# Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction

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*Who is bound by a forum selection clause? At first glance, the answer to this question may seem obvious. It is black-letter law that a person cannot be bound to an agreement without her consent. In recent years, however, courts have not followed this rule with respect to forum selection clauses. Instead, they routinely enforce these clauses against individuals who never signed the contract containing the clause. Courts justify this practice on the grounds that it promotes litigation efficiency by bringing all of the litigants together in the chosen forum. There are, however, problems with enforcing forum selection clauses against non-signatories. First, there is the unfairness of binding a litigant to a contract without her consent. Second, there is the danger that relying on a forum selection clause to assert personal jurisdiction over a non-signatory may be inconsistent with due process.*

*This Article critiques the rules that determine whether a non-signatory is bound by a forum selection clause. It first documents the emergence of a new doctrine—the closely-related-and-foreseeable test—that the courts have created to facilitate this practice. It then argues that the test serves as a portal to a parallel due process universe in which casual contacts and breezy assertions of foreseeability can connect a defendant to a forum selection clause in a way that would be, at best, highly scrutinized were they construed as potential minimum contacts with the forum. In a world of ever-tightening personal jurisdiction standards, courts have created a bubble of nearly unlimited jurisdiction for parties in close proximity to forum selection clauses. To address this problem, the Article proposes reforms that would provide more robust protections to non-signatory defendants and, as importantly, impose a degree of order on an increasingly fractured due process landscape.*

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## INTRODUCTION

In 1992, Robert Romano entered into a franchise agreement with Aamco Transmissions, Inc. (AAMCO).[1] Romano was a resident of Florida. AAMCO was a Pennsylvania corporation. The agreement contained an exclusive forum selection clause selecting the state and federal courts of Pennsylvania. Twenty-one years later, in 2013, Romano and AAMCO mutually agreed to terminate the franchise agreement. Pursuant to the termination agreement, Romano promised that he would not engage in the transmission repair business within ten miles of any AAMCO repair center for at least two years.[2] In 2014, AAMCO sued Romano and his wife, Linda, in the U.S. District Court for the Eastern District of Pennsylvania, alleging violations of the covenant not to compete. Linda appeared pro se to argue that the court lacked personal jurisdiction over her.[3] The court disagreed. It held that Linda was subject to personal jurisdiction in Pennsylvania by operation of the forum selection clause in the franchise agreement.[4] Since Robert was a party to the agreement, the court reasoned, and since Linda was closely related to Robert, Linda was bound by the clause even though she herself was not a party to the agreement.

This anecdote encapsulates the modern puzzle of forum selection clauses.[5] These provisions bring a welcome measure of efficiency and predictability to litigation arising out of contractual relationships. At the same time, their existence has the potential to generate fragmented litigation proceedings.[6] If Linda Romano is not bound by the forum selection clause, then AAMCO may have to bring two suits—one in Pennsylvania against Robert, the other in Florida against Linda—to enforce its rights. Such parallel litigation is inefficient and a waste of scarce judicial resources. To avoid this

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[1] AAMCO Transmissions, Inc. v. Romano, 42 F. Supp. 3d 700 (E.D. Pa. 2014).

[2] *Id.* at 705.

[3] *Id.*

[4] *Id.* at 709. The court also stated that Linda was bound by the clause because she was "a third-party beneficiary of the knowledge and experience that Robert Romano gained in the course of his franchisee relationship with AAMCO." *Id.* On the facts presented, it is hard to understand why Linda would qualify as a third-party beneficiary under traditional third-party beneficiary doctrine.

[5] A forum selection clause is a contractual provision that selects a court to resolve disputes between the parties. In recent years, scholars have considered such question as when these clauses are enforceable, how they should be interpreted, and whether damages may be sought when they are breached. *See, e.g.,* John F. Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 52 ARIZ. ST. L. J. 506 (2021); John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. (forthcoming 2021); John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791 (2019); Tanya J. Monestier, *Damages for Breach of a Forum Selection Clause*, 52 AM. BUS. L.J. (forthcoming 2021). To date, however, the question of whether forum selection clauses apply to non-signatories in the United States has only been addressed in a pair of student notes. *See* Monika L. Woodward, *Ghosts Have Rights Too! A New Era in Contractual Rights: Third Party Invocation in Forum Selection Clauses*, 26 ST. THOMAS L. REV. 467 (2014); Lukas A. Anton, C.H. Robinson Worldwide, Inc. v. FLS Transportation Inc*: How Minnesota's Closely-Related-Party Doctrine Undermines Long-Settled Principles of Contract Law*, 35 HAMLINE L. REV. 497 (2011); *cf.* Vaughan Black & Stephen G. A. Pitel, *Forum-Selection Clauses: Beyond the Contracting Parties*, 12 J. PRIV. INT'L L. 26. (2016) (surveying Canadian cases analyzing this issue). The propriety of binding non-signatories to arbitration clauses, by comparison, has attracted a significant amount of scholarly attention. *See* Matthew Berg, *Equitable Estoppel to Compel Arbitration in New York: A Doctrine to Prevent Inequity*, 13 CARDOZO J. CONFLICT RESOL. 169 (2011); Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 FRANCHISE L.J. 175 (2006); James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469 (2004); Tamar Meshel, *Of International Commercial Arbitration, Non-signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56 STAN. J. INT'L L. 123 (2020); D. Scott Crawford, *Inextricably Intertwined: The Yin and Yang of The New York Convention, FAA, and Non-Signatory Third Parties*, 43 TUL. MAR. L.J. 115 (2018); Alexandra Anne Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711 (2007). We do not discuss the rights of third parties in the arbitration context in this Article for two reasons. First, courts in many jurisdictions have developed distinct doctrines that apply exclusively to determine the rights and obligations of non-signatories in the context of forum selection clauses requiring disputes to be resolved in court rather than in arbitration. *See* Zydus Worldwide DMCC v. Teva API Inc., 461 F. Supp. 3d 119, 132-37 (D.N.J. 2020) (surveying state rules relating to the rights and obligations of non-signatories to forum selection clauses and distinguishing rules applied in the arbitration context). Second, the scholarly literature on non-signatories and forum selection clauses is woefully underdeveloped. As a precursor to any project comparing how arbitration clauses and forum selection clauses deal with the problem of non-signatories, it is essential to know what, exactly, the courts are doing in the latter group of cases. It is our hope that the descriptive account in this Article will provide a basis for a future comparative study that analyzes the different ways that courts deal with the problem of non-signatories in arbitration clauses and forum selection clauses.

[6] Presidential Hosp., Ltd. Liab. Co. v. Wyndham Hotel Grp., Ltd. Liab. Co., 333 F. Supp. 3d 1179, 1225 (D.N.M. 2018) (recognizing the possibility of "judicial inefficiency" if forum selection clauses are not enforced against non-signatories).

outcome, the courts will sometimes enforce forum selection clauses against contract non-signatories like Linda, thereby allowing the entire dispute to be resolved in the chosen forum.[7]

The willingness of courts to enforce forum selection clauses against non-signatories, however, creates tension with other important values enshrined in U.S. law. The first value is personal autonomy. The law has long recognized that parties are generally free to contract with one another.[8] The law also recognizes, however, that parties are likewise free *not* to contract if they do not wish to do so.[9] When the courts conclude that a litigant must abide by a provision in a contract that she never signed, the freedom not to contract comes under attack.[10] The second value is due process. The Due Process Clause of the Fourteenth Amendment imposes limits upon a court's power to assert personal jurisdiction over an out-of-state defendant. When a court asserts personal jurisdiction over a defendant on the basis of a forum selection clause in an agreement *that she did not sign*, it is not at all clear that this assertion of judicial power is consistent with due process.[11]

Courts have been quietly but consistently grappling with these issues for nearly four decades with minimal input from scholars and no direct guidance from the U.S. Supreme Court. This Article fills that gap. It is the first to identify the tension between litigation efficiency, on the one hand, and personal autonomy and due process, on the other, in cases where the courts are asked to enforce forum selection clauses by or against non-signatories. It is also the first scholarly work to propose a conceptual framework for reconciling these competing values, thereby allowing courts to promote litigation efficiency without doing undue harm to principles of personal autonomy and due process. Drawing upon an exhaustive review of the existing case law addressing the enforceability of forum selection clauses against non-signatories, the Article maps the many different legal doctrines that the courts have invoked to determine when a clause may be given effect. It then identifies scenarios where such clauses are routinely enforced and explains that the propriety of enforcing forum selection clauses against non-signatories will vary depending upon who, precisely, is invoking the clause and for what purpose.

The Article then goes on to argue that the most problematic cases are those in which a signatory plaintiff invokes the forum selection clause to obtain personal jurisdiction over a non-

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[7] Power Up Lending Grp, Ltd v. Murphy, 2016 U.S. Dist. LEXIS 144268, at *19 (E.D.N.Y. Oct. 18, 2016) (enforcing clause against non-signatory general counsel); Southridge Partners II, Ltd. P'ship v. SND Auto Grp., Inc., 2019 U.S. Dist. LEXIS 218003 (enforcing clause against non-signatory corporate executive); Warwick v. Schneider Nat'l, Inc., 2020 U.S. Dist. LEXIS 184147, at *4 (N.D. Ill. Oct. 5, 2020) (enforcing clause against non-signatory parent company).

[8] ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1059 n.66 (Del. Ch. 2006) (observing that "the right to contract is one of the great, inalienable rights accorded to every free citizen" and stating "that this freedom of contract shall not lightly be interfered with") (internal citations and quotation marks omitted).

[9] Trustees of Dartmouth Coll. v. Woodward, 65 N.H. 473, 634 (1817) ("[T]here can be no contract without consent."); Adams v. Unione Mediterranea di Sicurta, 364 F.3d 646, 652 (5th Cir. 2004) ("Under the general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein." (quoting EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 460 (6th Cir. 1999))); Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1169 (11th Cir. 2009) (As "a contractual right[,]" a forum-selection clause "cannot ordinarily be invoked by or against a party who did not sign the contract in which the provision appears."); *cf.* AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)).

[10] This is not to state that one can *never* be bound to an agreement that one does not sign. We discuss several traditional doctrines that permit this outcome in Part I.A.

[11] The routine enforcement of forum selection clauses against non-signatories also generates other costs. If a person knows that he may be bound by a forum selection clause in a contract executed by a family member or a close business associate, for example, he must monitor the content of those contracts more closely. In other cases, one company may decide not to enter into an agreement with another company due to concerns that the transaction may bring it within the ambit of a forum selection clause in a related contract. In still other cases, contracting parties may devote extra time to drafting contract language that seeks to protect themselves against this outcome. *See* Coyle, *Interpreting Forum Selection Clauses*, *supra* note 5, at 1820-26 (discussing drafting solutions to the problem of binding non-signatories to forum selection clauses). These costs must likewise be weighed against the efficiency gains that flow from enforcing forum selection clauses against non-signatories.

signatory defendant like Linda Romano.[12] In contemporary practice, the courts rely on a new legal doctrine—the closely-related-and-foreseeable test—to decide whether a non-signatory is bound by a forum selection clause. Unlike the trajectory of minimum contacts analysis, in which courts have imposed an ever-escalating set of hurdles in front of plaintiffs who wish to connect the actions of a non-resident defendant to a harm or result in the forum state, the closely-related-and-foreseeable test constitutes a parallel due process universe. In that universe, casual contacts and breezy assertions of foreseeability can connect a defendant to a forum selection clause in a way that would be, at best, highly scrutinized were they construed as potential minimum contacts with the forum. The curious feature of this new test is that it reads like a wish list of everything that progressive commentators want that for the minimum contacts test to *be*, but currently is not. Hiding in plain sight is a doctrine of nearly unlimited jurisdiction.

In this parallel due process universe, we argue, the enforcement of forum selection clauses by or against third parties exists in a doctrinal "uncanny valley" of due process jurisprudence. The various standards and jurisprudential landscape are not a picture of uniformly bad or incorrect decisions. The results and reasoning in many of these cases are, in many instances, both correct and desirable. The problem, however, is that the doctrine, as a whole, is out of sync with the larger approach to due process considerations in personal jurisdiction. Judges confronting the problem of non-signatories in cases involving forum selection clauses have created a doctrine that is a rough facsimile of "ordinary" personal jurisdiction cases, but still out of alignment with the doctrinal approach of post-*International Shoe* jurisprudence.

The question of whether a forum selection clause is enforceable has been historically evaluated through the lens of "consent" rather than "minimum contacts." To address the concerns outlined above, we argue that the enforceability of a clause should be evaluated within the rubric of minimum contacts for three reasons. First, it would better protect the rights of non-signatory defendants and, in so doing, promote the values of personal autonomy and due process. Second, it would replace the rubric of consent with the more familiar minimum contacts test, thereby serving to plug one of several cracks in the existing due process framework. Third, and finally, analyzing forum selection clauses through the lens of minimum contacts carries with it the potential to *improve* that doctrine.[13] Instead of trying to bring the flexible jurisdictional inquiry exemplified by the closely-related-and-foreseeable test into line with narrow Supreme Court precedents, we argue, the courts should consider expanding these precedents to bring them into alignment with the closely-related-and-foreseeable test.

Part I of this Article provides a comprehensive overview of the traditional agency and contract doctrines that allow non-parties to be bound or advantaged by a contract and explains how they are used to bind non-signatories to forum selection clauses. It then offers a detailed account of the rise of the closely-related-and-foreseeable test and discusses the propriety of using this test across a number of different scenarios. Part II details the doctrinal problems that arise when the courts invoke the closely-related-and-foreseeable test to enforce forum selection clauses against non-signatory defendants. The rules governing the assertion of personal jurisdiction in this context, we argue, are generally inconsistent with the rules applied to ordinary non-resident defendants. Non-signatories are instead subjected to a different constitutional standard because of proximity to

[12] *See* Europa Eye Wear Corp. v. Kaizen Advisors, LLC, 390 F. Supp. 3d 228, 232 (D. Mass. 2019) (observing that "significant due process considerations [are] implicated where forum-selection clauses are applied to a non-signatory").

[13] In so doing, we are well aware of the problems with the minimum-contacts test. The purpose of this Article is to demonstrate that non-signatories to forum selection clauses should receive the same constitutional treatment as other non-resident defendants. As bad as the minimum contacts landscape is, the closely-related-and-foreseeable test for non-signatories only adds to the chaos and disuniformity in personal jurisdiction doctrine.

a forum selection clause that they did not sign. In Part III we suggest that courts can best align the application of the closely-related-and-foreseeable test with accepted contract principles—as well as due process—by bringing forum selection clauses within the framework of *International Shoe*'s minimum contacts analysis. The Article concludes by suggesting how these observations can contribute to a broader reimagining of the role of consent in the minimum contacts framework.

## I. THE PROBLEM OF NON-SIGNATORIES

The courts have historically addressed the question of whether a non-signatory is bound or advantaged by a forum selection clause by looking to traditional principles of agency and contract law, equitable estoppel, and the law of third-party beneficiaries.[14] In recent years, however, the courts have developed a new doctrine—the closely-related-and-foreseeable test—that supplants these traditional doctrines to a significant extent. In this Part, we first chronicle this shift in practice. We then analyze several scenarios where modern courts routinely apply the closely-related-and-foreseeable test.

### A. Agency and Contract Law

#### 1. Traditional Doctrines

There are a number of legal doctrines by which an individual who never actually signed an agreement may nevertheless become bound by that agreement.[15] First, an agent may bind a principal to a contract.[16] If an agent signs a contract on behalf of a principal, and if that contract contains a forum selection clause, the clause is binding upon the principal even though the principal never signed the contract.[17] Second, a person may be bound by the signature of its "alter ego." If the agreement signed by the alter ego contains a forum selection clause, the clause is binding on the person (and vice versa).[18] Third, a person may voluntarily assume the obligations of a contract concluded by another. When this occurs, the new party will be bound by a forum selection clause in the contract notwithstanding the fact that it never signed it.[19] Fourth, a person who signs an agreement that incorporates another agreement by reference is bound by the terms of the agreement so incorporated. If the incorporated agreement contains a forum selection clause, the clause is binding.[20] Fifth, an entity that is a continuation of a prior entity is responsible for the obligations of its predecessor under a theory of successor liability. If the prior entity was a party to a contract containing a forum selection clause, that clause is binding upon the successor entity.[21]

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[14] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) ("[T]raditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." (internal quotation marks omitted)).

[15] *See* De Olivera Dos Santos v. Bell Helicopter Textron, Inc., 651 F. Supp. 2d 550, 557 (N.D. Tex. 2009) ("It may thus now be apparent that enforcement of a forum-selection clause by a non-signatory is an area of the law dominated by generalized statements that provide little guidance to this Court's analysis.").

[16] *See* RESTATEMENT (THIRD) OF AGENCY § 6.01(1).

[17] *See* Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 442-43 (7th Cir. 2012); Express Lien, Inc. v. Handle, Inc., No. 19-10156, 2020 U.S. Dist. LEXIS 36141, at *7 (E.D. La. Mar. 3, 2020); Adsit Co. v. Gustin, 874 N.E.2d 1018, 1024 (Ind. Ct. App. 2007).

[18] *See* Mullen v. Saber Healthcare Grp., LLC, No. 5:18-CV-317-BO, 2018 U.S. Dist. LEXIS 204591, at *11 (E.D.N.C. Dec. 3, 2018).

[19] *See* Interlogic Outsourcing v. Onesource Virtual, 2018 U.S. Dist. LEXIS 233519, at *7-8 (N.D. Ind. Sep. 24, 2018); Hellex Car Rental Sys., Inc. v. Dollar Sys., Inc., No. CV-04-5580, 2005 U.S. Dist. LEXIS 33858, at *11 (E.D.N.Y. Nov. 7, 2005); In re Cornerstone Healthcare Holding Grp., Inc., 348 S.W.3d 538, 542 (Tex. App. 2011).

[20] *See* Mattingly v. Humana Health Plan, Inc., No. 1:15-CV-781, 2018 WL 5620653, at *1 (S.D. Ohio Aug. 21, 2018); Pro Star Logistics, Inc. v. AN Enter., No. 2:17-CV-491 TS, 2017 U.S. Dist. LEXIS 195994, at *8 (D. Utah Nov. 28, 2017).

[21] *See* Aguas Lenders Recovery Grp. LLC v. Suez, S.A., 585 F.3d 696, 701 (2d Cir. 2009); Hetronic Int'l, Inc. v. Hetronic Germany GmbH, No. CIV-14-650-C, 2015 U.S. Dist. LEXIS 126476, at *7 (W.D. Okla. Sep. 22, 2015); Vianix Delaware v. Nuance Comms., 637 F. Supp. 2d 356, 362 (E.D. Va. 2009).

### 2. Equitable Estoppel

The doctrine of direct-benefit equitable estoppel "prevents a non-signatory to a contract from embracing the contract, and then turning her back on the portions of the contract, such as a forum selection clause, that she finds distasteful."[22] If a non-signatory has directly benefitted from one part of the agreement, in other words, he is estopped from arguing that he is not bound by a different provision in that same agreement. The core insight underlying this doctrine is that a contract is not an à la carte menu; the bitter must be taken with the sweet. The doctrine of direct-benefit equitable estoppel does not require a showing that the non-signatory was an intended beneficiary of the agreement at the time the contract was made.[23] Instead, the doctrine focuses on the conduct of the non-signatory during the period when the contract was in effect.[24] If a non-signatory derives a direct benefit from the agreement containing a forum selection clause during this period, that person may be equitably estopped from denying the enforceability of the clause.[25]

### 3. Third-Party Beneficiaries

The law of contracts has long recognized that a "nonparty becomes legally entitled to a benefit promised in a contract . . . if the contracting parties so intend."[26] If a non-party is able to present evidence showing a "clear and definite intent" on the part of the contracting parties to confer an

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[22] Sustainability Partners LLC v. Jacobs, 2020 Del. Ch. LEXIS 209 (Del. Ch. June 11, 2020) (quoting *Capital Grp. Cos., Inc. v. Armour*, 2004 WL 2521295, at *6 (Del. Ch. Nov. 3, 2004)); Weygandt v. Weco, LLC, No. 4056-VCS, 2009 Del. Ch. LEXIS 87, at *15 n.18 (Ch. May 14, 2009) ("In general, a non-signatory is estopped from refusing to comply with a forum selection clause when she received a 'direct benefit' from a contract containing a forum selection clause.").

[23] Black v. Diamond Offshore Drilling, Inc., 551 S.W.3d 346, 355 (Tex. App. 2018) ("[U]nder direct-benefits estoppel, the non-signatory defendants could compel enforcement of the forum-selection clause only if appellant sought a benefit that stems directly from the Agreement. Here, the direct-benefits estoppel theory is inapplicable because appellant's claims do not arise from the Agreement—i.e., there are no terms within the Agreement for which appellant must rely upon in order to pursue his Jones Act and general maritime law claims.").

[24] Some courts apply a distinctive version of equitable estoppel to determine the rights of non-signatories that is derived from cases that address this same issue in the arbitration context. The Eleventh Circuit, for example, has held that equitable estoppel "allows a non-signatory to enforce the provisions of a contract against a signatory in two circumstances: (1) when the signatory to the contract relies on the terms of the contract to assert his or her claims against the non-signatory; and (2) when the signatory raises allegations of interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." Bailey v. ERG Enters., LP, 705 F.3d 1311, 1320 (11th Cir. 2013). The theory underlying the first rule is that if the signatory is suing the non-signatory for breach of contract, the signatory is very likely "relying" on the contract to bring the claim. In light of this reliance, the signatory is said to be estopped from denying the enforceability of the forum selection clause in that same contract. The practical result of this rule is that a non-signatory defendant will typically be able to enforce a forum selection clause when the signatory plaintiff's claim is "intimately founded in and intertwined with the underlying contract obligations." Black v. Diamond Offshore Drilling, Inc., 551 S.W.3d 346, 354 (Tex. App. 2018). The second rule provides that when a forum selection clause is invoked by a non-signatory defendant, the signatory plaintiff is equitably estopped from denying the enforceability of the clause when the signatory raises allegations of interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract. As a practical matter, this test will be applied in situations where the signatory plaintiff's does not rely on the contract to bring its suit against the non-signatory defendant. In such cases, the non-signatory defendant may still invoke the forum selection clause if it is alleged to have conspired with a signatory defendant to cause injury to the plaintiff. This test bears a passing resemblance to the closely-related-and-foreseeable test. The key difference, of course, is that while that test focuses on the *relationship* between the signatory and the non-signatory, the interdependent-and-concerted-misconduct test focuses on the *actions* of the signatory and the non-signatory.

[25] *See* Bundy v. Adesa Hous., No. 01-17-00863-CV, 2018 Tex. App. LEXIS 9472, at *12 (Tex. App. Nov. 20, 2018) ("Direct-benefits estoppel has been applied to allow a defendant signatory to enforce a forum-selection clause against a nonsignatory plaintiff who is suing based on the contract that contains the forum-selection clause."). The threshold for what qualifies as a "direct benefit" under this theory is lower than the one that applies in the third-party beneficiary context. The doctrine of direct-benefit equitable estoppel is, however, limited by the requirement that the benefit flow from the operation of the contract rather than its breach. In a few cases, the courts have concluded that a non-signatory defendant directly benefitted from the breach of a contract and that this breach provided a basis for invoking the doctrine of direct-benefit equitable estoppel. *See, e.g.,* Peterson v. Evapco, Inc., 238 Md. App. 1, 46-48, 188 A.3d 210, 236-38 (2018). Such cases push the doctrine too far. In order for a non-signatory defendant to be bound under the doctrine, that defendant must derive a direct benefit from the *agreement* containing the forum selection clause. If the non-signatory derives no direct benefit from the agreement, there is no basis from estopping her from denying the enforceability of that clause. The fact that the non-signatory derives a direct benefit from the *breach* of the agreement by the signatory is immaterial.

[26] *See* Astra USA, Inc. v. Santa Clara Cty., 563 U.S. 110, 117, 131 S. Ct. 1342, 1347 (2011); Mendel v. Henry Phipps Plaza W., Inc., 2006 NY Slip Op 1047, ¶ 3, 6 N.Y.3d 783, 786, 811 N.Y.S.2d 294, 297, 844 N.E.2d 748, 751.

"enforceable benefit" upon her, she attains the status of an "intended" beneficiary.[27] Thereafter, an intended beneficiary may go to court to enforce her third-party beneficiary rights to an agreement when she never signed.[28] When a person is a third-party beneficiary to a contract that contains a forum selection clause, that person may invoke the clause even though she is a non-signatory to the agreement.[29] Since third-party beneficiaries are subject to the same limitations in the contract as the signatories, however, that same individual may also find herself bound by the forum selection clause against her wishes by virtue of her status as a beneficiary.[30]

### B. The Closely-Related-and-Foreseeable Test

Each of the doctrines set forth above has a rich history in the common law. The use of these doctrines to enforce forum selection clauses by or against non-signatories is relatively unproblematic because it is of a piece with how other contractual issues involving non-signatories are resolved. As forum selection clauses have proliferated, however, the courts have developed a new doctrinal test to determine the rights of non-signatories to these clauses separate and apart from these existing doctrines. This test is generally known as the "closely related and foreseeable test."

The closely-related-and-foreseeable test posits that "a party can enforce a contract's forum selection clause against a non-signatory if the non-signatory is so *closely related* to one of the signatories that enforcement of the clause is *foreseeable* by virtue of the relationship between them."[31] Unlike the doctrines discussed in the previous Part, this test is used exclusively in the context of forum selection clauses; it is never applied to determine the rights and obligations of non-signatories in other parts of the contract.[32] The purpose of the test is to "give[] parties who have come to an agreement the ability to enforce that agreement against the universe of entities who should expect as much—successors-in-interest, executive officers, and the like—without being overly persnickety about who signed on the dotted line."[33] In this Part, we first trace the origins of the closely-related-and-foreseeable test. We then show that this test is widely used by state and federal courts.

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[27] Section 302 of the Restatement (Second) of Contracts provides that "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." This rule requires a showing that the contracting parties *intended* to confer a benefit upon the non-signatory. The mere fact that a person derives an *actual benefit* from an agreement to which she is not a party is not usually enough to confer third-party beneficiary status (though it may be enough to bind them under a doctrine of equitable estoppel).

[28] Ramsdell v. Bowles, 64 F.3d 5, 10 (1st Cir. 1995).

[29] In re W. Dairy Transp., LLC, 574 S.W.3d 537, 551 (Tex. App. 2019) ("Pursuant to a third-party beneficiary theory, a nonsignatory to a contract containing a forum-selection clause may be bound by the clause if he or she is deemed *a third-party beneficiary of the contract*. Contracts may be enforced by third-party beneficiaries so long as the parties to the contract intended to secure a benefit to that third party and entered into the contract directly for the third party's benefit. Neither general beneficence, nor indirect or incidental benefits, establish the necessary level of intent.") (emphasis added); *see also* Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co., 2019 U.S. Dist. LEXIS 234800, at *16 (C.D. Cal. Oct. 24, 2019) (concluding non-signatory was third-party beneficiary of forum selection clause).

[30] *See* Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 203 (3d Cir. 1983); Johnson v. Pa. Nat'l Ins. Cos., 527 Pa. 504, 508, 594 A.2d 296, 298 (1991).

[31] Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 39, 857 N.Y.S.2d 62, 67 (1st Dep't 2008) (emphasis added).

[32] *See* JTF Aviation Holding Inc. v. CliftonLarsonAllen LLP, 472 P.3d 526, 528 (Ariz. 2020) (declining to extend the "closely related" test to situations not involving forum selection clauses); Lavigne v. Herbalife, Ltd., 2019 U.S. Dist. LEXIS 216778, at *35 (C.D. Cal. Oct. 22, 2019) (declining to extend the "closely related" test to choice-of-law inquiry) Wexler v. Allegion (Uk), 2018 U.S. Dist. LEXIS 54655, at *38 (S.D.N.Y. Mar. 29, 2018) (declining to apply the "closely related" test to determine whether a non-signatory was bound by a merger clause).

[33] Affiliated FM Ins. Co. v. Kuehne + Nagel, Inc., 328 F. Supp. 3d 329, 337 (S.D.N.Y. 2018).

1. Origins

The first case to state the rule that was eventually incorporated into the closely-related-and-foreseeable test was *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd*., which was decided by the Third Circuit in 1983.[34] In this case, an American manufacturer named Coastal Steel had contracted with an English firm called Farmer Norton to purchase steel. Farmer Norton then entered into a second agreement with a different English company—Tilghman—to purchase a blast unit to be installed in Coastal Steel's factory in New Jersey. This second agreement between the English firms contained a forum selection clause requiring all disputes to be resolved by the English courts. When the blast unit malfunctioned, Coastal Steel sued Tilghman in New Jersey federal court. Tilghman moved to dismiss the case on the basis of the English forum selection clause. In response, Coastal Steel argued that it was not a party to the English contract containing the English forum selection clause and was therefore not bound by the clause.

In a lengthy decision, the Third Circuit held that the clause was enforceable against Coastal Steel even though that company never signed the agreement containing the clause. In support of this decision, the court observed that "Coastal chose to do business with Farmer Norton, an English firm, knowing that Farmer Norton would be acquiring components from other English manufacturers."[35] The court further observed that it was therefore "perfectly *foreseeable* that Coastal would be a third-party beneficiary of an English contract, and that such a contract would provide for litigation in an English court."[36] This case marks the first time a court specifically referenced "foreseeability" when evaluating whether to enforce a forum selection clause against a non-signatory.[37] In referencing foreseeability, the Third Circuit appears to have been explaining why Coastal Steel was an intended beneficiary to the English contract under traditional principles of third-party beneficiary law. Indeed, the outcome in *Coastal Steel* is entirely consistent with the doctrine of third-party beneficiaries. In the years that followed, however, the casual reference to foreseeability in this case came to be incorporated into an entirely new doctrinal test for determining whether forum selection clauses apply to non-signatories.

In 1988, the Ninth Circuit contributed to the further development of the closely-related-and-foreseeable test in *Manetti-Farrow, Inc. v. Gucci Am., Inc.*[38] In that case, an American perfume distributor sued an Italian perfume manufacturer along with several of its Italian affiliates in federal court in California. The affiliates argued that the case against them should be dismissed because the distribution agreement contained an Italian forum selection clause. The American company argued in response that the affiliates were not parties to the distribution agreement and, accordingly, were ineligible to invoke the clause as a ground for dismissing the suit. The Ninth Circuit held that the non-signatory affiliates were covered by the clause. In reaching this decision, the court observed that "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses" and that "the alleged conduct of the non-parties is so *closely related* to the

[34] 709 F.2d 190, 203 (3d Cir. 1983).

[35] *Id.*

[36] *Id.* (emphasis added).

[37] Although the *Coastal Steel* court invokes third-party beneficiary law in support of its decision, the case is more appropriately classified as an equitable estoppel case. Coastal Steel stood to receive a direct benefit from the contract between the two English companies, i.e., the blast unit. As such, it was estopped from denying the English forum selection clause contained in the contract to manufacture the blast furnace. This sort of doctrinal confusion is depressingly common. In *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, No. 18-1048 (U.S. Jun. 1, 2020), the U.S. Supreme Court held that nothing in the New York Convention precludes U.S. courts from relying on "equitable estoppel doctrines that permit the enforcement of arbitration agreements by [defendant] nonsignatories." This arbitration case is better classified as a third-party beneficiary case because the non-signatory defendant—GE—was seeking to enforce the arbitration clause against a signatory plaintiff.

[38] 858 F.2d 509, 514 n.5 (9th Cir. 1988).

contractual relationship that the forum selection clause applies to all defendants."[39] In its decision, the Ninth Circuit emphasized the closeness of the relationship between the affiliates and the signatory defendant in explaining why the non-signatory affiliates should benefit from the clause. The court did not, however, discuss whether it was foreseeable that the affiliates would be bound.

In 1993, the Seventh Circuit brought the "foreseeability" prong of the test and the "closely related" prong of the test together in *Hugel v. Corp. of Lloyd's*.[40] In that case, Hugel and two companies controlled by Hugel sued Lloyd's of London for breach of contract in federal court in Illinois. Lloyds moved to dismiss the suit on the grounds that the agreement contained a forum selection clause requiring litigation to be brought in England. The plaintiffs argued that the controlled companies had not signed the agreement and were therefore not subject to the forum selection clause. The Seventh Circuit disagreed. It stated that "[i]n order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound."[41] Since both of the companies at issue were controlled by Hugel, and since the insurance policies that were the object of the policies related to these companies, the Seventh Circuit concluded that both of these requirements were satisfied. Accordingly, it enforced the clause and dismissed the case in favor of an English forum.

2. Modern Usage

In the years following the *Hugel* decision, the closely-related-and-foreseeable test was embraced by federal courts across the United States. The Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all applied the test to determine the rights and obligations of non-signatories to forum selection clauses.[42] And while the First, Third, Fourth, Fifth, and Tenth Circuits have yet to adopt the test, federal district courts in each of these circuits routinely apply it. [43] The test has also received an enthusiastic reception among state courts. The courts of New York regularly apply a version of the test to determine the rights and obligations of non-signatories.[44] The courts of Delaware likewise apply a version of the test to assess when forum selection clauses may be invoked

[39] *Id.* (emphasis added).

[40] 999 F.2d 206, 209 (7th Cir. 1993).

[41] *Id.*

[42] *See* Magi XXI, Inc. v. Stato della Città del Vaticano, 714 F.3d 714, 722-23 (2d Cir. 2013) (applying closely-related-and-foreseeable test); Wilson v. 5 Choices, LLC, 776 F. App'x 320, 329 (6th Cir. 2019) (applying closely related test); Stifel v. Lac DU Flambeau Band of Lake Superior Chippewa Indians, 807 F.3d 184, 212 (7th Cir. 2015) (applying closely related test but framing the inquiry through the lens of "affiliation" and "mutuality"); Marano Enters. v. Z-Teca Rests., L.P., 254 F.3d 753, 757 (8th Cir. 2001) (applying closely related test); Holland Am. Line, Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 456 (9th Cir. 2007) (applying closely related test); Stiles v. Bankers Healthcare Grp., Inc., 637 F. App'x 556, 561 (11th Cir. 2016) (applying closely-related-and-foreseeable test). The Ninth Circuit recently clarified that the courts should focus on whether the defendant's *conduct* was closely related to the contractual relationship rather than focusing on closeness of the *relationship* between the defendant and the contract signatory. *See* AMA Multimedia, Ltd. Liab. Co. v. Sagan Ltd., 807 F. App'x 677, 679 (9th Cir. 2020).

[43] *See* Deese-Laurent v. Real Liquidity, Inc., 305 F. Supp. 3d 280, 285 (D. Mass. 2018); Directpacket Research, Inc. v. Polycom, Inc., 2019 U.S. Dist. LEXIS 228225, at *9 (E.D. Va. 2019); OKCDT Enter., LLC v. CR Crawford Constr., LLC, 2019 U.S. Dist. LEXIS 47607, at *8 (W.D. Okla. 2019); Huawei Techs. Co. v. Yiren Ronnie Huang, Civil Action No. 4:17-CV-00893, 2018 U.S. Dist. LEXIS 69745, at *24 (E.D. Tex. Apr. 25, 2018). The case law in the Third Circuit is admittedly ambiguous. *See* In re McGraw-Hill Glob. Educ. Holdings LLC, 909 F.3d 48, 62 n.6 (3d Cir. 2018) ("There is some ambiguity in our cases concerning whether we even recognize the closely related parties doctrine."). This ambiguity notwithstanding, federal district courts in the Third Circuit have applied the closely-related-and-foreseeable test on a number of occasions. *See* Nutrimost, LLC v. Werfel, 2016 U.S. Dist. LEXIS 192878, at *21 (W.D. Pa. Mar. 2, 2016) ("In the Third Circuit, it is accepted that non-signatory third-parties . . . who are closely related to [a] contractual relationship are bound by forum selection clauses contained in the contracts underlying the relevant contractual relationship.") (internal citations and quotation marks omitted).

[44] *See* Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd., 2020 NY Slip Op 02991, ¶ 5, 184 A.D.3d 116, 124 N.Y.S.3d 346 (App. Div. 1st Dept.); Freeford Ltd. v. Pendleton, 2008 NY Slip Op 3148, ¶ 6, 53 A.D.3d 32, 39, 857 N.Y.S.2d 62, 67 (App. Div. 1st Dept.).

by and against corporate affiliates.[45] Some version of the test has also been applied by state courts in Alabama, California, Illinois, Minnesota, Mississippi, Ohio, Texas, West Virginia, and Wyoming.[46]

The closely-related-and-foreseeable test has been used to consider whether a non-signatory is bound or advantaged by a forum selection clause across a wide range of cases and against a diverse array of non-signatories. The test is frequently invoked in cases for breach of contract.[47] It is also regularly applied in cases where an employer brings an action against its former employees or business affiliates.[48] State and federal courts have also applied the test in cases alleging copyright infringement, defamation, employment discrimination, invasion of privacy, securities fraud, slip-and-fall torts, and wrongful death, among others.[49] The non-signatories whose rights and obligations are most frequently affected by the closely-related-and-foreseeable test are corporate executives, corporate subsidiaries, corporate affiliates, and corporate parent companies.[50] In many cases, these individuals and entities would not qualify as intended beneficiaries under the traditional test for third-party beneficiaries.[51] They will, however, frequently fall within the ambit of the closely-related-and-foreseeable test, thereby bringing the relevant corporate affiliate within the scope of the clause for purposes of consolidating litigation proceedings. In other cases, the courts have relied on the test to conclude that one spouse is closely related to another, as in the case with Linda Romano and her

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[45] The Delaware Court of Chancery nominally applies the doctrine of "equitable estoppel" to determine whether a non-signatory is bound to a forum selection clause. In practice, however, the court applies a hybrid test that combines elements of direct-benefits equitable estoppel, the closely-related-and-foreseeable test, and third-party beneficiary law. The formal test recited by these courts poses three questions: "First, is the forum selection clause valid? Second, are the defendants third-party beneficiaries, or closely related to, the contract? Third, does the claim arise from their standing relating to the . . . agreement?" Sustainability Partners LLC v. Jacobs, 2020 Del. Ch. LEXIS 209, at *11-12 (Del. Ch. June 11, 2020). The Court of Chancery has held that the "closely-related" concept referenced in the second question "expands the availability of the equitable estoppel doctrine to encompass parties who would not technically meet the definition of third-party beneficiaries." *Id.* at *14. The court will therefore bind non-signatories to forum selection clauses if (1) the non-signatory receives a direct benefit from the agreement (equitable estoppel); or (2) it was foreseeable that he would be bound by the agreement (closely-related-and-foreseeable). In a 2019 decision, Vice Chancellor McCormick noted that "[a]lthough the direct-benefit and foreseeability inquiries have been articulated as disjunctive, many Delaware cases have relegated the foreseeability inquiry to a subordinate role." Neurvana Med., Ltd. Liab. Co. v. Balt USA, Ltd. Liab. Co., 2019 Del. Ch. LEXIS 995, at *12 (Del. Ch. Sep. 18, 2019).

[46] *See* Ex parte Killian Constr. Co., 276 So. 3d 201, 209 (Ala. 2018); Net2phone, Inc. v. Superior Court, 109 Cal. App. 4th 583, 588, 135 Cal. Rptr. 2d 149, 153 (2003); Solargenix Energy, LLC v. Acciona, S.A., 2014 IL App (1st) 123403, ¶ 50, 384 Ill. Dec. 598, 615, 17 N.E.3d 171, 188 (2014); C.H. Robinson Worldwide, Inc. v. FLS Transp., 772 N.W.2d 528, 534 (Minn. Ct. App. 2009); Titan Indem. Co. v. Hood, 895 So. 2d 138, 151 (Miss. 2004) (transaction participant test); Keehan Tenn. Inv., LLC v. Praetorium Secured Fund I, L.P., 2016-Ohio-8390, ¶ 40, 71 N.E.3d 325, 334 (Ct. App.); Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428, 444 (Tex. 2017) (transaction participant test); Caperton v. A.T. Massey Coal Co., 223 W. Va. 624, 645, 679 S.E.2d 223, 244 (2008); Venard v. Jackson Hole Paragliding, LLC, 292 P.3d 165, 173 (Wyo. 2013). The state courts in New Jersey generally refuse to apply the test. Instead, they rely on traditional third-party-beneficiary law to determine when non-signatories are bound by forum selection clauses. Zydus Worldwide DMCC v. Teva API Inc., 461 F. Supp. 3d 119, 135-36 (D.N.J. 2020) ("[T]he best and most authoritative indicator of New Jersey law is contained in the intermediate appellate case law, which holds that, absent third-party beneficiary status, a non-signatory is not within the scope of an agreement's forum selection clause.").

[47] *See* AMTO, LLC v. Bedford Asset Mgmt., LLC, 168 F. Supp. 3d 556, 569 (S.D.N.Y. 2016) (breach of contract); Am. Maplan Corp. v. Hebei Quanen High-Tech Piping Co., 2017 U.S. Dist. LEXIS 192330, at *42 (D. Kan. Nov. 21, 2017) (breach of contract).

[48] *See* Weatherford Int'l, LLC v. Binstock, 452 F. Supp. 3d 561, 571 (S.D. Tex. 2020); Mechanix Wear, Inc. v. Performance Fabrics, Inc., 2017 U.S. Dist. LEXIS 13357, at *23 (C.D. Cal. Jan. 31, 2017) (former employee); Guaranteed Rate, Inc. v. Conn, 264 F. Supp. 3d 909, 927 (N.D. Ill. 2017) (former employee); TK Prods., Ltd. Liab. Co. v. Buckley, No. 3:16-cv-803-SI, 2016 U.S. Dist. LEXIS 164270, at *22 (D. Or. Nov. 29, 2016) (former employee).

[49] *See* Krist v. Scholastic, Inc., 253 F. Supp. 3d 804, 811 (E.D. Pa. 2017) (copyright); Gottwald v. Sebert, 2016 NY Slip Op 30198(U), ¶ 9 (Sup. Ct.) (defamation); Olawole v. Actionet, Inc., Civil Action No. PX 16-3506, 2017 U.S. Dist. LEXIS 51683, at *8 (D. Md. Apr. 3, 2017) (employment discrimination); Cameron v. X-Ray Prof'l Ass'n, 2017 DNH 032 (invasion of privacy); Dragon State Int'l, Ltd. v. Keyuan Petrochemicals, Inc., 2016 U.S. Dist. LEXIS 12980, at *10 (S.D.N.Y. Feb. 2, 2016) (securities fraud); Wylie v. Island Hotel Co., No. 15-24113-CIV-KING, 2017 U.S. Dist. LEXIS 143228, at *4 (S.D. Fla. Jan. 5, 2017) (slip and fall); Sierra Tucson, Inc. v. Bergin, 239 Ariz. 507, 512, 372 P.3d 1031, 1036 (Ct. App. 2016) (wrongful death).

[50] *See, e.g.,* Overseas Food Trading Ltd. v. Bridor USA, Inc., 2018 U.S. Dist. LEXIS 232420, at *7 (D.N.J. Jan. 16, 2018); Or.-Idaho Utils., Inc. v. Skitter Cable TV, Inc., 2017 U.S. Dist. LEXIS 128287, at *25 (D. Idaho Aug. 9, 2017); VenardRedHawk Holdings Corp. v. Craig Invs., LLC, 2016 U.S. Dist. LEXIS 146291, at *3 (S.D.N.Y. Oct. 18, 2016); Venard v. Jackson Hole Paragliding, LLC, 292 P.3d 165, 172 (Wyo. 2013); *see also* Imodules Software, Inc. v. Essenza Software, Inc., 2017 Del. Ch. LEXIS 908, at *7 (Ch. Dec. 22, 2017)("[W]hen parties agree contractually to a forum for resolution of disputes, they should expect that the forum will hear the disputes, rather than allowing one side of the deal to use principles of entity separateness later to balkanize the dispute resolution process.").

[51] It is the rare corporate executive who will be able to present evidence tending to show a "clear and definite" intent that the parties to a merger agreement intended to confer an "enforceable benefit" upon the executive via the forum selection clause. Consequently, most corporate executives will not be deemed intended beneficiaries under the law of third-party beneficiaries.

husband's dispute with AAMCO.[52] Attempts to bring outside auditors, outside attorneys, and independent contractors within the scope of a forum selection clause via the test have generally been unsuccessful.[53]

As the closely-related-and-foreseeable test has gained acceptance, a number of courts have come to rely on it to the exclusion of the traditional doctrines of agency and contract law discussed above.[54] In the past, courts would consider whether a shareholder was bound by a forum selection clause under an alter ego theory. In recent years, by contrast, the courts have turned to the closely-related-and-foreseeable test as a simpler, easier route to this same conclusion.[55] A similar shift has occurred with respect to the doctrines of successor liability and assumption.[56] In addition, the test has largely supplanted the traditional rules of agency in the context of a forum selection clause. Under the common law of agency, an agent is not a party to an agreement that she signs on behalf of a disclosed principal.[57] Under the closely-related-and-foreseeable test, however, the agent may be bound by the *forum selection clause* in that agreement by virtue of her close relationship to the principal pursuant to the closely-related-and-foreseeable test.[58]

The closely-related-and-foreseeable test has a number of doctrinal cousins. Some courts apply a "transaction participant" test that allows corporate executives who are personally involved in a transaction to partake of forum selection clauses even if they are not intended beneficiaries of the agreements in question.[59] Other courts apply a "global transaction test" to hold that "parties to an integrated, global transaction, who are not signatories to a specific agreement within the

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[52] *See* AAMCO Transmissions, Inc. v. Romano, 42 F. Supp. 3d 700 (E.D. Pa. 2014); *see also* Stiles v. Bankers Healthcare Grp., Inc., 637 F. App'x 556, 562 (11th Cir. 2016); Diamond v. Calaway, 2018 U.S. Dist. LEXIS 174687, at *10 (S.D.N.Y. Oct. 9, 2018); Stavrinides v. Vin Di Bona, 2018 U.S. Dist. LEXIS 4019, at *9 (N.D. Cal. Jan. 8, 2018); Cupo v. Aliomanu Sand Castles, LLC, 2017 U.S. Dist. LEXIS 206918, at *8 (D. Haw. Dec. 15, 2017); Wylie v. Island Hotel Co., 2017 U.S. Dist. LEXIS 143228, at *4 (S.D. Fla. Jan. 5, 2017); Peterson v. Evapco, Inc., 238 Md. App. 1, 46-48, 188 A.3d 210, 236-38 (2018). *But see* Wescott v. Reisner, 2018 U.S. Dist. LEXIS 92320, at *9 (N.D. Cal. June 1, 2018) (declining to assert personal jurisdiction over non-signatory spouse).

[53] Lawyers Funding Grp., LLC v. Harris, 2016 U.S. Dist. LEXIS 6650, at *19 (E.D. Pa. Jan. 20, 2016) (attorney); GemCap Lending I, LLC v. Pertl, 2019 U.S. Dist. LEXIS 210246, at *34 (C.D. Cal. Aug. 9, 2019) (attorney); Am. Med. Distribs., Inc. v. Saturna Grp. Chartered Accountants, LLP, 2016 U.S. Dist. LEXIS 92387, at *11 (E.D.N.Y. July 15, 2016) (auditor); St. Jude Med. S.C., Inc. v. Hanson, 2014 U.S. Dist. LEXIS 199234, at *21 (D. Minn. Aug. 6, 2014) (independent contractor). *But see* Prospect Funding Holdings, LLC v. Vinson, 256 F. Supp. 3d 318, 325 (S.D.N.Y. 2017) (discussing cases where attorneys were deemed "closely related" and hence bound by a forum selection clause).

[54] Fitness Together Franchise, L.L.C. v. EM Fitness, L.L.C., 2020 U.S. Dist. LEXIS 191690, at *13 (D. Colo. Oct. 16, 2020) ("Defendants are clearly bound to the forum selection clauses under not only the generic 'closely related' doctrine but under the more traditional doctrines of estoppel, successor liability, and principal-agent liability.").

[55] *See, e.g.,* ResCap Liquidating Tr. v. LendingTree, LLC, 2020 U.S. Dist. LEXIS 48632, at *30 (D. Minn. Mar. 20, 2020); C.H. Robinson Worldwide, Inc. v. Steven Tu & Everest Glob. Freight Servs., 2019 U.S. Dist. LEXIS 224369, at *9 (D. Minn. Dec. 20, 2019; Huawei Techs. Co. v. Yiren Ronnie Huang, 2018 U.S. Dist. LEXIS 69745, at *26 (E.D. Tex. Apr. 25, 2018); Deese-Laurent v. Real Liquidity, Inc., 305 F. Supp. 3d 280, 285 (D. Mass. 2018); Ujvari v. 1stdibs.com, Inc., 2017 U.S. Dist. LEXIS 148413, at *30 (S.D.N.Y. Sep. 13, 2017). We discuss this issue at greater length in Part II.C.

[56] Cfirstclass Corp. v. Silverjet PLC, 560 F. Supp. 2d 324, 328 (S.D.N.Y. 2008) (successor liability); Cajun Glob. LLC v. Swati Enters., 283 F. Supp. 3d 1325, 1331 (N.D. Ga. 2017) (assumption); Nitro Elec. Co. v. ALTIVIA Petrochemicals, LLC, 2017 U.S. Dist. LEXIS 210776, at *12 (S.D. W. Va. Dec. 22, 2017) (assumption).

[57] *See* RESTATEMENT (THIRD) OF AGENCY § 6.01.

[58] *See* Green Tech. Lighting Corp. v. Liberty Surplus Ins. Corp., 2018 U.S. Dist. LEXIS 32927, at *16 (D. Idaho Feb. 26, 2018); Power Up Lending Grp, Ltd v. Murphy, 2016 U.S. Dist. LEXIS 144268, at *19 (E.D.N.Y. Oct. 18, 2016); Greenway Nutrients, Inc. v. Blackburn, 2015 U.S. Dist. LEXIS 42100, at *15 (D. Colo. Feb. 20, 2015); Mohamed v. Chi. Title Ins. Co., 2012 U.S. Dist. LEXIS 149259, at *11 (E.D. Wis. Oct. 17, 2012). *But see* Monco v. Zoltek Corp., No. 17 C 6882, 2019 U.S. Dist. LEXIS 31279, at *52-53 (N.D. Ill. Feb. 27, 2019) ("[T]he Court certainly did not hold, and will not hold here, that an officer who signed an agreement in his representative capacity and assisted in litigation for the corporation necessarily subjected himself to jurisdiction . . . To hold otherwise would severely undercut the rule that officers generally are not bound by—including for personal jurisdiction purposes—contracts signed in their representative capacities."); Interface Sys. v. Metro Urgent Care LLP, 2015 U.S. Dist. LEXIS 143648, at *6 (E.D. Ark. Feb. 19, 2015) ("Although Disraeli and Bauer signed the Agreement, they did so as representatives of Metro, and they did not by their signatures become parties to the Agreement.")

[59] Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 428, 444 (Tex. 2017) (discussing "transaction participant" test and noting its similarities to the closely-related-and-foreseeable test); *accord* Rieder v. Woods, 603 S.W.3d 86, 98-99 (Tex. 2020); *see also* Grott v. Jim Barna Log Sys.-Midwest, Inc., 794 N.E.2d 1098, 1105 (Ind. Ct. App. 2003) (concluding that owner who signed a contract containing a forum selection clause on behalf of corporation was bound by the clause because he was a transaction participant).

transaction, may nonetheless benefit from a forum selection clause in one of the other agreements."[60] Still other courts apply an "affiliation test" whereby non-signatory corporations are presumptively covered by forum selection clauses executed by their affiliates.[61] Finally, some courts drop the "foreseeable" prong of the inquiry altogether and focus exclusively on the question of whether the non-signatory is "closely related" to the contract or the contracting parties.[62] We do not discuss these doctrinal cousins at any depth in this Article. Our analysis and critique of the closely-related-and-foreseeable test, however, generally applies with equal force to these other doctrines.

### C. Three Scenarios

The closely-related-and-foreseeable test is sufficiently novel that it has attracted virtually no attention from scholars to date. A careful review of the cases in which this test has been applied, however, suggests that the task of evaluating its overall utility is complex. On the one hand, the test helps to promote litigation efficiency by making it easier for courts to rope non-signatories into forum selection clauses to which they would not otherwise be bound. On the other hand, the test raises a number of issues with respect to personal autonomy and due process.

Our core argument is that any evaluation of the closely-related-and-foreseeable test must consider *who* is invoking the forum selection clause and *for what purpose*.[63] When the clause is invoked *by* a non-signatory, the use of this test presents no concerns. When the clause is invoked *against* a non-signatory plaintiff, the use of the test presents concerns because the non-signatory never consented to be bound by the clause. When the test is invoked *against* a non-signatory defendant, the use of the test presents additional concerns because there is no consent *and* there are due process issues. We explore the first three of these scenarios below. We defer our discussion of the fourth and final scenario—the invocation of the test against a non-signatory defendant as a means of obtaining personal jurisdiction—until the next Part.

#### 1. Non-Signatory Defendant Invokes Clause Against Signatory Plaintiff

The closely-related-and-foreseeable test is sometimes invoked when a *signatory* plaintiff brings a lawsuit against a *non-signatory* defendant in a forum other than the one named in the forum selection clause. In such cases, the non-signatory defendant typically moves to dismiss or transfer the suit to the chosen forum. The plaintiff opposes the motion on the ground that the defendant is not a party to the contract containing the forum selection clause and hence ineligible to invoke it. The court then applies the closely-related-and-foreseeable test to determine whether the non-signatory defendant is so closely related to one of the contract signatories that it can rely on the clause to obtain transfer or dismissal of the case.[64]

It is important to emphasize that, in this scenario, the non-signatory defendant is actively seeking the benefits provided by the forum selection clause. The non-signatory defendant *wants* to

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[60] Tate & Lyle Ingredients Ams., Inc. v. Whitefox Techs. USA, Inc., 2012 NY Slip Op 5888, ¶ 1, 98 A.D.3d 401, 401, 949 N.Y.S.2d 375, 376 (App. Div. 1st Dept., 2012); *see also* Queen City Pastry, LLC v. Bakery Tech. Enters., LLC, 2015 U.S. Dist. LEXIS 83198, at *7 (W.D.N.C. June 26, 2015); Red Mortg. Capital, LLC v. Shores, LLC, No. 2:16-cv-678, 2017 U.S. Dist. LEXIS 49092, at *16 (S.D. Ohio Mar. 31, 2017).

[61] Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 442 (7th Cir. 2012) (noting connection between this test and the closely-related-and-foreseeable test).

[62] *See* Wilson v. 5 Choices, LLC, 776 F. App'x 320, 329 (6th Cir. 2019) (applying closely related test); Marano Enters. v. Z-Teca Rests., L.P., 254 F.3d 753, 757 (8th Cir. 2001) (applying closely related test); Holland Am. Line, Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 456 (9th Cir. 2007) (applying closely related test).

[63] As we shall demonstrate *infra*, the other tests are less likely to cause contract law or due process problems. To the extent that they do, however, the uniform due process approach that we recommend for the closely-related-and-foreseeable test would also apply to and guard against any stray due process problems that would arise from the application of the traditional non-signatory doctrines.

[64] This was the fact pattern presented in *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988).

litigate in the forum named in the clause. To determine whether the non-signatory defendant may benefit from the clause, the court would ordinarily apply the law of third-party beneficiaries. This law is, however, fairly strict. It requires the non-signatory defendant to prove that it was an intended beneficiary of the agreement, which is no easy task. Viewed through the lens of litigation efficiency, the courts would prefer a less demanding test that would enable them to bring more non-signatory defendants within the scope of the clause. The closely-related-and-foreseeable test serves precisely this purpose.[65] This test is easier to satisfy than the test for third-party beneficiaries. Using this test to determine whether a non-signatory defendant may take advantage of a forum selection clause, therefore, helps to ensure cases involving a mix of signatory and non-signatory defendants are heard in the same forum, i.e. the one named in the forum selection clause.

The law of third-party beneficiaries is judge-made common law. As such, the courts are free to modify that law as they see fit.[66] In this context, many state and federal courts have concluded that it is appropriate to modify the traditional third-party beneficiary test to make it easier for willing non-signatory defendants to take advantage of forum selection clauses in the name of litigation efficiency. There is no problem with personal autonomy or due process in this context. All of the defendants are clamoring to be covered by the clause and the Fourteenth Amendment is not implicated. When a non-signatory defendant invokes the clause against a signatory plaintiff, therefore, there is no issue with applying the closely-related-and-foreseeable test if it will result in efficiency gains.

### 2. Non-Signatory Plaintiff Invokes Clause Against Signatory Defendant

The closely-related-and-foreseeable test is also sometimes invoked when a *non-signatory* plaintiff brings a lawsuit against a *signatory* defendant. In such cases, the plaintiff cites the clause as

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[65] The closely-related-and-foreseeable test is easier to satisfy that the traditional test for determining third-party beneficiaries because there is no need to prove that the contracting parties intended that the non-signatory benefit from the agreement at the time of contracting. *See* Leviton Mfg. Co. v. Reeve, 942 F. Supp. 2d 244, 258 (E.D.N.Y. 2013) ("The 'closely related' test is necessarily satisfied where the defendant is a third-party beneficiary of the agreement, but that situation is not required."). It is sufficient to prove a close relationship after the fact. In addition, where the law of third-party beneficiaries seeks to determine whether a person was an intended beneficiary of the *contract*, the closely-related-and-foreseeable test seeks to determine whether a person is covered by the *forum selection clause*. Utilizing a less-demanding test that applies exclusively to forum selection clauses helps to promote litigation efficiency. *See* Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 441 (7th Cir. 2012) ("Were it not for judicial willingness in appropriate circumstances to enforce forum selection clauses against affiliates of signatories, such clauses often could easily be evaded. For example, a signatory of a contract containing such a clause might shift the business to which the contract pertained to a corporate affiliate—perhaps one created for the very purpose of providing a new home for the business—thereby nullifying the clause.").

[66] *See* Bowen Eng'g Corp. v. Pac. Indem. Co., 83 F. Supp. 3d 1185, 1189 (D. Kan. 2015) (invoking the closely-related-and-foreseeable test and observing that the defendants were "entitled to invoke the forum selection clause as intended beneficiaries of the clause"). This gloss on the test derives support from the fact that the courts will not apply it when the contract contains a so-called "no third party beneficiaries" clause. See Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1169 (11th Cir. 2009); Casville Invs., Ltd. v. Kates, No. 12 Civ. 6968(RA), 2013 WL 3465816, at *6 (S.D.N.Y. July 8, 2013); Bensinger v. Denbury Res. Inc., No. 10-CV-1917 (JG), 2011 WL 3648277, at *6 (E.D.N.Y. Aug. 17, 2011); APA Excelsior III L.P. v. Premiere Techs., Inc., 49 F. Supp. 2d 664, 671 (S.D.N.Y. 1999); Pinto Tech. Ventures, L.P. v. Sheldon, 526 S.W.3d 438, 445 (2017); Davis v. Scottish Re Grp. Ltd., 2016 NY Slip Op 01756, ¶ 4, 138 A.D.3d 230, 239, 28 N.Y.S.3d 18, 24 (App. Div. 1st Dept.); Crastvell Trading Ltd. v. Marengere, 90 So. 3d 349, 354 (Fla. Dist. Ct. App. 2012); McMahan Sec. Co. L.P. v. Aviator Master Fund, Ltd., 2008 NY Slip Op 9847, ¶ 1, 57 A.D.3d 326, 327, 868 N.Y.S.2d 669, 670 (App. Div.). *Cf.* Black v. Diamond Offshore Drilling, Inc., 551 S.W.3d 346, 352 (Tex. App. 2018) (observing that "the scope of the forum-selection clause . . . is specifically limited to enforcement by the parties to the contract" and refusing to allow a non-signatory defendant to invoke the clause against a signatory plaintiff). In *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 446 (Tex. 2017), the Texas Supreme Court cited the existence of a no-third-party-beneficiaries clause in refusing to permit a non-signatory defendant to dismiss the suit in favor of a Delaware forum notwithstanding the existence of an exclusive Delaware forum selection clause. The court reasoned that since the contract "disavows any intent to extend contractual rights and remedies to anyone other than the parties and their permitted successors and assignees," there was no reason to allow the non-signatory defendants to take advantage of the clause. *Cf.* Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 442 (7th Cir. 2012) ("On balance it seems better to let the parties decide in the contract whether to limit the forum selection clause to the named entities than for the law to impose such a limit as a default provision to govern in the absence of specification of other entities to be bound. The latter approach would greatly complicate the negotiation of such clauses because the parties would have to strain to close all the loopholes that would open if only entities named in the contract could ever invoke or be made subject to such a clause.").

a basis for asserting personal jurisdiction over the defendant in the chosen forum. The defendant opposes the motion on the ground that the plaintiff is not a party to the contract containing the clause. The court then applies the closely-related-and-foreseeable test to determine whether the non-signatory plaintiff may rely on the clause to assert personal jurisdiction over the defendant.[67]

In such cases, it is clear that the defendant has consented to jurisdiction in the chosen forum with respect to claims brought by *somebody*. The question is whether the defendant has consented to jurisdiction in the chosen forum with respect to claims brought by *this particular plaintiff*. To resolve this question, the court may inquire whether the plaintiff may invoke this clause notwithstanding the fact that it was not a party to the relevant contract.[68] There is no obvious reason why this question may be not resolved by the closely-related-and-foreseeable test. In such cases, the test may (again) be usefully conceptualized as a liberalized version of traditional third-party beneficiary doctrine. If the non-signatory plaintiff is so closely related to a contract signatory that it is foreseeable that he is covered by the clause, then it may invoke the clause to assert personal jurisdiction over the defendant. Again, there is no issue with consent or due process on these facts. The defendant has previously consented to jurisdiction in the chosen state via the forum selection clause. The only question is whether the non-signatory plaintiff is entitled to take advantage of that prior consent.

3. Signatory Defendant Invokes Clause Against Non-Signatory Plaintiff

In cases where a *signatory* defendant invokes a forum selection clause against a *non-signatory* plaintiff, the use of the closely-related-and-foreseeable test is more troubling. Consider a case where a non-signatory plaintiff brings a lawsuit against a signatory defendant in a forum other than the one named in the clause.[69] The signatory defendant invokes the clause and moves to dismiss or transfer the suit. The non-signatory plaintiff opposes the motion on the ground that he is not a party to the contract containing the clause. The court then applies the closely-related-and-foreseeable test to determine whether the non-signatory plaintiff is so closely related to a contract signatory that he is prohibited from suing in any court except the one named in the clause. After concluding that the non-signatory is, in fact, closely related to the signatory, the court dismisses the case.[70]

In this scenario, the closely-related-and-foreseeable test operates somewhat differently than the two scenarios discussed above. In those scenarios, the forum selection clause was being invoked *by* the non-signatory. The non-signatory was seeking to take advantage of the clause to further its own interests in litigation. Here, the forum selection clause is being invoked *against* the non-signatory. The non-signatory is being forced to comply with a clause in a contract it never signed. In contrast to the first two scenarios, this scenario raises the question of whether a forum selection clause may be enforced against a non-signatory without their consent.

This shift in perspective necessitates a shift in the way that we think about the use of the closely-related-and-foreseeable test. As discussed above, the test may in some cases be usefully conceptualized as a modified third-party beneficiary test that applies exclusively to forum selection

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[67] This was the fact pattern presented in *Nutrimost, LLC v. Werfel*, 2016 U.S. Dist. LEXIS 192878, at *21 (W.D. Pa. Mar. 2, 2016)

[68] Ball Up, LLC v. Strategic Partners Corp, Nos. 02-17-00197-CV, 02-17-00198-CV, 2018 Tex. App. LEXIS 6068, at *18 (Tex. App. Aug. 2, 2018) ("[I]t is not [defendant's] burden to disprove his alleged consent to be bound by the forum-selection clauses in the [contract]. It is [plaintiff's] burden to prove how [plaintiff] is authorized to enforce a forum-selection clause in [the contract] when [plaintiff] is a nonparty and nonsignatory to the [contract]").

[69] In *Coastal Steel*, for example, the Third Circuit considered whether a non-signatory plaintiff—the American manufacturer—was bound by a forum selection clause in a contract between two English firms. Similarly, in *Hugel*, the Seventh Circuit considered whether two non-signatory plaintiffs—the companies controlled by Hugel—were bound by a forum selection clause in a contract between Hugel and Lloyd's.

[70] This was the fact pattern presented in *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993).

clauses. When the non-signatory plaintiff derives no benefit from the agreement or the clause, however, it is inappropriate for the courts to rely on such a test to deprive him of his ability to bring a lawsuit in the forum of his choice. It is one thing to expand the scope of a forum selection clause to encompass individuals who are actively seeking its benefits. It is quite another to expand the scope of a clause to bind unwilling non-signatories who want nothing to do with it.

As a general rule, we believe the courts should not utilize the closely-related-and-foreseeable test in situations when a signatory defendant invokes the clause against a non-signatory plaintiff. To be clear, this is a prudential policy recommendation grounded in notions of personal autonomy and fairness. It is not a constitutional argument. There is no provision in the U.S. Constitution that guarantees a plaintiff the right to sue in the forum of choice.[71] Indeed, the courts routinely deny plaintiffs access to their preferred forum by transferring or dismissing the suit on the basis of *forum non conveniens* in cases where there is no forum selection clause. If refusing to allow a plaintiff to sue in a given forum absent a forum selection clause is constitutional under a *forum non conveniens* analysis—and the U.S. Supreme Court has repeatedly held that it is—then surely there is no constitutional problem when the courts refuse to allow a plaintiff to sue in a given forum because that plaintiff is closely related to a party bound by a forum selection clause requiring suit to be brought elsewhere.

Although there is no constitutional due process issue presented under this scenario, we still believe that the absence of any meaningful consent compels the conclusion that the courts should not apply the closely-related-and-foreseeable test in this context. In lieu of the test, we would urge the courts to adopt the following approach. First, they should first consider whether one of the traditional doctrines discussed in Part I provide a basis for concluding that the plaintiff is bound by the clause.[72] If not, the courts should consider whether the action brought by the non-signatory should be transferred or dismissed on the basis of *forum non conveniens* using the usual criteria that apply in cases where there is no forum selection clause. In applying these criteria, the courts may of course consider the fact that some plaintiffs are bound by the forum selection clause while others are not.[73] They should not, however, apply the closely-related-and-foreseeable test to determine the rights and obligations of any non-signatory plaintiffs.

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[71] There is a long-running academic debate as to whether judicial abstention doctrines such as *forum non conveniens* are constitutional. *See, e.g.*, Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 67-68 (2019) (surveying the literature); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2353-2356 (2018) (same). However, the fact that the courts routinely rely on the doctrine of *forum non conveniens* "to dismiss, on a discretionary basis, cases they believe would be better heard by another [jurisdiction's] courts," suggests that most courts perceive no constitutions problems with the doctrine. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414 (2017).

[72] This list of doctrines includes agency, alter ego, assumption, incorporation by reference, successor liability, the global transaction test, equitable estoppel, and the law of third-party beneficiaries. With respect to third-party beneficiary law, we believe it is appropriate to bind a non-signatory plaintiff to a forum selection clause if it is an intended beneficiary of the contract as a whole. *See* Christensen v. Norman, 2019 U.S. Dist. LEXIS 48182, at *8 (D. Utah Feb. 1, 2019) ("Plaintiff cannot have it both ways—he cannot allege he is a third-party beneficiary of the APA, but concurrently argue that although his agent PEMC executed the APA, he is not personally bound by the [forum selection clause in] the APA."); Hostforweb Inc. v. Cloud Equity Grp. Sim Ltd. Liab. Co., 2019 U.S. Dist. LEXIS 197820, at *7 (N.D. Ill. Nov. 14, 2019) ("Plaintiff cannot assert it is a third-party beneficiary to the APA and argue it is not bound by the forum selection clause in the APA because it is not a party to the agreement. As a third-party beneficiary seeking to enforce the APA, Plaintiff is bound by all the provisions in the APA, including a valid forum selection clause contained therein.") Under principles of equitable estoppel, it is likewise appropriate to bind a non-signatory plaintiff to a forum selection clause if it has derived some direct benefit from the agreement. See Sustainability Partners LLC v. Jacobs, 2020 Del. Ch. LEXIS 209 (stating that equitable estoppel "prevents a non-signatory to a contract from embracing the contract, and then turning her back on the portions of the contract, such as a forum selection clause, that she finds distasteful"). However, if the plaintiff is not an intended beneficiary, and if it has not derived some direct benefit from the agreement, then it is inappropriate for the courts to bind it to a forum selection clause it never signed based solely on its close relationship to a contract signatory.

[73] Adams v. Raintree Vacation Exch., LLC, 702 F.3d 436, 443 (7th Cir. 2012) ("[N]otice that because Raintree was entitled to remove the case to Mexico under the forum selection clause irrespective of Starwood's rights, the doctrine of forum non conveniens clicks in and would require the dismissal of the claim against Starwood as well, even if it weren't entitled to enforce the forum selection clause. The suit would then be refiled in the Mexico court in which the plaintiffs would refile their claim against Raintree."). Our preferred approach is broadly consistent with one recently adopted by the Third Circuit in *In re Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017). In

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The use of the closely-related-and-foreseeable test in the three scenarios discussed above presents a wide array of issues. The fourth and final scenario, however, presents issues that are exponentially more complex. This is the scenario where a signatory plaintiff invokes the clause as a basis for asserting personal jurisdiction over a non-signatory defendant.[74] Since this scenario implicates issues of personal autonomy *and* due process, it is different from the three discussed above, as we explain in the next Part. In anticipation of this discussion in Part II, however, we wish to make our position clear on one point. We believe that concerns about personal autonomy, standing alone, are sufficient to counsel against the use of the closely-related-and-foreseeable test when a non-signatory seeks to assert personal jurisdiction against a non-signatory defendant based solely on the existence of a forum selection clause. In such cases, the freedom *not* to contract must take precedence over any gains to be derived from litigation efficiency and the court should refrain from asserting personal jurisdiction over a non-signatory defendant based solely on that defendant's close proximity to a contract signatory. With that position clearly stated, we now turn our full attention to the question of due process.

## II. PERSONAL JURISDICTION AND NON-SIGNATORY DEFENDANTS

Over the past decade, the courts have increasingly relied on the closely-related-and-foreseeable test to conclude that the constitutional requirements of due process were satisfied in cases where a signatory plaintiff invoked a clause against a non-signatory defendant.[75] In the case of Linda Romano, for example, the federal court in Pennsylvania expressly invoked this test to support its conclusion that it had personal jurisdiction.[76] The court reasoned that "[g]iven her spousal relationship with Robert Romano, Linda Romano is so *closely related* to Robert Romano's dispute with AAMCO that she should have *foreseen* being bound by the forum selection clause in the Franchisee Agreement."[77] Within the universe of cases applying the closely-related-and-foreseeable test, this conclusion is unremarkable. If one looks at this case through a slightly different lens, however, the decision is rather surprising. Under the minimum contacts test laid down by the U.S. Supreme Court in its post-*International Shoe* jurisprudence, the mere fact that someone is married to someone over whom the court has personal jurisdiction is ordinarily not enough to support the

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that case, the court considered the question of "how district courts should apply *Atlantic Marine* when all defendants seek a transfer to one district under § 1404(a), but only some of those defendants agreed to forum-selection clauses that designate a different district." *Id.* at 399. In answering this question, the Third Circuit gave short shrift to the argument that these parties were bound by a forum selection clause in a contract executed by persons to whom they were closely related. *Id.* at 407. Instead, the court held that it was appropriate to consider "the private and public interests relevant to non-contracting parties." *Id.* at 408.

[74] *See, e.g.,* McWane, Inc. v. Lanier, No. CV 9488-VCP, 2015 WL 399582, at *11 (Del. Ch. Jan. 30, 2015); Peterson v. Evapco, Inc., 238 Md. App. 1, 47, 188 A.3d 210, 237 (2018) (concluding that lower court properly "exercised personal jurisdiction over Mrs. Peterson properly because she was closely related to the Confidentiality Agreement such that she should have foreseen that [plaintiff] would seek to bind her by its forum-selection clause"); Solargenix Energy, LLC v. Acciona, S.A., 2014 IL App (1st) 123403, ¶ 52, N.E.3d 171, 189 (concluding that even in the absence of minimum contacts with the forum, a non-signatory "impliedly consents to the forum selection clause via its connections with dispute, the parties, and the contract or contracts at issue.").

[75] *See, e.g.*, Umlaut, Inc. v. P3 USA, Inc., No. 2:19-cv-13310, 2020 U.S. Dist. LEXIS 124750, at *7 (E.D. Mich. July 15, 2020); Matthews Int'l Corp. v. Lombardi, 2020 U.S. Dist. LEXIS 45728, at *17 (W.D. Pa. Mar. 17, 2020); Franlink, Inc. v. Bace Servs., No. 4:19-CV-04593, 2020 U.S. Dist. LEXIS 213782, at *9 (S.D. Tex. Feb. 7, 2020); Southridge Partners II, Ltd. P'ship v. SND Auto Grp., Inc., 2019 U.S. Dist. LEXIS 218003, at *9 (D. Conn. Dec. 19, 2019); Ninespot Diamond v. Calaway, 2018 U.S. Dist. LEXIS 174687, at *10 (S.D.N.Y. Oct. 9, 2018);, Inc. v. Jupai Holdings, Ltd., 2018 U.S. Dist. LEXIS 126469, at *17 (D. Del. July 30, 2018); Power Up Lending Grp, Ltd v. Murphy, 2016 U.S. Dist. LEXIS 144268, at *19 (E.D.N.Y. Oct. 18, 2016); AAMCO Transmissions, Inc. v. Romano, 42 F. Supp. 3d 700 (E.D. Pa. 2014); Synthes, Inc. v. Emerge Med., Inc., 887 F. Supp. 2d 598, 599 (E.D. Pa. 2012).

[76] Aamco Transmissions, Inc. v. Romano, 42 F. Supp. 3d 700, 708 (E.D. Pa. 2014) (stating that "a non-signatory party may enforce a forum selection clause in a contract if the party is a third-party beneficiary of the contract or is closely related to the contractual relationship or dispute such that it is foreseeable that the party will be bound").

[77] *Id*. at 709 (emphasis added).

exercise the court's exercise of personal jurisdiction over that person.[78] And yet this spousal relationship was deemed sufficient to subject Linda Romano to personal jurisdiction in Pennsylvania in *AAMCO*.

In this Part, we argue that this and other decisions applying the closely-related-and-foreseeable test to cases involving non-signatory defendants are out of step with the ordinary rules relating to personal jurisdiction and due process. First, we argue that a close connection between the defendant and a *contract* is very different from the close connection between the defendant and the *forum*. Second, we argue that the concept of foreseeability is insufficient under existing doctrine to support the exercise of personal jurisdiction over an out-of-state defendant. Third, we argue that the contacts of a subsidiary cannot be imputed to a parent for purposes of establishing personal jurisdiction under current law.

Collectively, these arguments show that the routine use of the closely-related-and-foreseeable test to assert personal jurisdiction over non-signatory defendants is impossible to reconcile with recent Supreme Court precedents relating to personal jurisdiction with respect to out-of-state defendants. The mere fact that these decisions are inconsistent with this prevailing case law, to be sure, does not mean that they are undesirable. The Supreme Court's recent jurisprudence in the area of personal jurisdiction has many critics and it may well be that a more liberal approach to personal jurisdiction would be beneficial to society at large. It is merely to point out that the jurisdictional inquiry with respect to contract non-signatories is very different from the jurisdictional inquiry that courts typically apply to other defendants.

### A. Minimum Contacts

The U.S. Supreme Court has long held that a defendant is subject to personal jurisdiction in a state if the defendant has "minimum contacts" with that state.[79] The minimum contacts test has always centered the question of whether a non-resident defendant has "sufficient contacts or ties with the state of the forum" to support a constitutional exercise of personal jurisdiction.[80] The extent and strength demanded of such ties has waxed and waned over the decades, and most commentators agree that the Court's most recent round of personal jurisdiction decisions have privileged the importance of the forum state's exercise of territorial power and sovereignty over other analytical tools that would tie a defendant's intention or conduct to the forum state. Although many scholars have resisted the trend toward a circumscribed understanding of minimum contacts, none have challenged the necessity of identifying the contact that is the meaningful connection between the defendant and the forum state.[81] Indeed, the Supreme Court recently reaffirmed that minimum

[78] *See* Gognat v. Ellsworth, 2009 U.S. Dist. LEXIS 99456, at *10-11 (W.D. Ky. Oct. 26, 2009) ("Neither party has cited, nor has the Court found, a case which states that personal jurisdiction is conferred merely based on a spousal relationship.").

[79] In the arbitration context, the Court has held that a defendant who has not signed the agreement containing the arbitration clause has not agreed to submit the arbitrability of the dispute to arbitration. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947, 115 S. Ct. 1920, 1924 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so."). It is beyond the scope of this paper to reevaluate the Supreme Court jurisprudence regarding the enforcement of forum selection clauses in boilerplate contracts. Although there are strong arguments that assent via a boilerplate agreement that a party is likely to neither read nor understand is not a purposeful contact with the forum state, the current jurisprudence permits assent to such contracts and it is the assent itself that is understood as purposeful. While it may be a welcome development to use a minimum contacts analysis to chip away at the use of such clauses, this paper does not take a position on that doctrinal move. And as we will expand on below, the strength of our argument depends, to some extent, on the ability of courts to apply minimum contacts to a small range of situations (non-signatories) without the fear that a single holding will directly overturn a half-century of settled precedent regard signatories to forum selection clauses.

[80] Int'l Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 160 (1945).

[81] There are good reasons to question the minimum contacts framework altogether, and even to question whether personal jurisdiction is a matter of due process. *See*, e.g., Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249 (2017). The purpose of this Article is to show the unsettling asymmetry between the treatment of forum selection clause non-signatories and other non-resident defendants. This Article takes the continued use and existence of the minimum contacts test as a given. Although a wholesale rethinking of the

contacts demand a "substantial connection" between the defendant, the cause of action, and the forum state.[82]

The closely-related-and-foreseeable test is not concerned with the existence of any connection between the defendant and the *forum state*. Instead, that test focuses exclusively on the relationship between the defendant and the *contract* containing the forum selection clause.[83] This is problematic for at least two reasons. First, a non-signatory defendant who has some relationship to the contract will in many cases lack any meaningful relationship with the state named in the forum selection clause. Second, the state named in a forum selection clause will in many cases lack any connection to the parties or the contract. This disconnect is not significant when one contract signatory seeks to enforce a forum selection clause against another because the constitutionally relevant connection to the forum is the consent manifested in the clause.[84] When the defendant is a non-signatory, however, that cognizable connection to the forum is missing.

*Fair Isaac Corp. v. Gordon* illustrates this problem well.[85] An employer, FICO, sought to sue Gordon, its former employee, and his new employer, Callcredit, for breach of a confidentiality and non-solicitation agreement that he signed upon resigning from FICO. FICO, a Delaware corporation, had its headquarters in California. Callcredit was an English company with offices in several cities outside of the United States. Despite no other apparent connection to Minnesota, the contract that Gordon and FICO signed named Hennepin County, Minnesota, in the forum selection clause.[86] The purposeful conduct that a court would typically look for in such a case was therefore absent. Assuming that Callcredit was, in fact, directing harmful acts at *FICO*, there is no indication that it directed its harmful conduct to *Minnesota* because FICO lacked any meaningful connection to Minnesota. Nevertheless, the Minnesota court relied on the closely-related-and-foreseeable test to conclude that it had personal jurisdiction over Callcredit on the basis of the forum selection clause.

In such cases, where the forum selection clause itself is the only link between the defendant and the forum state, the proximity to the forum selection clause would only be a constitutionally sufficient minimum contact vis-à-vis a closely related non-signatory if it amounted to "intentional conduct by the defendant that creates the necessary contacts with the forum."[87] Although the Supreme Court has intimated that assent to a contract naming the forum state as the selected forum is a minimum contact for the signatory party,[88] it has never directly identified a forum selection clause, disconnected from its parties, as a constitutionally relevant contact with the forum state.

The use of the closely-related-and-foreseeable test thus produces a bizarre scenario in which the contract containing the forum selection clause becomes a proxy for the forum state itself. So long as the defendant is expressly aiming its conduct at the contract via a close relationship with a contract

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constitutional personal jurisdiction framework may be normatively desirable, it is highly unlikely that the Supreme Court will move away from minimum contacts and due process. This Article thus situates the forum selection clause problem within the current doctrinal framework, flawed as it may be.

[82] Walden v. Fiore, 571 U.S. 277, 284 (2014).

[83] *See*, *e.g.,* Koninklijke Philips Elecs 333 F. Supp. 2d. 328, 333 (S.D.N.Y. 2005) ("A valid forum selection clause establishes sufficient contacts with New York for purposes of jurisdiction and venue."); Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 527 (1st Cir. 1985) (a valid forum selection clause means the court "need not decide whether Beneficial also had minimum contacts with the [forum state] to justify the assertion of personal jurisdiction."); H.H. Franchising Sys. v. Brooker-Gardner, 2015 WL 4464774 at *7-8 (S.D. Oh. July 15, 2015) ("The presence of a valid and enforceable forum-selection clause obviates the need to conduct a due-process and minimum-contacts analysis because such a clause acts as consent to jurisdiction in the contracted-for forum.").

[84] The Supreme Court has been silent on the question of whether the use of consent as a basis for personal jurisdiction is itself subject to the minimum contacts framework. We consider that question *infra* at Part III.

[85] 2016 WL 7439084 (Ct. App. Minn. 2016).

[86] *Id*. at *2. Callcredit was not a party to this agreement.

[87] Walden, 571 U.S. at 286.

[88] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985).

signatory, it is targeting its conduct at the jurisdiction named in the forum selection clause.[89] As the Supreme Court and lower courts clarified over the past decade, were the forum selection clause a *person* rather than a contract, such purposeful conduct would be subjected to a much higher degree of scrutiny to ensure that the contacts were in fact with the forum state, and not just with a person or entity who, by happenstance, is located within the territory of the forum state. When courts have confronted cases involved libel, defamation, copyright or patent infringement, and other intentional or "purposefully directed" causes of action, they inquire whether the "case involves both a forum-state injury *and* tortious conduct specifically directed at the forum, making the forum state the focal point" of the cause of action.[90] A defendant might have sporadic or "fortuitous" contacts with the forum state, but courts have repeatedly rejected the idea that "'any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff.'"[91]

This "injury plus" test is one in which the defendant must expressly target the forum state *independent* of the fact that it causes harm to the plaintiff in the forum state.[92] Courts routinely demand that extra conduct is directed toward the forum state, even when the plaintiff is incorporated in that jurisdiction and maintains headquarters in the forum state.[93] In other words, even if FICO were incorporated in Minnesota with headquarters there, those facts would not have, on their own, been enough for the assertion of personal jurisdiction over Callcredit in Minnesota but for the forum selection clause. If, for example, the defendant employee had worked in FICO's California office and his employment and subsequent new job had nothing to do with Minnesota, the location of FICO's headquarters and place of incorporation would not have been enough. The fact that Callcredit and Gordon could foresee that FICO might also experience an injury at its headquarters would not satisfy the "injury plus" test that many jurisdictions have fashioned out of *Calder* and *Walden*.[94]

Even in instances where the chosen forum does bear some relationship to the contract, its parties, or its performance, it is not a forgone conclusion that a non-signatory who has some relationship to a contract would share that contract's relationship to the forum, or that the relationship itself is sufficiently strong to pass minimum-contacts muster. To be clear, this gap is not an immutable feature of enforcement of forum selection clauses against non-signatories. There are situations in which a non-signatory defendant's relationship to the contract can also be construed as a set of constitutionally sufficient contacts with the forum state. To conclude that a court has personal jurisdiction over a defendant based solely on that defendant's connection to a contract, however, is to fundamentally misunderstand the Supreme Court's recent case law in this area.

### B. The Foreseeability Trap

Since at least the 1960s, courts have struggled to assimilate the concept of foreseeability into minimum contacts analysis. Foreseeability is an outgrowth of indirect forum contacts. The concept

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[89] *See, e.g.,* Canon Fin. Servs. v. ServeCo N. Am., LLC, 2020 U.S. Dist. LEXIS 126081, at *12 (D.N.J. July 16, 2020) (asserting personal jurisdiction over two individual non-signatory defendants without once considering whether those defendants had directed their actions toward New Jersey); Diamond v. Calaway, 2018 U.S. Dist. LEXIS 174687, at *12 (S.D.N.Y. Oct. 9, 2018) (observing that non-signatory was "closely related" to a fraudulent scheme enabled by the signatory's "execution of a Written Note and Written Guaranty with a New York forum-selection clause" and that the non-signatory was therefore subject to personal jurisdiction in New York).

[90] Tamburo v. Dworkin, 601 F.3d 693, 706 (7th Cir. 2010).

[91] Mobile Anesthesiologists Chi., LLC v. Anesthesisa 623 F.3d 440, 446 (7th Cir. 2010) (quoting Wallace v. Herron, 778 F.2d 391, 394 (7th Cir. 1985)).

[92] *See* Wescott v. Reisner, 2018 U.S. Dist. LEXIS 92320, at *7 (N.D. Cal. June 1, 2018) ("Because Ms. Condon was not a party to the agreement . . . she cannot be said to have consented to the forum selection clause; thus, she did not submit to the jurisdiction of California courts.").

[93] See, e.g., Telemedicine Solutions LLC v. WoundRight Techs., LLC, 27 F.Supp.3d 883, 896-96 (N.D. Ill. 2014).

[94] See Tamburo, 601 F.3d at 705.

first emerged in the so-called "stream of commerce" cases in which a defendant manufacturer or seller would place an item in the stream of commerce, perhaps by selling it to another manufacturer that would incorporate that component into a larger product, or perhaps by selling the product to a wholesaler or other seller who would eventually sell the product to someone in the forum state where the product would cause an injury. In other permutations, a buyer might decide to take the product with them to yet another state where the product would cause an injury. In each of these scenarios, the plaintiff could make a persuasive case that it was foreseeable that the defendant's conduct would lead to harm in the forum state.

In *World-Wide Volkswagen*, the Supreme Court announced that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."[95] It did not foreclose the usage of foreseeability altogether, but cautioned that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum Sate are such that he should reasonably anticipate being haled into court there."[96] Although the Court continued to flirt with the idea that strong foreseeability of the defendant's conduct causing harm in the forum state would be sufficient for minimum contacts,[97] a majority holding for a clear adoption of a "foreseeability" test for minimum contacts never emerged.[98] Time and time again, lower courts have shied away from relying on the "foreseeability" of conduct resulting in some sort of harm in or connection to the forum as a basis for constitutionally sufficient minimum contacts.

Despite the fact that foreseeability plays, at best, a supporting role in establishing minimum contacts in traditional in personam cases, foreseeability is front and center in the test that most courts now use to determine whether a non-signatory defendant is bound by a forum selection clause.[99] While the "closely related" prong functions as a proxy for contact with the forum, the "foreseeability" prong appears to be a substitute for consent. A party that engages in activity with other individuals or entities bound to a forum selection clause can foresee that litigation between signatories would be confined to the named jurisdiction. Through knowledge of the prior actions of the signatories, in other words, the defendant has bound itself to the forum by purposefully engaging with parties who might later litigate in that forum. This is not necessarily an outrageous constitutional argument. The problem is that courts would not tolerate that use of foreseeability as a manifestation of purposeful availment of the forum or of fictitious consent in any other context.

Take the facts of *J. McIntyre Machinery* as an example. There, the defendant, an English manufacturer sold a metal shearing machine to its Ohio distributor who then sold it to the New Jersey employer of the injured plaintiff. That a foreign manufacturer who engaged an exclusive distributor for the purposes of selling its products to U.S. customers in all 50 states could not foresee that its product might cause harm in one of the places of sale and use is laughable. It was this commerce-connected foreseeability that propelled Justice Brennan's argument in *Asahi* that foreseeability in the stream of commerce was tantamount to purposeful availment of the forum. Foreseeability, then, was taken as a given by all nine justices in *J. McIntyre* – no one could seriously argue that J. McIntyre could not foresee both harm and the possibility of litigation in a forum state. Nevertheless, Justice Kennedy used his plurality opinion to emphasize that "foreseeability is inconsistent with the premises of

[95] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980).
[96] *Id*. at 297.
[97] See Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 119 (1987) (Brennan, J. concurring); J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011) (Ginsburg, J. dissenting).
[98] *See*, Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L. J. 189, 216 – 21 (1998).
[99] *See, e.g.* H.H. Franchising Sys. v. Gardner, 2015 WL 4464774 at *9 (S.D. Oh. July 15, 2015) ("The *principal consideration* . . . is whether the non-signatory should have reasonably foreseen that he might be required to appear in another jurisdiction.") (emphasis added).

lawful judicial power."[100] No amount of clairvoyance by the defendant could overcome the deficit of other purposeful acts directed toward the forum state. Yet when a court binds a non-signatory to a forum selection clause in state where the defendant otherwise has no other contacts on the basis that it was foreseeable that litigation involving *other* parties might involve a forum selection clause, it is doing exactly what Justice Kennedy denounced in *J. McIntyre.* It is using the defendant's "expectations" rather than its "actions" to "empower a State's courts to subject him to judgment."[101]

To be clear, we do not endorse this conception of the limits on personal jurisdiction and the meaning of minimum contacts. Numerous commentators (and the New Jersey Supreme Court itself) have argued that it would be perfectly constitutional to subject J. McIntyre to New Jersey's jurisdiction, and these arguments include a reanimation of Justice Brennan's foreseeability arguments from *Burger King* and *Asahi*. The problem that we identify is a fundamental unfairness in the treatment of one class of non-resident defendants (non-signatories to forum selection clauses) as beholden to a foreseeability regime that does not apply to nearly all other non-resident defendants.

Reimagining the facts of *J. McIntyre* elucidates this asymmetry. Suppose that Mr. Nicastro's employer had insisted on a forum selection clause naming New Jersey in the contract of sale when it purchased the metal shearing machine from the Ohio distributor. This contract could be implicated in a products liability lawsuit arising from J. McIntyre's alleged negligence in the design and manufacture of the metal shearing machine.[102] According to the closely-related-and-foreseeable test, J. McIntyre might have known of such a clause and should have foreseen litigation in that forum. Suddenly, its expectations matter more than its actions. Its actions are no more purposeful, and consent as submission to the forum is just as fictional whether it is proximate to the consent of others or it is "consenting" by benefiting from the laws and economy of that forum. The arguments for litigation efficiency do not bridge this divide. While courts that apply the closely related and foreseeable test often do so in the name of avoiding piecemeal litigation in multiple fora, plaintiffs have made the same arguments in non-forum selection cases to little avail. U.S. plaintiffs must file multiple lawsuits if all defendants cannot be found in a single forum. This seemingly exigent circumstance that justifies using foreseeability to connect non-signatories has found little purchase outside of the context of non-signatories and forum selection clauses.

To be sure, a few courts have rejected the centrality of "foreseeability" when called upon to enforce forum selection clauses against non-signatories. As one federal district judge bluntly stated, "[i]f foreseeability cannot establish minimum contacts it should not be a sufficient basis for finding a waiver or implied consent either."[103] Such opinions highlight the possibility of alignment between foreseeability in minimum contacts and foreseeability in forum selection clauses. Indeed, the alignment might ultimately run in the other direction, as a signal to courts that a more forgiving minimum contacts standard could be beneficial to plaintiffs and, as a practical matter, not unnecessarily harsh to defendants whose foreseeable and purposeful conduct ties them to a forum state. At bottom, however, the "foreseeability" prong of the closely-related-and-foreseeable test falls

[100] J. McIntyre Machinery, Ltd., 564 U.S. at 883.
[101] *Id*.
[102] Moreover, J. McIntyre would not be bound to either of these contracts because it was not in privity with the employer or the tort victim. When the Supreme Court has extended these sorts of contractual provisions "upstream" or "downstream" in a chain of sale, it has done so by deliberately discarding privity as a consideration. *Cf.* Norfolk Southern Rwy. Co. v. Kirby, 543 U.S. 14 (2004).
[103] Guaranteed Rate, Inc. v. Conn., 264 F. Supp. 3d 909, 926 (N.D. Ill. 2017); *see also* Truinject Corp. v. Nestle Skin Health S.A., 2019 U.S. Dist. LEXIS 215313, at *28-29 (D. Del. Dec. 13, 2019) ("I have serious questions about the constitutionality of using the 'closely related' test to exercise personal jurisdiction over a non-signatory to a contract with a forum selection clause."); Arcadia Biosciences, Inc. v. Vilmorin & Cie, 356 F. Supp. 3d 379, 395 (S.D.N.Y. 2019) ("[C]onstitutional requirements caution against a liberal application of forum selection clauses to non-signatory defendants.").

prey to the same bootstrapping problem that has frustrated courts when trying to use foreseeability as a means for finding minimum contacts.[104]

### C. Agency and Corporate Alter Egos

Courts regularly invoke the closely-related-and-foreseeable test to enforce forum selection clauses against non-signatories when there is "close relationship" between the non-signatory and the entities who own, operate, or manage the entity that executed the contract containing the clause.[105] In *Pegasus Strategic Partners, LLC v. Stroden*, the court asserted personal jurisdiction over two directors in an LLC notwithstanding the fact that the LLC was the only signatory to the agreement.[106] In *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd.*, the court asserted personal jurisdiction over the parent company of the signatory entity even though the parent was a non-signatory to the agreement with the clause.[107] And in *American Maplan Corp. v. Hebei Quanen High-Tech Piping Co.*, the court asserted personal jurisdiction over two non-signatory corporate officers on the basis of a forum selection clause in a contract executed by the entity that employed them.[108]

In some instances, these cases do not present serious constitutional personal jurisdiction problems because the non-signatory is, in fact, quite intertwined with the signatory in its status and conduct. This creates room for two constitutional paths to personal jurisdiction. If consent alone forms the constitutional basis for personal jurisdiction, then the question should be wholly resolvable based on the generally applicable contract and agency principles discussed in Part I.A. Use of the closely-related-and-foreseeable test in these circumstances is unnecessary and undesirable. The test's deployment here makes it less likely that the courts will rely on the solid contractual foundation for binding the non-signatory to the forum selection clause according to the usual criteria. Utilizing the test in this context also singles out forum selection clauses for special treatment, indicating that it may be easier to bind a non-signatory to a forum selection clause than to any other part of the contract or to the contract as a whole. Where the "close relationship" is one in which the non-signatory is working functions more or less as a unit with the signatory, the relationship should be expressed and analyzed using the more familiar tools of agency, third party beneficiary law, and equitable estoppel.

The same insight may be applied to the question of when a corporate affiliate is subject to minimum contacts. If the non-signatory's entangled relationship with the signatory entity is so totalizing, then existing minimum contacts doctrine already has sufficient tools for extending personal jurisdiction to the non-signatory. If the non-signatory's conduct is so bound up in the

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[104] *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. Hastings L. Rev. 19, 94 (1990) ("Any expectation that the defendant has of avoiding an out-of-state court is a function of the jurisdictional rules themselves."). One can detect a similar pattern the closely-related-and-foreseeable cases. When the test is applied in a way that does not raise serious due process considerations, it is generally because the defendant already evinced significant connections to the forum state without the element for foreseeability.

[105] *See, e.g.,* Borden LP v. TPG Sixth St. Partners, 2019 NY Slip Op 30056(U), ¶ 5 (Sup. Ct.); GlaxoSmithKline LLC v. Laclede, Inc., 2019 U.S. Dist. LEXIS 10952, at *14 (S.D.N.Y. Jan. 23, 2019).

[106] 2016 NY Slip Op 31159(U), ¶ 3 (Sup. Ct.).

[107] 2017 NY Slip Op 06344, ¶ 3, 154 A.D.3d 171, 179, 62 N.Y.S.3d 1, 8 (App. Div. 1st Dept.) ("If the nonsignatory party has an ownership interest or a direct or indirect controlling interest in the signing party, or, the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process, then, a finding of personal jurisdiction based on a forum selection clause may be proper, as it achieves the 'rationale behind binding closely related entities to the forum selection clause [which] is to promote stable and dependable trade relations'").

[108] No. 17-1075-JTM, 2017 U.S. Dist. LEXIS 192330, at *42 (D. Kan. Nov. 21, 2017); *see also* Ackerman v. Secdo, Inc., No. 17-Civ-7845, 2019 U.S. Dist. LEXIS 238076, at *19 (S.D.N.Y. Oct. 11, 2019) (asserting personal jurisdiction over individual because he was a corporate officer and because he was the principal negotiator for five sales contracts notwithstanding the fact that he did not sign any of these agreements in his personal capacity).

conduct of the signatory, minimum contacts also provides the requisite analytical tools. To cite a "close relationship" between the signatory and the non-signatory as a constitutional shortcut to jurisdiction when the relationship is *not* totalizing and the non-signatory's conduct is *not* bound up with the conduct of the signatory, however, flies in the face of even the most basic axioms of personal jurisdiction doctrine. Service of process on a corporate director, officer, manager, subsidiary, or other affiliate cannot, in and of itself, suffice for personal jurisdiction.[109] In jurisdictions where such service of process is satisfies statutory and constitutional *notice* requirements, courts and commentators repeatedly intone that the rules for serving the defendant cannot create the conditions of constitutional personal jurisdiction where it does not otherwise exist. "An officer of a corporation is not the corporation."[110]

A "close relationship" between business entities is also an insufficient basis for a court to impute the forum contacts of one business entity to another. In *Daimler AG v. Bauman*, the Court held that for general jurisdiction, a subsidiary's contacts may only be imputed to a foreign corporation if the subsidiary is the "alter ego" of the parent,[111] a relationship that requires a finding that the businesses are "not really separate entities."[112] Courts have noted the parallel between imputing contacts for purposes of personal jurisdiction and the "corporate veil fiction" which isolates the actions, profits, and debts of the corporation from the individuals who invest in and run the entity."[113] It takes "extraordinary circumstances" to pierce the corporate veil, and simply acting in concert with another entity for certain purposes would not justify imposing liability on the second entity.[114]

Although the forum selection clause cases are not themselves general jurisdiction cases, the closely-related-and-foreseeable test replicates the problem that Justice Ginsburg criticized in *Daimler*, namely, that it binds a non-resident to a forum without constitutionally meaningful specificity. The closely-related-and-foreseeable test does the same thing: if a person or company affiliates itself closely enough with one who has signed a forum selection clause, then they can be bound, regardless of whether other conduct or affiliation would be contact with the forum. Some of the entanglements and affiliations between companies do amount to the sort of affiliation with a forum that would be contractually and constitutionally significant. But the closely-related-and-foreseeable test allows the more attenuated contacts slip through the cracks.

To illustrate this point, compare the problem of imputed contacts in general jurisdiction to the problem of binding a non-signatory to a forum that has no relationship to the contract or performance, save for its designation in the forum selection clause. In *Daimler*, a lawsuit involved Argentinian nationals suing a German corporation for the human rights abuses that the German company's Latin American subsidiary allegedly had perpetrated against the plaintiffs in the 1980s, the forum (California) was wholly unrelated to the cause of action and the parties. The only relevant affiliation to California was that of Daimler's American subsidiary. Compare this, again, to a situation

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[109] *See, e.g.,* Goldey v. Morning News of New Haven, 156 U.S. 518, 521–22 (1895) (service of process only confers jurisdiction when service of process was made "in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there."); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Martinez v. Aero Caribbean, 764 F.3d 1062, 1068 (9th Cir. 2014) (the Supreme Court "has required an analysis of a corporation's contacts with the forum state even when tag jurisdiction, if available, would have made such analysis unnecessary.").

[110] Martinez, 764 F.3d at 1068. Courts applying the closely-related-and-foreseeable test routinely overlook this fact. *See* Loma Linda Univ. v. Smarter Alloys, Inc., 2020 U.S. Dist. LEXIS 169856, at *50-51 (W.D.N.Y. Aug. 12, 2020) (concluding that a corporate employee who was not a signatory to the agreement executed by the corporation was bound by a forum selection clause in that agreement—and hence subject to personal jurisdiction in New York—because he "actively negotiated" the agreement signed an "acknowledgement" of the agreement).

[111] 571 U.S. 117, 134 (2014).

[112] *See* Ranza v. Nike, Inc., 793 F.3d 1059, 1072 (9th Cir. 2015).

[113] Dill v. Rembrandt Grp., Inc., 474 P.3d 176, 183 (Colo. App. 2020).

[114] *Id*.

where the only connection between the parties, the cause of action, and the forum, is a forum selection clause. The asymmetry is distressing – California might have had a stronger pull over the non-signatory new employer of an employee who signed a non-compete clause containing a California forum selection clause, even if the parties and employment had *nothing* to do with California, than it would have to offer itself as a forum to hear claims of serious human rights abuses.[115]

*Daimler* foreclosed the use of agency alone to impute contacts for general jurisdiction, but courts can still impute contacts between affiliated entities for purposes of specific jurisdiction.[116] Since a forum selection clause is itself a relevant forum contact,[117] that contact may be imputed for purposes of specific jurisdiction. Awareness of a forum selection clause by a non-signatory, in other words, could be one factor that helps to establish purposeful availment of the forum. But under the closely-related-and-foreseeable test, the presence of a forum selection clause allows a court to short-circuit the analysis of the connection between the defendant, the forum, and the cause of action that would be required of any other defendant. It is unclear why a forum selection clause should have such a gravitational pull in situations where agency law or other contract principles would not otherwise bind the non-signatory to the contract.

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In Part I, we identified a new legal doctrine—the closely-related-and-foreseeable test—and showed that this doctrine is now widely used by courts to bind non-signatories to forum selection clauses. In Part II, we documented the existence of an asymmetry. In ordinary cases, a non-resident defendant's amenability to jurisdiction is evaluated by looking at that defendant's connections with the forum. In cases involving forum selection clauses, by contrast, by contrast, a non-signatory defendant's amenability to jurisdiction is evaluated by looking at that defendant's connections with the contract. We further noted that this asymmetry threatens to destabilize traditional personal jurisdiction and minimum contacts analysis.

In Part III, we take a step back to explain *why* forum selection clause cases involving non-signatories have drifted into this parallel track of personal jurisdiction analysis. We then argue that a fundamental reconceptualization of the role that consent plays in personal jurisdiction doctrine holds the key to bringing these parallel tracks back into alignment. Our goal in Part III is not to solve any particular doctrinal problem. Instead, it is to encourage courts to bring forum selection clauses—as applied to signatories and non-signatories alike—within the umbrella of due process and minimum contracts as a first step in rethinking the broader law of personal jurisdiction.

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[115] Cf. Fair Isaac, Corp. v. Gordon, 2016 Minn. App. Unpub. LEXIS 1137 (Ct. App. Minn. Dec. 27, 2016).

[116] Daimler, 571 U.S. at 135 n.13 ("a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there" but "it does not inevitably follow. . . that similar reasoning applies to general jurisdiction."). *See also* Alcide v. Nippon Yusen Kabushiki Kaisha, 465 F. Supp. 3d 588, 607 (E.D. La. 2020) ("a subsidiary's contacts may be imputed to its parent to specific jurisdiction.") Viega GmbH v. Eight Jud. Dist., 130 Nev. 368 (2014) (appropriate agency theory enough to impute contacts of subsidiary to parent for purposes of specific jurisdiction); Cyganowski v. Beechwood Re Ltd. (In re Platinum-Beechwood Litig.), 427 F. Supp. 3d 395, 460 (S.D.N.Y. 2019) (concluding parent was bound by forum selection clause in contract executed by its subsidiary and agent and was therefore subject to personal jurisdiction in New York for claims relating to that contract). *But see* In re Griffith v. SSC Pueblo Belmont Operation Co. LLC, 381 P.3d 308 (Colo. 2016) (determination of imputation of contacts from subsidiary to parent required for both general and specific jurisdiction).

[117] *See* Burger King v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985).

## III. TOWARDS A MINIMUM CONTACTS STANDARD FOR FORUM SELECTION CLAUSES

Although many courts use the constitutional buzzwords of "consent," "minimum contacts" and "due process," very few courts have engaged in the deeper constitutional inquiry of where forum selection clause enforcement fits. Forum selection clauses are a subset of the broader category of consent, a category that has been relatively underexamined for its relationship to minimum contacts in particular and to due process writ large. At heart, this inquiry revolves around the question of whether personal jurisdiction based on consent is subject in whole or in part to the minimum contacts test and, if so, how consent via forum selection clause, or proximity thereto, should be analyzed as a matter of due process.

In this Part, we first evaluate several different conceptual frameworks for thinking through the problems posed by forum selection clauses and their enforcement against non-signatories. We then make the case that the question of whether a forum selection clause provides a basis for the assertion of personal jurisdiction over a non-signatory defendant should be evaluated through the lens of minimum contacts rather than consent.

### A. Possible Conceptual Frameworks

There is universal agreement among the courts that a forum selection clause may provide a valid basis for the assertion of personal jurisdiction. The decisions in support of this proposition, however, lack a cohesive conceptual grounding. Courts splinter over the constitutional terms in which the test is couched, disagreeing on whether and how the test relates to the minimum contacts doctrine. This stems from the broader conundrum of characterizing consent as a form of minimum contact or as a phenomenon with its own due process grounding that stands outside of minimum contacts. There are, broadly, speaking three approaches. The first holds that the enforcement of a forum selection clause should analyzed as part of the minimum contacts inquiry. The second frames the issue through the lens of consent. The third posits that this basis for personal jurisdiction exists outside the due process framework altogether.

#### 1. Minimum Contacts

Some courts apply a minimum contacts framework to the enforcement of forum selection clauses against non-signatories.[118] These courts pair this with a tacit understanding that a valid forum selection clause satisfies the minimum contacts test in and of itself.[119] Under this approach, any party bound by a forum selection clause is seen to automatically have minimum contacts with the forum state. The purpose of the closely-related-and-foreseeable test, on this account, is to establish which parties are bound to the forum selection clause, regardless of signatory status, and the status of a bound party is the totality of minimum contacts analysis. Courts applying this approach have reached different conclusions about the application of a forum selection clause to non-signatory defendants. What is worth noting is that courts taking this approach are the most likely to conclude that a non-signatory defendant is *not* bound by a forum selection clause in situations where it otherwise lacks minimum contacts with the forum.[120] This constitutes a minority position in a world where application of the closely-related-and-foreseeable test frequently results in a finding that a

[118] *See* Highway Commer Servs. v. Zitis, 2008 U.S. Dist. LEXIS 32487, at *9 (S.D. Oh. Apr. 21, 2008); Standlee Premium Prods., LLC v. WGST, Inc., 2020 N.Y. Misc. LEXIS 10207 (Sup. Ct. NY Nov. 23, 2020).
[119] *See* Veteran Payment Sys., LLC v. Gossage, 2015 U.S. Dist. LEXIS 16261 (N.D. Oh. Feb. 10, 2015); AAMCO Transmissions, Inc. v. Romano, 42 F. Supp. 3d 700, 708 (E.D. Pa. 2014).
[120] *See* Guaranteed Rate, Inc. v. Conn., 264 F. Supp. 3d 909, 936 (N.D. Ill. 2017).

non-signatory is bound to the forum selection clause and thus subject to the personal jurisdiction of the forum state.

2. Consent

The second approach posits that the minimum contacts analysis is unnecessary when a forum selection clause chooses a particular jurisdiction. This emanates from the general proposition that "[d]ue process is satisfied when a defendant consents personal jurisdiction by entering into a contract that contains a valid forum selection clause,"[121] or that the use of a forum selection clause indicates a "waiver" of minimum contacts.[122] Courts have held that "[a]n express consent to jurisdiction . . . satisfies the requirements of Due Process. . . . and an analysis of minimum contacts becomes unnecessary."[123]

This framing of forum selection clauses—that they exist within due process but outside of minimum contacts—is premised on the idea that the defendant has agreed to submit itself to the power of the forum state and has waived the right to raise a due process defense. Courts that rely on this approach to explain the relationship of non-signatories to the enforceability of forum selection clauses do so by eliding the contract question with the constitutional question. Recall that many of the cases involving non-signatories do not raise obvious constitutional questions, namely, those situations in which a non-signatory plaintiff or defendant seeks to enforce the clause against a signatory. In both instances, the presumption is that there are no other due process barriers to exercising personal jurisdiction over the defendant who is either already subject to the court's jurisdiction or has expressly consented by appearing in the action and not challenging the court's personal jurisdiction. Thus, courts develop doctrines to explain when parties are *bound* by a forum selection clause without stopping to consider whether the question of the *waiver* of a constitutional right or consent to jurisdiction requires an additional set of doctrinal tools.

3. Outside of Due Process

The last, and perhaps most startling approach, is to hold that forum selection clauses stand outside of due process constitutional analysis altogether. These courts have announced that "when parties choose a particular forum, their selection will be enforced without the need to engage in traditional personal jurisdiction analysis, including determining whether constitutional due process requirements have been met,"[124] or that "[w]here an agreement contains a valid and enforceable forum selection clause, it is not necessary to analyze jurisdiction under . . . federal constitutional requirements of due process."[125] This puts non-resident, non-signatory parties to a forum selection clause on exceptionally precarious constitutional footing. Courts enforcing forum selection clauses against signatories generally refer to the due process grounding for such enforcement.[126] And, as we shall see, even non-residents served pursuant to transient jurisdiction principles are not thought to be outside of personal jurisdiction due process protection.[127] This approach would leave non-

[121] Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 726 (8th Cir. 2001).
[122] *See* Ameritas Inv. Corp. v. McKinney, 269 Neb. 564, 571 (2005).
[123] Solae, LLC, v. Hershey, Can., Inc., 557 F. Supp. 2d 452, 456 (D. Del. 2008).
[124] Firefly Equities LLC v. Ultimate Combustion Co., 736 736 F. Supp. 2d 797, 800 – 01 (S.D.N.Y. 2010) (applying standard to non-signatories).
[125] Am. Med. Distribs., Inc. v. Saturna Grp. Chartered Accountants, LLP, 2016 U.S. Dist. LEXIS 92387, at *9 (E.D.N.Y. July 15, 2016); *See also* LaRoss Partners, LLC v. Contact 911 Inc., 874 F. Supp. 2d 147, 154 (E.D.N.Y. 2012).
[126] See *infra* Part III.A.
[127] *See* Burnham v. Sup. Ct. of Cal. 495 U.S. 604, 609 (1990) (determination of the assertion of personal jurisdiction within a due process framework).

signatories in roughly the same constitutional position as foreign sovereigns who are not protected by due process because they are not considered "persons" within the meaning of the Constitution.[128]

Other courts simply do not mention due process at all. While they avoid proclamations that due process is inapplicable, they omit any reference to either minimum contacts or due process, and instead analyze the closely-related-and-foreseeable test as if it were its own constitutionally sufficient criteria without directly invoking either a minimum contacts framework or a consent framework.[129] These approaches that sideline due process stem from the fact that the closely-related-and-foreseeable test has applications entirely outside of personal jurisdiction, for example, when a non-signatory defendant seeks to invoke the clause against a signatory plaintiff,[130] or when parties do not challenge the personal jurisdiction of the court over the defendant, but seek a change of venue, a remand from federal to state court, or a dismissal based on forum non conveniens. Minimum contacts and due process are not relevant to these doctrines, so their omission from the opinions is expected. The problems begin when analysis that is necessarily devoid of due process inquiry migrates into challenges to forum selection clause enforcement that include challenges to the personal jurisdiction of the forum state. That is the point at which jurisdiction-granting forum selection clauses appear to be an exception to due process altogether, a position that is, at best, constitutionally questionable.

### B. The Case for Minimum Contacts

#### 1. Protecting Non-Signatory Defendants

In our view, the question of whether a forum selection clause provides a basis for the assertion of personal jurisdiction over a non-signatory defendant should be evaluated through the lens of minimum contacts. The primary advantage of subjecting forum selection clauses to the minimum contacts standard is that it would impose some discipline on the fractured factual and legal landscape of forum selection clause enforcement against non-signatories. It must be noted, however that the minimum contacts test itself is a difficult and convoluted set of doctrines. To bring forum selection clause enforcement under the minimum contacts umbrella would not be an instant cure-all for the knotty problems that courts face. It would, however, force courts to nominally treat all non-resident, non-signatory parties equally without letting forum selection clauses become a ticket to nearly unlimited exercises of jurisdiction so long as the plaintiff can show a modicum of foreseeability on the part of the defendant.

Indeed, defendants who are non-signatories to forum selection clauses are quite possibly the least protected litigants with respect to personal jurisdiction in the modern doctrinal landscape. They are not afforded the generic application of consent-as-due-process given to signatories. They do not benefit from the ever-narrowing world of permissible minimum contacts that govern the jurisdiction of non-resident defendants in ordinary litigation. They receive even less solicitude than resident plaintiffs whose interests in suing at home are at least nominally accounted for under the *World-Wide Volkswagen* fairness factors.[131] In the most alarming framing, these defendants are on par with the "non-persons" who fall outsides of constitutional protection altogether.[132] Of course, not every non-signatory defendant finds itself in dire straits. Plenty of these parties would meet other criteria for

[128] *See* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019).
[129] *See, e.g.,* Magi XXI, Inv. v. Stato della Citta del Vaticano, 818 F. Supp. 2d 597 (E.D.N.Y. 2011); In re Optimal U.S. Litig., 813 F. Supp. 2d 351 (S.D.N.Y. 2011).
[130] See supra Part I.C.2.
[131] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
[132] See supra note 121 and accompanying text.

jurisdiction in the forum state. But the assumption of constitutionality without a deeper structured analysis is troubling. If the question of whether a non-signatory is subject to personal jurisdiction on the basis of a forum selection clause is analyzed through the lens of minimum contracts, many of these issues fall away.

### 2. Plugging the Due Process Cracks

Unlike the implied or indirect forms of consent such as registration statutes, courts have assumed that forum selection clauses are rock solid examples of express consent. Having decided, for better or for worse, that forum selection clauses are enforceable, even in contracts of adhesion or other situations in which litigants had questioned the meaningfulness of a signatory's consent,[133] courts assumed that the constitutional questions about forum selection clauses were all but answered. A minimum contacts analysis would be unhelpful or duplicative.

This Article has shown, however, that by letting forum selection clauses fall by the wayside, courts have created a constitutional gray zone for certain litigants. Non-signatories against whom the closely-related-and-foreseeable test is applied are often parties who would not be bound to a contract, or even the remainder of the relevant contract, by ordinary contract principles. Although the binding of signatories to contracts of adhesion is still a subject of heated academic debate, the doctrine is quite clear – signatories may be bound to contracts of adhesion, and this principle extends far beyond forum selection clauses into all aspects of contractual enforcement.[134] Thus, even though it may be worth urging courts to eventually reconsider the efficacy and fairness of consenting to jurisdiction via adhesion contracts, one can at least say that forum selection clause signatories are not singled out for a type of consent that would be unacceptable when applied to other aspects of a contract. Without a coherent theory of consent and without the backstop of minimum contacts, non-signatories to forum selection clauses have fallen through the due process cracks. It is time for courts to begin analyzing forum selection clause personal jurisdiction based within this framework.[135]

The difference in treatment between these two categories of defendants is not the result of superficial analysis or benign neglect. Rather, it is part and parcel of the Supreme Court's fractured approach to the due process limits on the exercise of personal jurisdiction. Forum selection clauses lie at the unstable and unresolved crossroads of traditional bases of personal jurisdiction and due process. The dominant approaches to the personal jurisdiction aspect of forum selection clause enforcement reflect courts' tacit assumptions about the force of forum selection clauses together with a failure to fully analyze the relationship between traditional bases of jurisdiction and the minimum contacts test. Courts have mostly (although not unanimously) assumed that a presumptively valid forum selection clause is such an uncomplicated connection to the forum state that the only remaining analytical questions concern whether the non-signatories are bound by the clause. While we argue that this approach is mistaken, it is the logical extension of the evolution of post-*International Shoe* due process jurisprudence.

How did the parallel universe of faux-minimum-contacts for forum selection clause enforcement come to be? To understand how courts arrived at the current patchwork of opinions,

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[133] *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (591095 (1991); Smith v. Prof'l Claims, Inc., 19 F. Supp. 2d 1276, 1280 (M.D. Ala. 1998) ("A forum selection clause does not become unenforceable simply because it is part of an adhesion contract."); Eisaman v. Cinema Grill Sys., Inc., 87 F. Supp. 2d 446, 450 (D. Md. 1999)("The fact that a forum-selection clause is part of a form contract presented by a party with superior bargaining power on a 'take-it or leave-it' basis does not render the clause unenforceable.")

[134] We do not endorse this doctrinal stance from a policy perspective, but simply note its pervasive existence as a doctrine of contract law that can be used to bind parties to an entire agreement.

[135] Although it might also make sense to locate the larger category of consent within minimum contacts, we reserve a more thorough exploration of this question for future work.

and analytical frameworks that constitute the closely-related-and-foreseeable test, one must take a step back and appreciate the relationship of forum selection clauses and the due process limits on a forum state's exercise of personal jurisdiction. The doctrinal chasm between the enforcement of forum selection clauses and other exercises of jurisdiction over non-resident defendants, begins with a doctrinal and historical account of how courts have understood the place of so-called "traditional" bases of jurisdiction.

Prior to 1945, the Supreme Court limited the constitutional scope of personal jurisdiction to four traditional bases: (1) presence, (2) domicile or status, (3) in rem, and (4) consent. Courts and litigants stretched the use and boundaries of each of these categories to reach non-resident defendants and establish jurisdiction over businesses whose "location" was difficult to determine. In 1945, the Supreme Court introduced the minimum contacts test in *International Shoe* which uses a defendant's contacts with the forum state as an additional constitutionally acceptable basis for jurisdiction.[136] The subsequent struggles to define the nature and sufficiency of minimum contacts are well-known. However, the scope of the minimum contacts test itself has also been a source of contention. *International Shoe* and its progeny concerned the use of minimum contacts to gain personal jurisdiction over out-of-state defendants who were formerly unreachable under the traditional jurisdictional bases. But *International Shoe* was silent on the question of whether the minimum contacts test applied to all exercises of jurisdiction, or only those long-arm statutes that did not use a traditional jurisdictional predicate. It is in this silence that the relationship between forum selection clauses and minimum contacts got lost.

Over three decades into the minimum contacts era, the Supreme Court began a piecemeal consideration of whether minimum contacts applies to the traditional bases of jurisdiction as well as to the modern era long-arm statutes. The use of intangible property as a basis for quasi in rem jurisdiction forced the first reckoning with the applicability of minimum contacts to personal jurisdiction outside of in personam exercises. In *Shaffer v. Heitner*, the Court held that the minimum contacts test applies to the use of quasi in rem 2 jurisdiction.[137] Justice Marshall reasoned that the potential for attenuated contact between the non-resident property owner and a forum state called into question the "continued soundness of the conceptual structure" of treating traditional bases of jurisdiction as standing outside of minimum contacts analysis.[138] This opened the door to the question of whether other traditional bases were subject to minimum contacts. The 1991 decision in *Burnham v. Superior Court of California*[139] concerned the outer constitutional bounds of transient or "presence" jurisdiction. The Supreme Court held in an 9-0 decision that California could constitutionally exercise personal jurisdiction over the defendant, but the Court split 4-4 on the reasoning. Justice Scalia relied upon the 19th Century understanding of transient jurisdiction as

[136] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[137] In rem jurisdiction stems for the same principles of state territorial sovereign power as in personam jurisdiction. The state has sovereign power over the disposition of property within its borders. This includes attaching property to adjudicate its status or disposition. These suits came to be known as "in rem" and "quasi-in-rem 1" suits. *See* Karen Nelson Moore, *Procedural Due Process in Quasi In Rem Actions after Shaffer v. Heitner*, 20 WM. & MARY L. REV. 157, 172 (1978) (distinguishing the two types of quasi-in-rem jurisdiction and stating that one type involves the attachment of property in the forum state that is completely unrelated to the claims of the plaintiff as long as "the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him"). Quasi in rem 2 jurisdiction involves attaching property within the forum state because of its potential use in satisfying a judgment on a claim wholly unrelated to the property itself, the theory being that if the defendant is liable to the plaintiff, the state has the power to adjudicate the "status" of property located within the forum state as "belonging" to the plaintiff. *See* 4B Charles Allen Wright & Arthur R. Miller, Adam Steinman, Federal Practice and Procedure, § 1070, *Jurisdiction Based on Property—In General* ("jurisdiction also could be asserted in rem or quasi-in-rem by predicating the court's ability to proceed on the basis of its power over the defendant's local property or status relationships, rather than on the basis of the presence of the defendant himself."); Matthew P. Harrington, *Rethinking "In Rem": The Supreme Court's New (And Misguided) Approach to Civil Forfeiture*, 12 Yale L. & Pol. R. 481, 486 (1994) ("The purpose of the action *in rem* is to declare status…the court is asked to recognize a change in the status of [the property's] ownership").

[138] 433 U.S. at 212 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.").

[139] 495 U.S. 604 (1990).

"[a]mong the most firmly established principles of personal jurisdiction in the American tradition."[140] While the minimum contacts test relaxed the rigid *Pennoyer* framework, it did not mean that transient jurisdiction was "itself no longer sufficient to establish jurisdiction."[141] Rather, "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard."[142] Justice Brennan rejected this categorical approach, writing instead that "[a]ll rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process."[143]

The tacit assumption about the remaining traditional bases of jurisdiction is that they were conceptually shielded from serious constitutional challenges. In rem and quasi-in-rem 1 use forum-state property that is also the subject of the lawsuit as a predicate for jurisdiction, thus the chances that the defendant-owner has no purposeful contacts with the forum state are remote.[144] That leaves consent as the last unexamined traditional basis of jurisdiction. Courts have viewed consent as akin to in rem or quasi in rem 1 jurisdiction: the basis of jurisdiction itself requires such a direct and purposeful connection to both the lawsuit and the forum that a formal minimum contacts analysis would be redundant. Although this is a relatively accurate descriptive account of courts' collective perspective on forum selection clauses, it is not entirely justified. Since the Supreme Court's 1991 *Carnival Cruise* decision, courts have upheld forum selection clauses against consumers or other parties who have "consented" to the forum via a boilerplate agreement that they may neither read nor comprehend.[145]

Applying the minimum contacts doctrine to forum selection clauses is an easy extension of the existing doctrinal framework. As *Shaffer* and the Brennan plurality opinion in *Burnham* show, the Supreme Court has already held that traditional bases of jurisdiction beyond the modern long-arm statutes can be subject to minimum contacts scrutiny. And the phenomenon of forum selection clauses themselves suggest that Justice Scalia's reasoning in *Burnham* is less forceful here. One reason that the Scalia plurality believed that transient jurisdiction should not be subject to minimum contacts was that "its validation is its pedigree."[146] In *Burnham*, Justice Scalia distinguished *Shaffer* by arguing that the quasi in rem sequestration proceeding was a "new procedure[], hitherto unknown" which requires minimum contacts analysis.[147] Forum selection clauses likewise lack a long historical pedigree; the use and enforcement of these provisions only gained traction in the post-World War II period when courts began to let go of the "ouster" doctrines that had, until that point, prohibited parties from making agreements that would "oust" a court of its power or jurisdiction.[148] And as we have shown in this Article, the enforcement of forum selection clauses against non-signatories is an even more recent phenomenon, dating back to the early 1980's. Forum selection clauses, being mostly unused and unenforceable in the pre- and post-*Pennoyer* eras, cannot be said to be a part of an ancient and historical form of consent that was a traditional basis of jurisdiction.

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[140] 495 U.S. at 610.
[141] 495 U.S. at 618.
[142] 495 U.S. at 619.
[143] 495 U.S. at 630.
[144] *See* Shaffer, 433 U.S. at 209 ("jurisdiction over many types of actions which now are or might be brough in rem would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard.").
[145] While the merits of enforcing boilerplate clauses against consumers are beyond the scope of this Article, it is worth noting that in skating past the minimum contacts question for consent, courts may be assuming a higher degree of purposeful conduct than is warranted for a basis of jurisdiction shielded from minimum contacts.
[146] Burnham, 495 U.S. at 621.
[147] *Id*. at 622.
[148] See Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion,* 98 B.U. L. REV. 127 134 (2018) (describing the rise and fall of ouster doctrine).

Instead, the quandary of enforcing forum selection clauses, in many ways, mirrors the factual world that the Court encountered in *Shaffer*. Most exercises of *in rem* jurisdiction appeared to be connected to the forum in some obvious or tangible way and allowing states to exercise jurisdiction over the disposition of property within its borders did not strike most jurists as intuitively unfair. But for the small subset of cases in which plaintiffs used intangible property to reach distant, non-resident defendants, the Court concluded that the minimum contacts test could act as functional backstop.

The same can be said of forum selection clauses. For one thing, applying a minimum contacts test would not alter the Court's current position regarding the enforcement of forum selection clauses as to signatories. Forum selection clauses have been enforced both in terms of conceptualizing consent as a *waiver* of the due process objection,[149] but also as itself a meaningful, purposeful contact with the forum state. One way to preserve the waiver aspect of forum selection clauses would be to subject *only* non-signatories to the minimum contacts test. Minimum contacts should be sufficient to maintain the status quo regarding signatories so long as courts continue to uphold contracts of adhesion writ large as enforceable. Bringing forum selection clauses within the minimum contacts fold might prompt some judges to reconsider whether such contracts really represent purposeful and voluntary forum-directed contacts. For those advocates interested in expanding plaintiffs' jurisdictional opportunities, this doctrinal foot-in-the-door would be a welcome change. But without broad, concomitant changes to contract law, courts are unlikely to categorically rethink the enforceability of forum selection clauses against signatories. Thus, skeptics should be reassured that an application of minimum contacts doctrine would be unlikely to disturb the doctrinal landscape as to forum selection clauses generally – any changes to this status quo would likely be part and parcel of a much larger revolution in prohibiting parties from using private contracts to alter procedural rights.[150]

To illustrate, consider again the scenario of non-signatories to a departing employee's non-compete or confidentiality agreement. In some situations, the agreement contains a forum selection clause that has little to do with the contract, its parties, or its performance.[151] As the *Fair Isaac* case discussed earlier shows, the fact that a defendant "knows" of a forum selection clause in the contract does not evince any targeted behavior toward the forum state that would count as a minimum contact but for the forum selection clause. But in other situations, the forum selection clause *can* act as a bridge of purposeful conduct to the forum. For example, in *C.H. Robinson Worldwide Inc. v. FLS Transportation*,[152] several former employees of C.H. Robinson were alleged to have wrongfully used Robinson's confidential information in breach of their confidentiality agreements, all of which contained a forum selection clause for Minnesota. The plaintiff alleged that the defendant, FLS, "told the[] former employees" that "'in the event legal action is commenced FLS will support and defend them."[153] Here, the closely related and foreseeable test allowed the court to point to several aspects of FLS's employment of the former Robinson employees as evidence that FLS was closely related to the dispute and the contract. But had the court also stopped to consider minimum contacts, it could

[149] *See* Burger King v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("personal jurisdiction is a waivable right. . . . particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction") (citing Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964)).

[150] The forum selection clause non-signatory is analogous to the intangible property owner in *Shaffer*. These are less common situations, but not so unusual that they should not be ignored for constitutional purposes. And even here, the minimum contacts test would not demand a total reversal with respect to enforcing forum selection clauses against non-signatories. In many instances, a forum selection clause is a meaningful contact with the forum state with which non-resident, non-signatory defendants interact. In any number of cases, the business that these non-signatories undertake with signatory parties, or with respect to contracts and agreements that contain forum selection clauses will indicate targeted conduct toward the forum state and purposeful availment of the forum.

[151] See *supra* notes 81-84 and accompanying text.

[152] 772 N.W.2d 528 (Ct. App. Minn. 2009).

[153] Id. at 532.

have found that FLS's promises to defend the employees constituted the sort of targeted forum conduct that truly tied FLS to Minnesota, as any lawsuits against the employees would necessarily be brought in that forum. Moreover, C.H. Robinson itself was located in Minnesota, so a minimum contacts analysis would give the plaintiff room to argue that FLS directed its harm toward the plaintiff where it was located and did business. The problem with the closely related and foreseeable test is that it puts *C.H. Robinson* on exactly the same footing as *Fair Isaac*, even though these cases would be treated quite differently had a forum selection clause not been in the mix.

3. Improving Minimum Contacts

We also believe that minimum contacts *itself* might have something to learn from the closely related and foreseeable test. The test's greatest due process failing is the way in which it singles out the presence of a forum selection clause as the reason to extend a far longer arm from the forum state to a non-resident defendant who has some entanglement with the parties who have initiated suit. But the rhythm and tone of many of the closely-related-and-foreseeable decisions should sound oddly familiar to the generations of lawyers who have struggled with the ebbs and flows of minimum contacts. It is the sound of the test that jurists like Justice Brennan have always *wanted* but could never quite achieve.[154]

To demand parity for forum selection clause non-signatories is not to unquestioningly doom them to the same unforgiving minimum contacts standard that has dominated personal jurisdiction for at the past three decades. It is, instead, to invite judges and commentators to consider how persuasive the reasoning in the closely-related-and-foreseeable test can be. It centers litigation efficiency and the interests of the plaintiff in filing a lawsuit in a single and predictable forum. It often focuses on a common sense understanding of the defendant's conduct toward the *plaintiff* and the situation without demanding "forum-directed" conduct that makes little sense in a national economy. It is a mode of analysis that should have its own gravitational force with regard to minimum contacts.

## CONCLUSION

At the outset of this Article, we identified a deep and abiding tension between litigation efficiency, on the one hand, and personal autonomy and due process, on the other, when courts are called upon to determine whether a non-signatory is bound by a forum selection clause. After briefly reviewing traditional doctrines of agency and contract law, we chronicled the rise of a new test—the closely-related-and-foreseeable test—that the courts apply exclusively to determine the rights and obligations of non-signatories with respect to forum selection clauses. The propriety of relying on this test, we argued, varies depending upon who is invoking the clause and for what purpose. When the test is invoked *by* a non-signatory, there is no problem. When the test is invoked *against* a non-signatory, however, it has the potential to come into conflict with values such as personal autonomy and due process.

[154] While this Article has identified the key doctrines and dimensions to non-signatory enforcement and articulated the need to bring these tests within a coherent due process minimum contacts framework, our analysis also demonstrates the potential for extending these arguments beyond forum selection clauses. For example, a renewed interest in corporate registration statutes has shown the limits of efforts to extract a business's consent to jurisdiction, with most courts holding that such consent cannot form the basis of general jurisdiction. *See generally* Monestier, *supra* note 5. Should courts adopt a minimum contacts approach to forum selection clauses, it will be necessary to think about the broader category of consent and how it fits into a coherent due process framework. Likewise, thinking carefully about the non-signatory problem in forum selection clauses provides fertile ground for developing new arguments about the application and enforceability of arbitration clauses by and against non-signatories. We hope to explore these problems in future work.

We then drew upon his insight to embark on a more general discussion of the law of personal jurisdiction. We argued that cases in which the courts have relied on the closely-related-and-foreseeable test to assert personal jurisdiction over non-signatories are out of step with existing Supreme Court jurisprudence in three respects. First, this test is not concerned with the existence of any connection between the defendant and the *forum state*. Instead, it focuses exclusively on the relationship between the defendant and the *contract* containing the forum selection clause. Second, the test places a great deal of weight on a concept—foreseeability—that the Supreme Court has never fully embraced in its personal jurisdiction jurisprudence. Third, the test makes it possible to assert personal jurisdiction over business affiliates in cases where this would not be allowed under the current minimum contacts framework. If the goal is to bring the treatment of contract non-signatories into line with that of out-of-state defendants, the closely-related-and-foreseeable test should be retired.

If the goal is to develop a better law of personal jurisdiction, however, the closely-related-and-foreseeable test actually has a lot to offer. Over the past decade, the Supreme Court has dramatically cut back on the ability of courts to assert personal jurisdiction over a wide range of corporate defendants. These decisions have attracted extensive scholarly criticism. The reasoning in the cases applying closely-related-and-foreseeable test offer a heretofore unappreciated way forward. If consent were to be brought within the minimum contacts framework, and if the more flexible test embodied in the closely-related-and-foreseeable test were to be applied to cases that do not involve non-signatory defendants, the law of personal jurisdiction would in our view be the better for it.