No. 18-1048

IN THE

Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP. A FOREIGN CORPORATION FORMERLY KNOWN AS CONVERTEAM SAS,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

A party seeking to compel arbitration under 9 U.S.C. § 206 must show the existence of a valid, written agreement to arbitrate within the meaning of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That treaty provides that an "agreement in writing . . . shall include an arbitral clause in a contract or arbitration agreement, signed by the parties." Does that language, as well as the requirement that arbitration be "at the request of one of the parties," bar a third party who has not signed the contract or arbitration agreement from compelling arbitration through equitable estoppel?

CORPORATE DISCLOSURE STATEMENT

Respondent Outokumpu Stainless USA, LLC is a single member limited liability company whose sole member is Outokumpu Americas, Inc. Outokumpu Americas, Inc. is a wholly owned subsidiary of Outokumpu Holding Nederland BV. Outokumpu Oyj of Finland is the corporate parent of Outokumpu Holding Nederland BV. Solidium Oy, a Finnish state-owned investment company, holds more than 10% of Outokumpu Oyj's stock.

Respondent Sompo Japan Insurance Co. of America, now known as Sompo American Insurance Co., is a wholly owned subsidiary of Sompo Americas Holdings, Inc. Sompo Holdings, Inc. is the corporate parent of Sompo Americas Holdings, Inc. No publicly traded corporation owns 10% or more of Sompo Holdings, Inc.'s stock.

Respondent Pohjola Insurance Ltd. is a wholly owned subsidiary of OP Insurance Ltd., which was formerly known as OP Corporate Bank PLC. OP Cooperative is the parent of OP Insurance Ltd. OP Cooperative is a member of the OP Financial Group.

Respondent AIG Europe Ltd. is a wholly owned subsidiary of AIG Europe Holdings Ltd. AIG Europe Holdings, Ltd. is a wholly owned subsidiary of AIG Property Casualty International, LLC. AIG Property Casualty International, LLC is a wholly owned subsidiary of AIG Property Casualty, Inc. AIG Property Casualty, Inc. is a wholly owned subsidiary of AIUH, LLC. AIUH, LLC is a wholly owned subsidiary of American International Group, Inc. No publicly traded corporation owns 10% or more of American International Group, Inc.'s stock.

Respondent Tapiola General Mutual Insurance Company is a subsidiary of LocalTapiola Group.

Respondent AXA Corporate Solutions Assurance SA UK Branch's parent company is AXA SA. No publicly traded corporation owns 10% or more of AXA SA's stock.

Respondent HDI Gerling UK Branch is a subsidiary of HDI Global SE. HDI Global SE is a wholly owned subsidiary of Talanx AG. HDI Haftpflichtverband der Deutschen Industrie V.a.G. holds more than 10% of Talanx AG's stock.

Respondent MSI Corporate Capital Ltd. is a wholly owned subsidiary of MSIG Holdings (Europe) Ltd as sole Corporate Member of Syndicate 3210. MSIG Holdings is a subsidiary of Mitsui Sumitomo Insurance Co., Ltd. Mitsui Sumitomo Insurance Co., Ltd. is a subsidiary of MS&AD Insurance Group Holdings, Inc. No publicly traded corporation owns 10% or more of MS&AD Insurance Group Holdings, Inc.'s stock.

Respondent Royal & Sun Alliance, PLC is a subsidiary of Royal Insurance Holdings Ltd., which was formerly known as Royal Insurance Holdings PLC. Royal Insurance Holdings Ltd. is a subsidiary of Royal and Sun Alliance Insurance Group, PLC. No publicly traded corporation owns 10% or more of Royal and Sun Alliance Insurance Group, PLC's stock.

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INTRODUCTION

Petitioner GE Energy[1] asks this Court to resolve a nonexistent circuit split over an unimportant and underdeveloped issue that cannot change the outcome of its motion to compel arbitration. The Court should decline that request and deny the petition.

As a subcontractor for the construction of Outokumpu's stainless-steel plant, GE Energy designed, manufactured, and supplied nine large electric motors. Soon after their installation, the motors began failing catastrophically. When Outokumpu sued to recover the millions it lost as a result of the motor failures, GE Energy moved to compel arbitration in Germany under German law. But Outokumpu and GE Energy have no agreement to arbitrate disputes. Instead, GE Energy sought to enforce an agreement between Outokumpu and Fives, an agreement that GE Energy undisputedly never signed.

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[1] This brief refers to Petitioner GE Energy Power Conversion France SAS Corp., a foreign corporation formerly known as Converteam SAS, as "GE Energy." It refers to Respondent Outokumpu Stainless USA, LLC as "Outokumpu." It refers to all Respondents other than Outokumpu collectively as "the Insurers." Because the Insurers are subrogees, when it makes no difference to the analysis, the brief also refers to the Respondents collectively as "Outokumpu." The brief refers to Fives ST Corp. and its predecessor, F.L. Industries, as "Fives."

The brief also refers to the Convention on the Recognition & Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 as "the Convention." It refers to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* as "the FAA." And it refers to 9 U.S.C. § 201, *et seq.* as "the Convention Act."

After the district court granted GE Energy's motion to compel arbitration, the Eleventh Circuit reversed. The Eleventh Circuit joined the Ninth Circuit in holding that the language of the Convention requires that the parties to the litigation have signed the arbitration agreement before federal courts can compel arbitration under the Convention Act. As a result, the Eleventh Circuit also joined the Ninth Circuit in holding that nonparties cannot use equitable estoppel to bypass that requirement.

GE Energy asserts that the Ninth and Eleventh Circuits' holdings have opened a 2-to-2 circuit split on equitable estoppel in Convention cases. That is incorrect. None of the decisions on which GE Energy relies rejected, or even considered, the reasoning the Ninth and Eleventh Circuits applied, and there is no true circuit split. Before deciding if certiorari is necessary to ensure uniformity among the circuits on equitable estoppel, the Court should allow the issue to percolate more fully through the courts of appeals to see whether the circuits will align or divide on the Ninth and Eleventh Circuits' reasoning.

The issue is also not an important one. Although GE Energy and an *amicus curiae* speculate about potential negative effects the Eleventh Circuit's decision might have on international commerce, Convention–estoppel cases are uncommon. In any event, if parties like GE Energy participating in international commerce want foreign arbitration of their disputes, they can achieve that by signing their own arbitration agreements.

In addition, this case is a poor vehicle to address the question presented for at least three reasons. One,

because Outokumpu's claims are not based on the contracts containing the arbitration clause that GE Energy is trying to enforce, equitable estoppel cannot apply to those claims. Two, whether equitable estoppel can apply may be a question of German law, but GE Energy has never invoked German law or shown how German law would treat its efforts to compel arbitration through equitable estoppel. Three, GE Energy belatedly and inadequately raised equitable estoppel in the lower courts and, at least arguably, waived the issue.

Last, the Eleventh Circuit's decision is correct. A plain reading of Article II of the Convention shows that its use of the word "parties" always means the parties to the arbitration agreement. Thus, the only logical reading of the Article II text is that "one of the parties" who moves to compel arbitration must also be a "party" to—a signatory of—the arbitration agreement. As a result, the requirement that the agreement be "signed by the parties" rules out a nonsignatory compelling arbitration through equitable estoppel.

This case, therefore, presents no split among the circuits or important federal question. It does not merit this Court's review. The petition should be denied.

STATUTORY AND OTHER PROVISIONS INVOLVED

Article II, § 3 of the Convention provides:

> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of

> this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

STATEMENT

1. Outokumpu operates a stainless-steel plant in Calvert, Alabama. (Pet. App. 3a.) In November 2007, Outokumpu's predecessor signed three contracts (the Contracts) with F.L. Industries, Inc.—now Fives—to construct three different sized cold rolling mills. (*Id.*) Each of the Contracts contained an arbitration clause:

> All disputes arising between both parties in connection with or in the performance of the Contract shall be settled through friendly consultation between both parties. In case no agreement can be reached through consultation after a maximum period of 30 days or as soon as one of the parties involved appeals for the arbitration tribunal the dispute shall be considered as failed and any such dispute shall be submitted to arbitration for settlement.

(*Id.* at 4a.) The arbitration clause called for the arbitration to take place in Düsseldorf, Germany under German substantive law and the Rules of Arbitration of the International Chamber of Commerce. (*Id.*)

The Contracts contemplated that Fives could subcontract some of its obligations, and each of the Contracts attached a list of "Preferred Brands or Manu-

facturers." (*Id.*) GE Energy was a Preferred Brand. (*Id.*) As part of GE Energy's subcontractor relationship, GE Energy, Fives, and a third entity entered into an "Agreement for Consortial Cooperation," (the Consortial Agreement). (*Id.* at 5a.)

2. Each mill contained three motors, and Fives subcontracted with GE Energy to design, manufacture, and supply all nine motors. (*Id.*) The motors were built in France and installed at the facility in Alabama in 2011–12. (*Id.*) The motors began failing in June 2014. (*Id.*) Despite efforts to inspect and repair them, by August 2015, motors in all three mills had failed. (*Id.*)

Outokumpu contacted Fives about repairing or replacing all nine motors. (*Id.*) Fives forwarded to Outokumpu a letter from GE Energy urging Fives to refuse Outokumpu's claims. (*Id.* at 5a–6a.) This is when Outokumpu learned of the existence of the Consortial Agreement. (*Id.* at 5a.)

3. Outokumpu and its Insurers filed suit against GE Energy in the Circuit Court of Mobile County, Alabama. (*Id.* at 6a.) GE Energy removed based on 9 U.S.C. § 205 and diversity, alleging fraudulent joinder of the foreign Insurers. (*Id.*)

Outokumpu moved to remand, and GE Energy moved to compel arbitration under the Contracts. (*Id.* at 6a–7a.) The district court denied the motion to remand, but it granted the motion to compel arbitration. (*Id.* at 23a–50a.) Outokumpu appealed to the United States Court of Appeals for the Eleventh Circuit.

4. The Eleventh Circuit reversed the order compelling arbitration. (*Id.* at 19a.) The court reasoned that a party may compel arbitration only if "there is an agreement in writing within the meaning of the Convention." (*Id.* at 14a (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005)).) The court turned to the Convention's definition of an "agreement in writing," which includes a requirement that it be "signed by the parties." (Pet. App. 14a.) The court reasoned that GE Energy was "undeniably not a signatory to the Contracts," and that the Convention requires that the parties actually have signed the agreement to arbitrate. (*Id.* at 15a.) It held that "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." (*Id.* at 16a.) Thus, it held that GE Energy could not "compel Outokumpu to arbitrate through estoppel." (*Id.* at 17a.)

GE Energy petitioned for rehearing, but the Eleventh Circuit denied its petition. (*Id.* at 20a–22a.) GE Energy then petitioned this Court for a writ of certiorari. (*See generally* Pet.)

REASONS FOR DENYING THE PETITION

I. No conflict exists over the Ninth and Eleventh Circuits' reasoning.

In its petition, GE Energy contends that courts of appeals "are split 2-to-2 on the question presented." The Eleventh Circuit here and the Ninth Circuit in *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017), have both held that a party who has not signed the arbitration agreement may not enforce

it under the Convention using the doctrine of equitable estoppel. *See* (Pet. App. 17a); *Yang*, 826 F.3d at 1002. But GE Energy argues that the First Circuit and Fourth Circuit have held that a party who did not sign an arbitration agreement may use equitable estoppel to compel arbitration even under the Convention. (*See* Pet. 14–17 (citing *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000)).)

In *Yang*, the Ninth Circuit examined the language of the Convention itself and of the Convention Act, which codified and implemented the Convention. *See* 876 F.3d at 998–1002. The court reasoned that, unlike Chapter 1 of the FAA, the Convention requires a written agreement to arbitrate and requires the parties to the litigation to have signed the agreement. *See id.* at 998–1001. In doing so, it relied heavily on the Second Circuit's similar interpretation of the Convention's language, which the Third and Eleventh Circuits had both followed. *See id.* (citing *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215–18 (2d Cir. 1999); *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290–91 (11th Cir. 2004); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003)). As to incorporating Chapter 1 of the FAA into the Convention Act through 9 U.S.C. § 208, the Ninth Circuit reasoned that if Chapter 1 allows parties who have not signed an arbitration agreement to enforce that agreement through equitable estoppel, then Chapter 1 conflicts with the Convention's signatory requirement. *See Yang*, 876 F.3d at 1002. So the Ninth Circuit held

that equitable estoppel could not apply in Convention cases. *See id.* (citing 9 U.S.C. § 208.)

The Eleventh Circuit's analysis here was basically the same. It began with the language of the Convention. (Pet. App. 14a–15a.) It reasoned that, unlike Chapter 1 of the FAA, the Convention requires a written agreement to arbitrate to be "signed by the parties" to the litigation. (Pet. App. 15a–17a.) That difference results in a conflict between Chapter 1 of the FAA and the Convention—Chapter 1 allows non-parties to compel arbitration through estoppel; the Convention does not. (Pet. App. 17a (citing 9 U.S.C. § 208).) The Convention controls.

None of the three cases GE Energy cites as creating a circuit split disagreed with—or even assessed—this line of reasoning. And neither *Yang* nor the Eleventh Circuit below discussed or considered these decisions to be contrary analyses of the Convention's signature requirement.

The Fourth Circuit's decision in *International Paper* never analyzed the language of the Convention or Convention Act to determine there was a conflict with Chapter 1 of the FAA. Indeed, the parties raised no such argument.[2] Instead of doing the textual analysis that forms the foundation of the Ninth and Eleventh Circuits' decisions, the Fourth Circuit re-

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[2] *See* Br. of Appellant, *Int'l Paper Co. v. Schwabedissen Maschinen & Amlangen GMBH* (4th Cir. 2000) (No. 98-2482), 1999 WL 33631802; Br. of Appellee, *Int'l Paper Co. v. Schwabedissen Maschinen & Amlangen GMBH* (4th Cir. 2000) (No. 98-2482), 1999 WL 33631800; Reply Br. of Appellant, *Int'l Paper Co. v. Schwabedissen Maschinen & Amlangen GMBH* (4th Cir. 2000) (No. 98-2482), 1999 WL 33631803.

flexively relied on two decisions that themselves did not analyze the language of the Convention or Convention Act. *See Int'l Paper*, 206 F.3d at 418 n.7 (citing *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97–98 (2d Cir. 1999); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320–21 (4th Cir. 1988)).

The same is true of the First Circuit's decision in *Sourcing Unlimited*. It never analyzed the language of the Convention or the Convention Act to see if there was a conflict with Chapter 1 of the FAA.[3] Instead of performing that analysis, the court focused on its appellate jurisdiction before moving on to whether the party seeking arbitration could meet the elements of equitable estoppel. *See Sourcing Unlimited*, 526 F.3d at 43–47. Additionally, the decisions the court cited as supporting the general rule that parties can be estopped from avoiding arbitration either failed to perform the relevant analysis or were not Convention cases. *See id.* at 47 (citing decisions from the First, Second, Fourth, and Eleventh Circuits).[4]

The Fourth Circuit's decision in *Aggarao* similarly did not analyze whether the language of either the Convention or Convention Act conflicts with Chapter

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[3] The briefs in that case are unavailable through Westlaw or Lexis, and they are unavailable for download through PACER.

[4] The cited Eleventh Circuit decision was not a Convention case. *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* 10 F.3d 753, 757–58 (11th Cir. 1993), *abrogated on other grounds by Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

1 of the FAA. Again, the parties never raised this argument. Instead, the appellant argued that the district court had misapplied the estoppel doctrine, not that the estoppel doctrine conflicted with the Convention.[5]

In addition, no court has disagreed with the reasoning in *Yang* or this case. In fact, in the roughly eighteen months since the Ninth Circuit decided *Yang*, three decisions have cited *Yang*'s arbitrability analysis—the Eleventh Circuit in this case, a federal district court decision, and a state supreme court. *See* (Pet. App. 15a–16a); *Youssefzadeh v. Global-IP Cayman*, No. 2:18-cv-02522, 2018 WL 6118436, at *6 (C.D. Cal. July 30, 2018); *Boyd v. Cook*, 906 N.W.2d 31, 42 (Neb. 2018). All did so approvingly. Only one decision has cited the Eleventh Circuit's arbitrability analysis, but it also did so approvingly. *See McCullough v. Royal Caribbean Cruises, Ltd.*, No. 16-cv-20194, 2019 WL 2076192, at *3–4 (S.D. Fla. May 10, 2019).

Moreover, as the Ninth and Eleventh Circuits were the first to consider the specific language of the Convention and evaluate whether it allows nonsignatories to compel arbitration through estoppel, and as no court has yet disagreed with that analysis, the issue is not ready for this Court's review. The Court should allow other courts of appeals to consider and either accept or reject the Ninth and Eleventh Circuits' reasoning. If those courts accept the Ninth and Eleventh Circuits' reasoning, then this Court will not

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[5] Opening Br. of Appellant at 30–34, *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012) (No. 10-2211), 2011 WL 1691920 at *30–35.

need to take up the issue. If those courts disagree, this Court will have the benefit of their analyses if it ultimately chooses to resolve some actual circuit conflict.

In sum, because no court of appeals has rejected the Ninth Circuit's reasoning in *Yang* or the Eleventh Circuit's decision below, no conflict among the circuits exists. Accordingly, this case does not warrant the Court's review.

II. The question presented is not important enough to warrant the Court's review.

In addition to the lack of any true conflict among the circuits, the question presented lacks sufficient importance to warrant this Court's review. *See* Sup. Ct. R. 10(a) (indicating that one of the compelling reasons for this Court to grant certiorari is when courts of appeals have reached conflicting decisions about "an *important* question of federal law" (emphasis added)). GE Energy contends that international commerce will suffer absent a reversal from this Court because equitable-estoppel issues supposedly arise often and in many contexts. (Pet. 19–23.) In its *amicus* brief, the National Association of Manufacturers (NAM) argues that granting the petition is "critically important" to preserve the benefits of international arbitration. (Amicus Br. of Nat'l Ass'n of Mfrs. 15–17.) But case law does not bear out GE Energy's and NAM's assertions.

For all of GE Energy and NAM's doom and gloom, questions of estoppel appear not to arise often in Convention cases. The two leading decisions on equitable estoppel in Convention cases have barely been cited—*Yang* only three times (in this case, in an un-

published district court decision, and by a state supreme court) and this case once (in an unpublished district court decision). The three cases GE Energy offers as creating a circuit split do not have much mileage either. A KeyCite of *International Paper*—a nineteen-year-old decision—shows that only twenty decisions in Convention cases have cited its discussion on equitable estoppel.[6] A KeyCite of *Sourcing Unlimited*—an eleven-year-old decision—shows that only four decisions have cited its discussion on equitable estoppel. Finally, a KeyCite of *Aggarao*—a seven-year-old decision—shows that only three decisions have cited its discussion on equitable estoppel. KeyCiting the five cases is not conclusive on the topic, but it is as likely to be overinclusive as underinclusive. More importantly, it suggests that Convention–estoppel cases are not so prevalent that this case and *Yang* threaten to upset the apple cart of international commerce.

Moreover, the stability and predictability that GE Energy and NAM extol as "virtues"[7] flowing from a grant of certiorari and reversal are achievable with-

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[6] Counsel reached this count by KeyCiting the relevant headnotes and then filtering the results for decisions that included the phrase "New York Convention" or a citation to any section of the Convention Act. Counsel repeated this analysis for all three decisions discussed in the paragraph above.

[7] GE Energy and NAM assume international arbitration is virtuous and universally so. A local drywall or painting subcontractor (for example) that was unexpectedly forced to arbitrate a dispute with Outokumpu in Düsseldorf, Germany under German law and applying unfamiliar procedures despite having never signed an arbitration agreement would be likely to dispute GE Energy and NAM's assumption.

out overturning the Eleventh Circuit's decision. If a party wants a contractual right to compel international arbitration, the easiest and best way to get it is for the party to contract directly for that right, not to seek that benefit in a roundabout way through equitable estoppel. In this case, for example, if GE Energy wished to have the right to compel Outokumpu to arbitrate its claims, all GE Energy had to do was condition its acceptance of a subcontract with Fives on Outokumpu and GE Energy signing a separate agreement to arbitrate disputes. That, of course, would have satisfied the Convention's signatory requirement.

In short, the Court need not take up this underdeveloped and uncommon issue to protect entities who engage in international commerce. They can protect themselves.

III. This case is a poor vehicle to consider the question presented.

A. Estoppel does not apply to Outokumpu's claims, so a decision on the question presented will not be determinative.

Even if a nonsignatory could compel arbitration through equitable estoppel, and even if federal common law governed whether estoppel applied, the outcome of this case would not change. Compelling arbitration would remain error. As a result, resolution of the question presented will not change the outcome of this case.

In a brief to the Eleventh Circuit, GE Energy argued that a party who had not signed an arbitration agreement could still compel arbitration against a

signatory: (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"; and (2) "when the signatory . . . raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." Br. of Appellee, at 45–46, *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018) (17-10944), 2017 WL 2875129 (quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999), *abrogated on other grounds by Carlisle*, 556 U.S. at 631). For reasons fully explained in briefing to the Eleventh Circuit, neither of those two circumstances are present here. *See* Br. of Pls.–Appellants Sompo Japan Ins. Co., et al. at 18–22, *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018) (17-10944), 2017 WL 2152613, at *18–22.

The first circumstance does not apply because Outokumpu's claims are not based on the Contracts. *See Bah. Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1343 (11th Cir. 2012). Indeed, the Complaint (which alleges claims of negligence, breach of professional design and construction warranties, breach of implied warranties, products liability, and breach of the Alabama Extended Manufacturer's Liability Doctrine) has no breach-of-contract claim and never mentions the Contracts. (*See* Compl., ECF No. 1-2 at 3–15.) Simply put, Outokumpu's claims against GE Energy do not rely on the Contracts.

The second circumstance does not apply either. Outokumpu has never alleged that GE Energy and Fives "worked hand-in-hand" in "pre-arranged collu-

sive behavior." *See MS Dealer*, 177 F.3d at 948. Here, the Complaint never refers to Fives, never cites to or relies on the Contracts, and alleges no concerted, prearranged, or collusive behavior by GE Energy and Fives. (*See* Compl., ECF No. 1-2 at 3–15.) As a result, the second circumstance is absent. *See Bailey v. ERG Enters., LP*, 705 F.3d 1311, 1321 (11th Cir. 2013).

Moreover, whether federal or Alabama common law even applies is unclear.[8] When a contract chooses foreign law, courts have often analyzed the availability of estoppel or some similar doctrine under the chosen foreign law.[9] Here, as Outokumpu explained in its brief to the Eleventh Circuit, the Contracts contain a German choice-of-law provision. *See* Reply Br. of Appellant Outokumpu Stainless USA, LLC, at

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[8] The Insurers argued in the Eleventh Circuit that Alabama law controls this question and maintain that Alabama law would not allow equitable estoppel to apply here. *See, e.g.*, Br. of Pls.–Appellants Sompo Japan Ins. Co., (17-10944), 2017 WL 2152613, at *20; Reply Br. of Pls.–Appellants Sompo Japan Ins. Co., et al. at 17, *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018) (17-10944), 2017 WL 3224925, at *17. In any event, GE Energy argued equitable estoppel as an alternative basis for affirmance, so it was GE Energy's burden to establish that equitable estoppel could apply.

[9] *See, e.g.*, *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50–53 (2d Cir. 2004) (applying Swiss law); *SBMH Grp. DMCC v. Noadiam USA, LLC*, 297 F. Supp. 3d 1321, 1327 (S.D. Fla. 2017) (applying UAE law); *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1361–62 (S.D. Fla. 2017) (applying Bahamian law); *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 647–52 (S.D.N.Y. 2011) (applying Kuwaiti law); *CCP Sys. AG v. Samsung Elecs. Corp.*, No. 09-cv-4354, 2010 WL 2546074, at *7 (D.N.J. June 21, 2010) (applying Swiss law).

28, *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018) (17-10944), 2017 WL 3224926, at *28. GE Energy, however, has never argued that German law allows nonsignatories to enforce arbitration agreements through equitable estoppel. Thus, it has waived any argument that estoppel is available under German law.

Because resolution of the question presented cannot change the outcome—there can be no equitable estoppel—the Court should deny the petition.

B. GE Energy inadequately presented and belatedly raised its equitable-estoppel arguments in the lower courts.

The question GE Energy presents to the Court is whether it can use equitable estoppel to compel arbitration even though it is a nonsignatory to the arbitration agreement. That is a far cry from its primary position in the lower courts.

In its motion to compel arbitration, GE Energy never argued that it could enforce the arbitration agreement between Outokumpu and Fives through equitable estoppel. (Mot. to Compel Arbitration & to Dismiss, ECF No. 6.) Equitable estoppel first came up in GE Energy's reply in support of its motion to compel. (Def.'s Reply in Supp. of its Mot. to Dismiss & Compel Arbitration & its Opp'n to Remand, ECF No. 38.) That reply never addressed the language of the Convention or Convention Act, and it cited none of the cases GE Energy now contends create a circuit split with the Ninth and Eleventh Circuits. (*Id.* at 16–19.)

GE Energy belatedly sought to cure its failure to include the equitable-estoppel argument in its motion to compel arbitration. It moved to supplement that motion, but the district court denied GE Energy's request. (Pet. App. 36a n.1.) Ultimately, the district court incorrectly held that GE Energy could compel arbitration because it was a party to the Contracts, so it never reached the late-raised nonsignatory estoppel issue. (*Id.*)

The issue received no greater treatment in the court of appeals. Outokumpu argued in its opening brief that the language of the Convention required that the parties to the litigation must have signed the arbitration agreement and that this requirement did not allow exceptions, like equitable estoppel, for nonsignatories. *See* Br. of Pls.–Appellants Sompo Japan Ins. Co., et al., *Outokumpu Stainless USA*, (17-10944), 2017 WL 2152613, at *20. In response, GE Energy made only a general argument that equitable estoppel applied based on an unpublished Eleventh Circuit decision that had applied equitable estoppel in a Convention case without analyzing whether the Convention language allowed it. *See* Br. of Appellee, at 46, *Outokumpu Stainless USA*, (17-10944), 2017 WL 2875129. GE Energy made no argument that Chapter 1 of the FAA did not conflict with the Convention's signatory requirement, which otherwise would preclude equitable estoppel from applying. *See id.* at 45–50. Again, GE Energy cited none of the three cases it now contends create a split with the Ninth and Eleventh Circuits. *See id.* It never argued that Article V of the Convention affects the analysis, as it does now for the first time in its petition. *Compare id.*, *with* (Pet. 26.) And, as in the district court, GE Energy's principal argument for compelling arbi-

tration was that it was a party to the agreement it had not signed. *See id.* at 37–45.

GE Energy finally addressed whether Chapter 1 of the FAA conflicts with the language of the Convention in a supplemental brief filed after oral argument. *See* Suppl. Br. of Appellee, *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018) (17-10944), 2018 WL 607565. It was here, for the first time, that GE Energy cited the three decisions on which it now stakes its argument that *Yang* and the Eleventh Circuit's decision created a split in the circuits. *See id.* at *7–8. That said, its discussion of those cases consisted of no more than a citation and a parenthetical. *See id.*

So in addition to the question presented being underdeveloped in the case law, (*see* Part I, *supra*), GE Energy was late in raising the issue. Because GE Energy waited until its reply in the district court to raise equitable estoppel, it waived the issue. *See Sharpe v. Global Sec. Int'l*, 766 F. Supp. 2d 1272, 1294 n.26 (S.D. Ala. 2011). Even once the case reached the Eleventh Circuit, GE Energy waited until supplemental briefing—after oral argument—to raise any argument responsive to Outokumpu's explanation that the Convention's language, as incorporated through the Convention Act, foreclosed equitable-estoppel and other nonsignatory exceptions.

Indeed, GE Energy treated equitable estoppel as a secondary issue, without timely or fully developing its arguments. Perhaps nothing shows this more than GE Energy's failure to address meaningfully whether and to what extent the German choice-of-

law provisions in the Contracts affect the equitable-estoppel analysis. (*See* Part III.A., *supra*.)

Given all of GE Energy's failures, if the Court were inclined to consider whether a nonsignatory can compel arbitration through equitable estoppel in a Convention case, it should wait for a case in which the advocating party has fully and meaningfully developed its arguments.

IV. The decision below is correct, is based on a plain reading of the Convention, and does not warrant this Court's attention.

Finally, GE Energy argues that the Eleventh Circuit gets the Convention's text "wrong." (Pet. 23.) Interpreting the Convention's text, the Eleventh Circuit held that, "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." (Pet. App. 16a.) In other words, the only parties who can seek to compel arbitration or that the court can compel to arbitration are the parties who signed the arbitration agreement. The Eleventh Circuit reached this conclusion after comparing and contrasting Chapter 1 of the FAA with the Convention, as codified in the Convention Act—Chapter 2 of the FAA. That is, unlike the Convention, Chapter 1 of the FAA "does not expressly restrict arbitration to the specific parties to the agreement." (Pet. App. 17a.)[10]

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[10] Secondary to its arguments about the Convention's text, GE Energy also argues that Congress, when enacting the Convention Act, "incorporat[ed] background principles of common law." (Pet. 25.) Here, however, Congress was clear: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is *not in conflict with* this

According to GE Energy's reading of the text, the only thing the Convention (and thus the Convention Act) requires is that there be an "agreement in writing" for purposes of the Convention. Examining the text of Article II, § 2 of the Convention, GE Energy does not dispute that "the parties" must sign the arbitration agreement. Instead, GE Energy argues: "the term 'parties,' in this context, can only mean parties *to the arbitration agreement*, not the parties *to the court case*." (Pet. 26.)

The Convention's text shows the fallacy in GE Energy's argument that only the parties to the arbitration agreement have to sign the arbitration agreement for a court to compel arbitration in favor of third parties under the Convention Act. Article II uses the term "parties" in all three of its sections—five times total:

> 1. Each Contracting State shall recognize an agreement in writing under which *the parties* undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

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chapter or *the Convention* as ratified by the United States." 9 U.S.C. § 208 (emphases added). The Convention, which many countries with no "common law" tradition also ratified, can trump not just Chapter 1 of the FAA, but also the "common law."

> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by *the parties* or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which *the parties* have made an agreement within the meaning of this article, shall, at the request of one of *the parties*, refer *the parties* to arbitration ….

The Convention, art. II (emphases added). The Court will not adopt constructions that "attribute different meanings to the same phrase in the same sentence." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000). Instead, the Court applies "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Applying this canon to the Convention text, the term "the parties" should have the same meaning every time Article II uses it.

This same canon has already been applied to the term "agreement" in Article II of the Convention. *See China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 292–93 (3d Cir. 2003) (Alito, J., concurring). The canon also implicitly underlies the Ninth Circuit's reasoning in *Yang*, which the Eleventh Circuit followed. *See Yang*, 876 F.3d at 1001 ("The Convention Treaty contemplates that only a 'party' or 'parties to the agreement referred to in article II' may litigate its enforcement."). Although

GE Energy argues that *Yang* created a circuit split, it cites no decisions examining the Convention's text and reaching a different result.

For GE Energy's contrary argument to work, the term "parties" in Article II, §§ 1 and 2 must mean something different from "parties" in Article II, § 3. Not only that, but for GE Energy to be right, in Article II, § 3, "parties" must also mean something different in its first use than in its next two uses within the same sentence. So, according to GE Energy, Article II, § 3 says this:

> The court of a Contracting State, when seized of an action in a matter in respect of which *the parties [to the arbitration agreement]* have made an agreement within the meaning of this article, shall, at the request of one of *the parties [to the court case]*, refer *the parties [to the court case]* to arbitration . . . .

That makes no sense.

GE Energy's argument works only by changing the meaning of "the parties" within the same sentence. GE Energy offers no "unusual situation" to explain why the term "the parties" should have something other than "a fixed meaning." *See Cochise Consultancy, Inc. v. United States, ex rel. Hunt*, — S. Ct. —, No. 18-315, 2019 WL 2078086, at *4 (May 13, 2019).

In fact, GE Energy's sole argument based on the text of the Convention turns, not on Article II, but on Article V, § 1(a). (*See* Pet. 26.). The language GE Energy relies on provides, in relevant part:

> 1. Recognition and enforcement of the award may be refused, at the request of *the party* against whom it is invoked, only if *that party* furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) *The parties* to the agreement referred to in article II were, under the law applicable to them, under some incapacity ….

The Convention at art. V (emphases added). The cross-reference to Article II in this text refers to the term "agreement," not the term "the parties." GE Energy's argument does nothing to explain why "one of the parties" requesting arbitration in Article II, § 3 need not also be a "party" to the arbitration agreement. The logical reading of the Article II text is that "one of the parties" requesting arbitration must be a "party" to—a signatory of—the arbitration agreement.

Thus, a plain reading of Article II of the Convention shows that the Eleventh Circuit got it right. GE Energy's tortured reading forces "the parties" to change its meaning within Article II, violating standard canons of construction and common sense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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