoppel; inducement and reliance.").

Florida's traditional conception of equitable estoppel fits this bill. Florida's generally-applicable doctrine applies "in all cases where one, by word, act or conduct, willfully caused another to believe in the existence of a certain state of things, and thereby induces him to act on his belief injuriously to himself, or to alter his own previous condition to his injury." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001) (quoting *State ex rel. Watson v. Gray*, 48 So. 2d 84, 87–88 (Fla. 1950)); *see also, e.g.*, *Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So. 2d 482, 485 (Fla. 1st DCA 1999) ("The doctrine of equitable estoppel requires that the following elements be shown as a prerequisite to its application (1) a misrepresentation of material fact by a party, which is contrary to a later asserted representation or position by that party, (2) reliance on that representation by the party claiming estoppel, and (3) a detrimental change in the position of the party claiming estoppel caused by the party's reliance on the misrepresentation.").

Like many of their brethren, Florida courts have been influenced in recent years by *MS Dealer*. *See, e.g.*, *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. 3d DCA 2010); *Armas v. Prudential Sec., Inc.*, 842 So. 2d 210, 212 (Fla. 3d DCA 2003). But these newfound, arbitration-specific doctrines did not arise "to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Arthur Andersen*, 556 U.S. at 631. They therefore cannot be applied to determine whether an arbitration agreement is enforceable under the FAA. *Id*.

Instead, this Court must apply Florida's traditional, generally-applicable estoppel rules. And under those rules, Sixt cannot compel Marin to arbitrate his claims.[10] Sixt has not shown, nor can it show, that Marin made any misrepresentations, or that Sixt detrimentally relied on those misrepresentations.[11] Its equitable estoppel claim, therefore, must fail.

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[10] In support of its estoppel arguments Sixt cites just one federal district court case—*Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1401 (S.D. Fla. 2014), discussed further below. Sixt Br. at 47. Sixt never so much as references Florida state law, much less provides this Court with that state's "traditional" estoppel principles. Conveniently so, because those "traditional principles" counsel strongly against permitting Sixt to enforce Orbitz's contract here.

[11] Sixt's inability to show detrimental reliance is particularly stark given that Sixt drafted and imposed on Marin its own contract terms which purport to be the sole and exclusive agreement between these parties and do not include an arbitration provision. Had Sixt wished for disputes related to its rentals to be resolved in arbitration, it would be a simple matter for it to include a clause in its documents saying so.

B. Marin does not rely on Orbitz's TOU to make out his claims here.

To the extent this Court declines to reaffirm the primacy of traditional state law estoppel principles and instead evaluates the district court's decision against the arbitration-specific standard set out in *MS Dealer*, it should still find that Sixt cannot compel arbitration. Marin need not rely upon any terms of the Orbitz agreement to prevail on his state law claims. Instead, those claims relate to alleged damage done to the rental vehicle which is governed exclusively by the agreement he signed with Sixt—the Face Page and (insufficiently-integrated) Rental Jacket.

Even under those Florida cases that adopt *MS Dealer* and diverge from Florida's traditional estoppel principles, Sixt may not invoke equitable estoppel. Those cases permit "a non-signatory defendant to enforce an arbitration clause against a signatory plaintiff . . . when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." *Allscripts Healthcare Sols., Inc. v. Pain Clinic of Nw. Fla., Inc.*, 158 So. 3d 644, 646 (Fla. 3d DCA 2014) (internal quotations and citations omitted). For a party to "rely on" a contract for purposes of Florida's *MS Dealer*-based equitable estoppel doctrine means more than that the contract has some factual significance, or bears a but-for relationship to the claims, like Orbitz's agreement here. *See Kolsky*, 28 So. 3d at 968. To the contrary, the doctrine is concerned with ensuring a party "not be allowed to sue to essentially

enforce its rights under a contract and, at the same time, evade an arbitration agreement in the contract." *Allscripts*, 158 So. 3d at 646 (emphasis added). Marin attempts no such thing.

The gravamen of Marin's claims against Sixt is that the one contract he signed with Sixt—the Face Page—did not permit the company to charge damage fees. A. 29 to 36. His complaint does not attempt to enforce any obligations imposed by the Orbitz documents. To make out his claims, Marin's complaint relies on the rights and obligations provided for—or not—in the Face Page and potentially the Rental Jacket. A court need only answer whether that document, as executed, permitted Sixt to charge the fees at issue. As the district court found with respect to Plaintiff Calderon's virtually identical claims, a reasonable trier of fact could find that the Rental Jacket was not sufficiently integrated into the Face Page under Florida law, and that Sixt's failure to clearly communicate the damage fees it charges amounts to both a breach of that Face Page contract and a violation of the FDUTPA. A. 218-23. It is on these questions that Marin's claims rise and fall. Marin and the court need never rely on any other document, including any Orbitz documents.

Sixt attempts to bootstrap the R&R into Marin's claims, as a last-ditch attempt to connect his claims back to Orbitz's arbitration policy. But not only has Sixt not proven that any agreement exists as to the R&R, the R&R also are not a

part of the contract on which Marin relies to make out his claims. Nowhere does the Face Page reference the R&R. To the contrary, it professes to supplant any prior obligations that might exist. *See supra* Section I. The only way the R&R could be relevant is if they were incorporated by reference into the Face Page. They were not. *See Lowe*, 235 So. 3d at 1026; *Kantner v. Boutin*, 624 So. 2d 779, 781 (Fla. 4th DCA 1993).

To be sure, the Orbitz documents may have some factual significance to how Marin made his reservation with Sixt. But that the court may consider the Orbitz documents as one part of its factual inquiry does not transform Marin's allegations into claims relying on Orbitz's terms. He does not attempt to enforce any contractual obligation arising out of those documents. He is not attempting to "have his cake and eat it too." *In re Humana*, 285 F.3d at 976.

Sixt's reliance on *Gunson*, 43 F. Supp. 3d 1396—the one federal district court case it cites in support of its estoppel claims—is misplaced. *Gunson* is clearly distinguishable and—far from supporting Sixt's entitlement to compel arbitration here—proves the weakness of Sixt's arguments by comparison. In *Gunson*, the plaintiff took out a series of payday loans from various lenders. Each of those loans was governed by an agreement containing an extremely broad arbitration clause covering "all disputes." *Id*. at 1398. The plaintiff thereafter brought RICO and conspiracy claims in federal court against the banks who had initiated the loans on

behalf of the lenders, alleging that she was charged "unlawful debts" because the interest rates set forth in the loan agreements were "usurious." *Id.* at 1401. The court found that Gunson was estopped from avoiding arbitration because her claims were founded directly on her obligation to pay that allegedly unlawful debt arising out of the very contract containing the arbitration clause. *Id*. at 1402. Her claims therefore relied plainly and primarily on those agreements. This stands in stark contrast with Marin's claims, which are premised on his dealings with Sixt and the obligations that arose—or did not arise—from Sixt's Face Page contract.[12]

At most, Sixt has shown that the Orbitz documents might have some factual significance in the adjudication of Marin's claims. To the extent Sixt has established this but-for connection, it has fallen short of the equitable estoppel mark under Florida law. This Court should not disturb the district court's decision on equitable estoppel.

[12] *Gunson* also distinguished its scenario from *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1173 (11th Cir. 2011) and *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335 (11th Cir. 2012), finding that those cases "address much more attenuated factual connections between the agreement and the plaintiff's claims"—attenuated factual connections to which equitable estoppel could not apply. *Gunson*, 43 F. Supp. 3d at 1402. The attenuated factual connection between the Orbitz arbitration agreement and Marin's claims here is much more like *Lawson* and *Byers* than it is similar to *Gunson*.

VI. Marin's claims should be adjudicated pursuant to his class action complaint in court—not in bilateral arbitration.

For the same reasons discussed at length above why Marin's claims should not be forced into arbitration, Orbitz's class action waiver also does not apply. This Court should therefore uphold the District Court's decision permitting Marin to move forward with his class action complaint, and reject Sixt's attempt to compel him to arbitrate his claims individually.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's denial of Sixt's motion to compel arbitration of Marin's claims.

Respectfully submitted this 7th of August, 2020.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,047 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: August 7, 2020

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on August 7, 2020.

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