

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

E-TIME SYSTEM, INC.,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
VOICESTREAM WIRELESS CORP.,	:	NO. 01-5754
Defendant.	:	

Memorandum and Order

YOHN, J.

August ____, 2002

Presently before the court is defendant's motion to dismiss plaintiff's complaint or, in the alternative, to stay this litigation pending arbitration. For the reasons that follow, the motion will be granted in part and denied in part.

I Factual Background¹ and Procedural History

A Factual Background

This action is brought pursuant to the court's diversity jurisdiction by plaintiff E-

¹ Although styled as a motion to dismiss, defendant's motion is appropriately evaluated under the summary judgment standard, for reasons delineated *infra*. Accordingly, all of the facts delineated below are stated in the light most favorable to plaintiff as the non-moving party. See *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001).

Unlike a typical summary judgment motion, however, the motion currently at bar cannot be evaluated in light of the fruits of discovery as, to the court's knowledge, such has not yet transpired in this case. Accordingly, although my concern is with the existence of a genuine issue of material fact regarding the applicability of the dealer agreement's arbitration clause to plaintiff's present claims, the facts set forth, *infra*, are gleaned primarily from plaintiff's amended complaint.

Time System, Inc. (“E-Time” or “plaintiff”) against VoiceStream Wireless Corp. (“VoiceStream” or “defendant”). The factual backdrop for the present dispute is intricate, as it involves both the evolving relationship between E-Time and US Cellphone, Inc. (“USC”)—a corporation that currently shares a common ownership with E-Time²—and the interactions between each of these corporations and VoiceStream. The pattern of dealing that led to the present dispute began in 1998, when USC became a dealer—i.e., a vendor of cellular telephones and airtime—for Omnipoint Communications.³ *See* Amended Complaint ¶ 23. In 1999, Omnipoint was acquired by VoiceStream, and soon thereafter USC became a VoiceStream dealer.⁴ *See id.* ¶ 25. As a precondition to the inception of its business relationship with USC, VoiceStream required that USC sign its standard dealer agreement, which USC did on April 1, 2000. *See id.* ¶ 28. As specified in that contract, VoiceStream offers cellular phone service on both pre- and post-paid bases. A pre-paid account is one that requires the customer to purchase in advance a fixed number of airtime minutes that must be used within a given period of time. *See id.* ¶ 33. Upon the expiration of that time period or the exhaustion of all of the minutes purchased—whichever

² Both of these corporations are owned by Gil Barzeski and Harvey Mindel.

³ From its inception in 1996 through 1998, USC sold both cellular phone equipment and services and technical equipment unrelated to telephony, e.g. computers and computer accessories, and provided computer consulting services to a range of clients. Amended Complaint ¶¶ 6-7.

⁴ E-Time contends that “USC had no realistic alternative but to become a dealer for VoiceStream . . . [because a]ll of the activations and phones that USC . . . had sold on behalf of Omnipoint operated on the so-called GSM platform, and no other substantial GSM carrier operated in the Philadelphia area besides VoiceStream after its acquisition of Omnipoint.” Amended Complaint ¶ 25. Moreover, plaintiff asserts, “the majority of USC’s cellular phone business was represented by sales of prepaid activations of cellular telephone service, and VoiceStream is and was the only substantial vendor of pre-paid cellular service in the greater Philadelphia area.” *Id.* ¶ 26.

occurs first—the customer purchases a new allotment of airtime. By contrast, a post-paid account is one in which the customer is charged a flat amount per month for a pre-determined number of minutes and a fixed rate for any minutes above and beyond those covered by the flat amount, with these fees being assessed after the conclusion of the month. *See id.* ¶ 31.

The dealer agreement provided that VoiceStream was to pay USC an activation fee for each account sold. The amount of this fee varied according to whether the account was pre- or post-paid, and depended on the quantity of each type of account sold during the month in question. *See Amended Complaint* ¶ 34. The agreement also specified that VoiceStream was entitled to reclaim these activation fees under certain circumstances through the imposition of “charge backs.” *See id.* ¶ 37. In particular, if a post-paid customer deactivated her service within 120 days of the initial activation, or if a pre-paid customer deactivated her service within 180 days of initially activating, VoiceStream was entitled to recoup the activation fees paid to USC.⁵ *See id.* However, E-Time asserts that “by oral agreement and practice of the parties since the signing of the [d]ealer [a]greement,” VoiceStream was entitled to impose a charge back “only if, within the 180-day period following the activation, the prepaid customer quickly used all of the minutes he initially purchased, and then purchased no others for the next 110 days.” *Id.* ¶ 39. The purpose of this understanding was to prevent VoiceStream from benefitting from an activation procured by USC and subsequently depriving USC itself from reaping any such reward where the disruption in service was only “brief and temporary.” *Id.*

E-Time asserts that in February, 2001, VoiceStream sought for the first time to

⁵ E-Time avers that the difference in the length of these periods was disadvantageous and “of particular concern” to USC because USC “sold more prepaid activations than postpaid activations.” *Amended Complaint* ¶ 38.

impose charge backs on USC. *See* Amended Complaint ¶ 42. The amount sought totaled \$368,490, a figure that allegedly was the product of deactivations that had occurred between October, 2000 and February, 2001. *See id.* USC contested the accuracy of the amount claimed by VoiceStream to be due, and in response, VoiceStream alleged that in January, 2001 it had notified USC that it was reducing from 110 to 60 the number of days which a prepaid account must remain continuously inactive to warrant a charge back.⁶ *See id.* ¶ 44. E-Time contends that USC never received such notification. *See id.* ¶ 45. Moreover, VoiceStream allegedly indicated that the entire \$368,490 figure had been computed using a sixty day inactivity cutoff, and thereby conceded that it had violated the dealer agreement by imposing its January, 2001 reduction retroactively, i.e., beginning in October, 2000. *See id.* ¶ 47.

Based presumably on USC's questioning of the charge backs it had assessed, VoiceStream indicated on March 2, 2001 that it was terminating the dealer agreement. Amended Complaint ¶ 50. Upon learning this, plaintiff investigated further the charge backs that defendant had imposed, and discovered that a substantial percentage of the accounts on which these assessments were based remained active. *See id.* ¶¶ 49, 51, 54. Although USC offered to share the results of its investigation with defendant, VoiceStream refused to accept this information, *see id.* ¶ 52, though it did offer a small credit to plaintiff. *See id.* ¶ 53. USC rejected this offering as inadequate, and demanded that it be provided with substantiation of the \$368,490 figure. *See id.* Not only did VoiceStream refuse this demand, plaintiff avers, but further, it allegedly became "determined to obtain retribution against Mr. Barzeski personally by whatever

⁶ VoiceStream had the right to unilaterally modify the dealer agreement provided that USC was afforded 30 days notice of the change. *See* Amended Complaint ¶ 35.

means were available to it,” and subsequently “set its sights on the destruction of . . . [E-Time].”
Id. ¶ 55.

Notably, although it is now an independent legal entity, until July, 2001 E-Time was formally a division of USC. Amended Complaint ¶ 12. The roots of the change in E-Time’s legal status lie in the early months of that year, during which USC decided to expand the scope of its commercial endeavors, and “began to develop an innovative, computer-based technology for the electronic delivery to retailers of coupons used for the purchase of prepaid air time on wireless telephone networks.”⁷ *Id.* ¶ 8. Although USC had been purchasing “hard copy” (non-electronic) prepaid airtime coupons from a company called Urban Wireless (“Urban”) since 1999, Amended complaint ¶ 72, the development of e-pin technology enabled USC to provide its customers with access to prepaid cellular airtime in a significantly more efficient manner. In February, 2001, “this so-called ‘e-pin’ technology became operational[,] and USC began selling

⁷ E-Time specifically describes its e-pin business as follows:

[E-Time] contracts with retail vendors and supplies them both with hardware (if needed) and software which permits the retailers to obtain and resell coupons to prepaid wireless customers without the retailers having to carry any inventory of prepaid phone cards. Instead, [E-Time] carries the inventory. When a prepaid customer desires to purchase air time, long distance telephone time, or any other similar product, the customer presents himself to the retailer, who simply downloads the necessary information from [E-Time’s] server, prints the coupon at the retail site, issues it, and collects the money for the sale. Without bearing any inventory cost, the retailer can offer for sale any available “e-coupon” product. . . . E-pins are the actual codes that afford a coupon holder access to additional prepaid air time. The retail customer can then place phone calls until the prepaid amount of air time runs out. The air time service provider, *e.g.*, VoiceStream, is the ultimate source of these e-pins.

Amended Complaint ¶¶ 64, 66. Accordingly, E-Time avers, its capability to engage in its business depends on the availability of e-pins, access to which is controlled by VoiceStream. *See id.* ¶ 65.

coupons to retailers via electronic delivery under the [E-Time] trade name.” *Id.* ¶ 9. E-Time asserts that at this point “it became clear that [E-Time] would be a commercial success,” albeit in a different market than that in which USC had previously been operating, and USC consequently “began the process of separately incorporating” E-Time. *Id.* ¶ 10. This process culminated in July of the same year, when E-Time was formally incorporated “for the purpose of owning and operating as a stand-alone business the computer-based ‘e-pin’ technology.” *Id.* ¶ 12.

Accordingly, when VoiceStream allegedly set out to destroy E-Time during the spring of 2001, E-Time was still a division of, and thus legally indistinct from, USC.

As indicated *supra*, note 7, the e-pins that were sold by E-Time originated with VoiceStream. They then were purchased by Urban, which had become a distributor of e-pins for defendant, as it had attained “the capability of electronically transmitting e-pins to [E-Time].” Amended Complaint ¶ 71. E-Time, in turn, purchased these e-pins from Urban, and resold them to retailers of cellular air time. *See id.* ¶¶ 67, 73. It never engaged in direct commercial or contractual dealings with VoiceStream. *See id.* ¶ 69.

In April, 2001, following the termination by defendant of the dealer agreement with USC, E-Time—then still a division of USC—commenced purchasing e-pins from Urban. *See id.* ¶ 73. From that time through June, 2001, plaintiff alleges, the relationship between E-Time and Urban flourished, and Urban “expressed an interest in continued and increased business with [E-Time].” *Id.* ¶ 74. The success of this relationship, however, was achieved despite the efforts of VoiceStream to disrupt it. Specifically, E-Time asserts that in May, 2001, defendant ordered Urban to cease selling e-pins to plaintiff, and threatened that if Urban continued its business relationship with E-Time, VoiceStream would stop providing it with e-pins for resale. *See id.* ¶¶

76-77. Although this effort on defendant's part was unsuccessful, it renewed its threat to Urban in June, 2001, and this time, E-Time claims, Urban ceded to VoiceStream's demand.⁸ *See id.* ¶¶ 76-79. Plaintiff alleges that beginning in June, 2001, and continuing through the present day, Urban has, at VoiceStream's direction, refused to provide it with e-pins. *See id.* ¶ 79.

E-Time asserts that the business consequences of these actions on it have been severe. It avers that “[r]ather than obtaining e-pins electronically from Urban, [it] now must obtain hard copy coupons from different distributors, and then endure the time-consuming, costly and mistake-prone process of opening the bags that contain the coupons, scratching the silver coating, and entering the data by hand.” *Id.* ¶ 80. As a consequence of both this more cumbersome means of transmitting cellular air time codes and the loss of its business dealings with Urban, E-Time allegedly has suffered both pecuniary and reputational harms. *See id.* ¶¶ 82-83.

B Procedural History

On April 3, 2001, USC filed against VoiceStream a demand for arbitration based on those portions of the above-delineated course of dealing that had transpired as of that date. *See Exhibits in Support of Defendant VoiceStream Wireless Corporation's Motion to Dismiss Plaintiff's Amended Complaint or, in the Alternative, to Stay Litigation Pending Arbitration* (“Exhibits”) at Exhibit A to Exhibit 1. It was obligated to take this step, as opposed to pursuing a

⁸ Again, the alleged purpose of these actions was the furtherance of VoiceStream's alleged vendetta against Gil Barzeski, personally. Amended Complaint ¶ 62. Plaintiff alleges that Urban has informed it that “but for VoiceStream's coercion, Urban would have continued to sell e-pins to [E-Tims].” *Id.* ¶ 79.

litigious resolution of its conflict with VoiceStream, by a provision of the dealer agreement, which directed that any dispute arising from the dealings between USC and VoiceStream was subject to binding arbitration. *See Dealer Agreement* ¶ 12.11.1. In this demand, USC advanced four claims. The first sounded in breach of contract and fraud based on the allegedly unjustified charge backs imposed by VoiceStream; the second asserted that defendant breached the dealer agreement by terminating it illegally; the third contended that defendant breached that agreement by permitting other VoiceStream dealers to contract with USC's sub-dealers;⁹ and the fourth sounded in defendant's alleged interference with USC's prospective economic advantage. *See Arbitration Demand* ¶¶ 53-116. This fourth claim concerned specifically the actions taken by VoiceStream to disrupt USC's¹⁰ business relationship with Urban. *See id.* ¶¶ 109-116.

From its filing in early April, 2001 through mid-November, 2001, E-Time alleges,

⁹ To explain, pursuant to section 5 of the agreement, USC was entitled to conduct a portion of its sales through sub-dealers. The agreement further provided that once a given VoiceStream dealer—e.g., USC—had established a relationship with a subdealer, defendant was obligated to prevent all other VoiceStream dealers from conducting their own sales through the same sub-dealer. USC averred in the third count of its arbitration demand that VoiceStream approved USC's sub-dealers as sub-dealers for USC's local competitors. *See Arbitration Demand* ¶¶ 100-103.

¹⁰ For the sake of clarity, it bears repeating that USC and E-Time were a single legal entity at this time, and thus the injuries allegedly caused by VoiceStream to E-Time actually constituted harm to USC. Therefore, defendant's actions properly were the subject of the arbitration demand filed by USC in April, 2001.

I note, however, that USC's allegation in its April 3, 2001 arbitration demand that defendant already had interfered with its relationship with Urban is in some tension with plaintiff's assertion in this case that VoiceStream began in May, 2001 to attempt to undermine the relationship between Urban and E-Time, which was then a division of USC. Nonetheless, whether defendant's alleged tortious conduct commenced sometime prior to April 3, 2001 or in May, 2001, these actions were undertaken prior to E-Time's incorporation in July, 2001. As such, the apparent discrepancy in the accounts offered by USC and E-Time is not of dispositive import in the instant matter, *see infra*, and the court will not devote to it any further attention.

defendant failed to respond to USC's arbitration demand. *See* Plaintiff E-Time System, Inc.'s Memorandum in Opposition to Motion of Defendant VoiceStream Wireless Corp. to Dismiss Plaintiff's Amended Complaint or, in the Alternative, to Stay Litigation Pending Arbitration ("Pl.'s Memo.") at 3; Exhibits at Exhibits E-G to Exhibit 1. Accordingly, "[o]n November 13, 2001, USC filed in [this district] a petition under the Federal Arbitration Act . . . seeking to compel VoiceStream to participate in the arbitration." Pl.'s Memo. at 3. Defendant responded to this petition by moving to transfer the action for improper venue, arguing that the dealer agreement gave it the "unilateral right" to select Seattle, Washington as the forum for what it conceded was mandatory, binding arbitration. Defendant VoiceStream Wireless Corporation's Motion to Dismiss Plaintiff's Amended Complaint or, in the Alternative, to Stay Litigation Pending Arbitration ("Def.'s Memo.") at 3. That matter was assigned to the Honorable Harvey Bartle III of this court, who found defendant's contention to be meritorious, and on December 12, 2001 transferred the action pursuant to 28 U.S.C. § 1406(a) to the Western District of Washington. Notably, subsequent to the transfer of its petition to compel arbitration, USC dropped the fourth claim from its arbitration demand. *See* Pl.'s Memo. at 4. Accordingly, although the Seattle arbitration proceedings were concluded in early 2002, no portion of the claims advanced in E-Time's present complaint were resolved therein.

Immediately following the filing of USC's petition to compel arbitration, E-Time filed the instant lawsuit. Plaintiff asserts two claims against VoiceStream, the first of which sounds in tortious interference with E-Time's existing and prospective business relations with Urban, and the second of which advances an identical claim with respect to plaintiff's relations with its retailer customers. Defendant moved to dismiss E-Time's complaint or, in the

alternative, stay the instant proceedings pursuant to 9 U.S.C. § 3 pending arbitration of the claims raised by E-Time. Plaintiff responded on January 18, 2002 by filing an amended complaint, from which the facts recounted above are drawn. After E-Time's filing of its amended complaint, VoiceStream renewed its motion to dismiss or stay this action, and it is this motion that currently is pending before the court.

II Standard of Review

When confronted with a motion to stay proceedings pursuant to 9 U.S.C. § 3, the appropriate standard of review for the district court is that employed in evaluating motions for summary judgment under Fed. R. Civ. P. 56(c). *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980); *Technetronics, Inc. v. Leybold-Graeus GmbH*, 1993 WL 197028, at *2 (E.D. Pa. 1993); *Trott v. Paciolla*, 748 F. Supp. 305, 308 (E.D. Pa. 1990).

Accordingly, the court's task is limited to determining whether there is a genuine, factual question as to the applicability of the arbitration agreement to plaintiff's claims; if such a disputed factual issue does exist, the court is not to resolve it. *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Varallo v. Elkins Park Hosp.*, 2002 WL 437956, at *2 (E.D. Pa. Mar. 19, 2002) (applying the summary judgment standard in the context of a motion to compel arbitration).

If, however, the applicability of that provision to the instant dispute is clear, then defendant will be entitled to the stay that it seeks. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to

arbitration on issues as to which an arbitration agreement has been signed.”) (emphasis original).

In the end, “as a matter of federal law,¹¹ any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”

Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

III Discussion

A Summary of Arguments

VoiceStream notes initially that under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 3,¹² federal courts are obligated to stay suits involving claims that are subject to

¹¹ Importantly, determinations such as these that concern the construction and enforcement of an arbitration provision are governed by federal law even in cases in which jurisdiction is based on diversity of citizenship. As has been stated by our court of appeals:

Arbitrability, of course, is purely a matter of contract. In resolving such a question of contract, a federal court sitting in diversity would normally be bound by state law under the *Erie* doctrine. In enacting the Federal Arbitration Act, 9 U.S.C. §§ 1-13, however, Congress intended to establish a uniform federal law over contracts which fall within its scope. Thus, if the Arbitration Act is deemed applicable, federal law applies in construing and enforcing an arbitration clause, even in those cases in which jurisdiction is based on diversity.

Goodwin v. Elkins & Co., 730 F.2d 99, 108 (3d Cir. 1984), *cert. denied*, 469 U.S. 831 (1984).

¹² That provision provides, in full, as follows:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such

contractual arbitration agreements. *See* Def.’s Memo. at 7. Moreover, it asserts, if all of the claims advanced in an action are arbitrable pursuant to such an agreement, the court is permitted to dismiss the suit in its entirety.¹³ *See id.* (citing *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3d Cir. 1998)); *see also Smith v. The Equitable*, 209 F.3d 268, 272 (3d Cir. 2000), *abrogated on other grounds by Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000). Defendant avers that the facts of this case warrant either a stay or a dismissal of plaintiff’s claims.

VoiceStream’s argument in favor of a stay is extremely straightforward, as it sounds in the plain language of § 3 of the FAA. That section mandates that “[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration . . . the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3 (emphasis added). Defendant next directs the court to the unambiguous terms of the dealer agreement, which provides in pertinent part that “all counterclaims, cross-claims and disputes between [VoiceStream] and [USC] . . .

arbitration.

9 U.S.C. § 3.

¹³ Although the arbitration of the issues raised in USC’s arbitration demand (from which the current tortious interference claims were dropped) has been completed, to the extent that the claims presently advanced by E-Time matters are arbitrable under the VoiceStream-USC agreement as well, defendant has the right to refer these issues to binding arbitration. If so, the court is obligated under 9 U.S.C. 3 to stay this litigation pending the conclusion of such an arbitration. The fact of the previous arbitration is irrelevant to the question of the arbitrability of plaintiff’s present claims.

shall be resolved by submission to binding arbitration.” Dealer Agreement ¶ 12.11.1.¹⁴

Accordingly, VoiceStream avers, to the extent that any of E-Time’s present claims are encompassed within this provision, the instant litigation must be stayed in favor of arbitration pursuant to the terms of the dealer agreement.

In arguing that plaintiff’s claims fall within the arbitration clause of the VoiceStream-USC contract, defendant contends that E-Time, by its own admission, was legally inseparable from USC at the time of VoiceStream’s alleged interference with plaintiff’s business relations with Urban. *See* Def.’s Memo. at 7-8. Accordingly, it asserts, the circumstances contemplated by § 3 presently are manifest, and the stay provision codified in that section must be given effect.¹⁵

¹⁴ This paragraph of the agreement provides in full as follows:

Except as stated in paragraph 12.11.5 [pertaining to VoiceStream’s right to seek an injunction against non-compliance with the dealer agreement] . . . all claims, counterclaims, cross-claims, and disputes between [VoiceStream] and [USC] shall be resolved by submission to binding arbitration. [VoiceStream] shall have the right, in its sole discretion, to submit an such disputes to the Seattle, Washington, or another office, of Judicial Arbitration & Mediation Services, Inc. (“JAMS”), any other arbitration or mediation service of its choosing, or to arbitrate any such disputes under the commercial arbitration rules of the American Arbitration Association (“AAA”), before one neutral arbitrator, except to the extent that those rules are modified herein.

Dealer Agreement ¶ 12.11.1.

¹⁵ Notably, defendant also argues that even if E-Time’s present claims are not within the scope of the VoiceStream-USC arbitration agreement, the instant matter nonetheless should be stayed in order to advance the strong “federal policy in favor of arbitration.” Def.’s Memo. at 10 (quoting *Harvey v. Joyce*, 199 F.3d 790, 796 (5th Cir. 2000)). VoiceStream reasons specifically that were this suit permitted to go forward, it could entail a preclusive effect on any pending arbitration, and thereby undermine the efficacy of the latter proceeding. *See id.*

Although commonsensical at the time of its formulation, this argument no longer is apposite to the facts of this case. As stated, *supra*, at the time that defendant filed its motion to

VoiceStream also argues that E-Time asserts no claim that falls outside the scope of the dealer agreement's arbitration clause, and that the dismissal of this action consequently is appropriate under *Seus*. *See* Def.'s Memo. at 7. In support of this contention, defendant emphatically posits that plaintiff was legally indistinct from USC during the entire period within which VoiceStream allegedly interfered with its business relationship with Urban. *See id.* In particular, defendant asserts that the validity of this conclusion is evidenced by E-Time's own concession that it did not become an independent legal entity until July, 2001. *See id.* at 8; Amended Complaint ¶ 12. Moreover, VoiceStream argues that to the extent that any harm to plaintiff continued following its incorporation, E-Time currently should be considered the alter ego of USC. Accordingly, defendant continues, it is appropriate to pierce plaintiff's corporate veil so as to preclude E-Time from using its current status as an independent legal entity to inequitably deprive VoiceStream of the benefit of the dealer agreement's arbitration clause.¹⁶ *See id.* at 8-9.

Defendant thus concludes that regardless of the precise time(s) at which E-Time's present claims arose, plaintiff was—and is—legally inseparable from USC. *See* Def.'s Memo. at 8-

dismiss or stay this suit, an arbitration was pending in Seattle, Washington. Since that time, that arbitration has concluded, and there is no other pending arbitration between VoiceStream and USC or E-Time. Accordingly, defendant's argument that these proceedings should be stayed in favor of a pending arbitration has been mooted, and the court will not consider it.

¹⁶ In support of its argument in favor of piercing, VoiceStream notes that USC and E-Time share a common ownership and address. Def.'s Memo. at 8-9. It also avers that USC "used the [E-Time] name to acquire VoiceStream service in an effort to defraud or mislead VoiceStream." *Id.* at 8. In particular, VoiceStream contends that, in an effort to deceive it, USC caused E-Time to buy e-pins directly from Urban instead of engaging directly in these transactions, thereby pecuniarily injuring defendant and warranting a piercing of the corporate veil. *See id.* at 8-9.

9. This is so whether E-Time was merely a division of USC or, though distinct from USC in a de jure sense, plaintiff is the de facto alter ego of USC. Accordingly, by defendant's account, E-Time is bound by the terms of the USC-VoiceStream contract, and pursuant to that agreement, each of the claims that plaintiff presently advances must be resolved through binding arbitration. Consequently, it asserts, the court should dismiss the present litigation in its entirety pursuant to *Seus*. *See id.* at 7 (citing 146 F.3d at 179).

E-Time responds to these arguments by contending that as a non-signatory of the dealer agreement, it can be bound by the arbitration clause contained therein under only an extremely limited set of circumstances. *See Pl.'s Memo.* at 5-6. It cites the opinion of the Second Circuit in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, for the proposition that there are only five "theories under which nonsignatories may be bound to the arbitration agreements of others: . . . 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Pl.'s Memo.* at 6 (quoting 64 F.3d 773, 776 (2d Cir. 1995)). Plaintiff characterizes VoiceStream's argument in favor of binding it to the terms of the arbitration provision as one sounding in a veil-piercing or alter-ego theory, and argues at length against the propriety of piercing in this case. *See Pl.'s Memo.* at 6-11. Based on its contention that it is not in fact the alter-ego of USC, E-Time concludes that there is no viable basis on which it may be bound by the dealer agreement's arbitration clause.¹⁷ *See id.*

¹⁷ E-Time also advances a second argument against the propriety of a stay of these proceedings. It posits that because it is not bound by the terms of the dealer agreement's arbitration clause, the mandatory stay provision codified at 9 U.S.C. § 3 is inapplicable in this case. *Pl.'s Memo.* at 12. Accordingly, plaintiff's argument goes, the only possible basis on which the court could stay this litigation is its inherent power to control its docket, which would properly be invoked if a pending arbitration was capable of resolving the questions at bar. *See id.* at 13-14. E-Time argues that the factual and legal issues presented in the Seattle arbitration are

Notably, E-Time further avers that the applicability of the arbitration provision to its claims is unaffected by the timing of the accrual of its causes of action. *See id.* at 11-12. Although it does not dispute that it remained a legally indistinct entity from USC until July, 2001, plaintiff contends that VoiceStream's interference with its relationship with Urban continues to the present day, and that claims arising after its incorporation cannot possibly fall within the scope of the dealer agreement's arbitration provision. *See id.* at 12. Of course, this contention is bolstered by plaintiff's arguments against the proposition that it may be deemed the alter ego of USC.

In its reply, VoiceStream contests E-Time's arguments. It asserts as follows:

In essence, [E-Time] seeks a ruling that a claim subject to and submitted to arbitration¹⁸ can be removed from a pending arbitration proceeding and litigated in court if the original owner of the claim transfers it to a third party who is not a signatory to the arbitration agreement. Unfortunately for [E-Time], the law is otherwise. A party who acquires the rights to a claim that is subject to mandatory arbitration must submit the claim to arbitration.

Defendant VoiceStream Wireless Corporation's Reply Memorandum in Support of its Motion to

distinct from those at issue in this case, and that a stay of the present action consequently would be inappropriate.

Importantly, plaintiff's contention is predicated on the assumption that there is a pending arbitration. However, as explained *supra*, this no longer is the case. Thus, like VoiceStream's argument regarding the propriety of binding a non-party to an arbitration agreement, it is unnecessary to consider plaintiff's argument as to the impropriety of the court discretionarily exercising its power to stay these proceedings in favor of a pending arbitration. Indeed, given that there no longer is any pending arbitration between VoiceStream and either USC or E-Time, the only conceivable basis for staying this action is the FAA's mandatory stay provision. *See* 9 U.S.C. § 3.

¹⁸ Again, the tortious interference claims currently asserted by E-Time were first asserted in USC's original demand for arbitration. However, they later were dropped by USC, and that arbitration proceeded on the remaining issues raised by USC, which sounded in various alleged breaches of the dealer agreement by VoiceStream.

Dismiss Plaintiff's Amended Complaint or, in the Alternative, to Stay Litigation Pending Arbitration ("Reply") at 2 (citing *Porzig v. Dresdner Kleinwort Benson N. Am. LLC*, 1999 WL 518833, at *5 n.5 (S.D.N.Y. July 21, 1999)).

Defendant analogizes the relationship between E-Time and USC (as the signatory to the dealer agreement) to that between a trustee in bankruptcy and a debtor. It posits that just as such a trustee is subject to any defenses that a litigant may viably assert against the debtor—e.g., the applicability of an arbitration agreement—E-Time, as the successor-in-interest to USC, is likewise bound by all limitations on the right to sue that were contractually incurred by USC. *See Reply* at 3 ("As the alleged successor or assignee who 'stands in the shoes' of USC, [E-Time] cannot avoid arbitration").

More fundamentally, VoiceStream reiterates its contention that E-Time cannot fairly be considered the successor-in-interest to USC because in fact it remains the alter-ego of USC. *Reply* at 4. In support of this proposition, defendant not only repeats its assertion that E-Time and USC are commonly owned and share office space, but it further draws the court's attention to the fact that during November, 2001—some four months after plaintiff's tortious interference claims allegedly passed to it—USC sought a ruling compelling VoiceStream to submit to the arbitration of these claims in Philadelphia, Pennsylvania. *See id.* 4-6. Defendant avers that "[t]hese undisputed facts cast significant doubt on both the alleged transfer of the claims to, and the alleged independence of, [E-Time]." *Reply* at 5. Stated alternatively, VoiceStream argues that E-Time's obligation to arbitrate its tortious interference claims stems not from any assumption of USC's contractual obligations, but rather because it remains legally indistinct from USC. *See id.* at 4-5.

E-Time contests defendant's argument as to plaintiff's status as a successor-in-interest to USC. Plaintiff E-Time System, Inc.'s Sur-Reply in Opposition to Motion of Defendant VoiceStream Wireless Corporation to Dismiss Plaintiff's Amended Complaint or, in the Alternative, to Stay Litigation Pending Arbitration ("Sur-Reply") at 2-4. It asserts that such a successor relationship exists only where the party the interests of which are assumed ceases to exist, as would be the case in the event of a corporate merger. *See id.* at 2-3. Because USC remains a viable, ongoing entity, plaintiff posits, E-Time cannot be deemed its successor-in-interest. Nor, by plaintiff's account, was the incorporation of E-Time designed to fraudulently divest VoiceStream of the benefit of the provisions of its contract with USC. *See id.* at 5. Finally, E-Time posits that the dealer agreement simply did not encompass e-pins, and that for this reason the present dispute is not encompassed within its arbitration clause. As support for this argument, plaintiff notes that the dealer agreement was entered into "well before [E-Time's] e-pin business became operational," Sur-Reply at 4, and that the agreement makes no reference to e-pins. *See id.* Moreover, E-Time contends that it never sold any equipment purchased from VoiceStream by USC under the agreement and that it has derived no benefit whatsoever from that contract. *See id.*

B Analysis

To determine whether either the dismissal or the stay sought by defendant is warranted, it will be helpful to examine the evolution of the relationship among E-Time, USC and VoiceStream over time, and to evaluate the effect of this relationship on the arbitrability of the claims currently advanced by E-Time.

Prior to July, 2001, E-Time was legally inseparable from USC. *See* Amended Complaint ¶ 12. Accordingly, any tortious interference with the relationship between plaintiff and Urban that transpired prior to July, 2001 actually constituted a legally cognizable harm to USC, and as such fell within the scope of the dealer agreement’s arbitration clause, which stated that “all claims . . . and disputes between [VoiceStream] and [USC] shall be resolved by submission to binding arbitration.”¹⁹ Dealer Agreement ¶ 12.11.1. Neither party disputes this proposition, and indeed, USC did in fact assert in its initial demand for arbitration a claim sounding in VoiceStream’s alleged interference with its business relationship with Urban. *See* USC’s Demand for Arbitration at 18.

Subsequently, E-Time was formally incorporated in July, 2001, and thereby attained legal independence from USC. When it became an separate corporation, E-Time became capable of incurring obligations and liabilities in its own name, and, as a corollary of this capacity, it also gained the ability to bring suit to vindicate its proprietary and pecuniary interests. The question that must be answered in this case, however, has less to do with the impact of E-Time’s incorporation on its powers and duties than with the effect of that event on its possession of claims that previously had accrued to USC. E-Time does not specify any basis on which it assumed ownership of USC’s tortious interference claims against VoiceStream. Instead, it asserts only that when it was formally incorporated, “these causes of action. . . passed to [E-

¹⁹ Although the USC-VoiceStream contract did not refer specifically to e-pins, this omission is rendered irrelevant by the agreement’s sweeping pronouncement as to the arbitrability of “all claims . . . and disputes between [VoiceStream] and [USC].” Dealer Agreement ¶ 12.11.1.

Time], just as the e-pin technology itself was transferred from USC to [E-Time].”²⁰ Pl.’s Memo. at 12. Yet this explanation is inadequate, as E-Time fails to specify any legal principle pursuant to which a claim held by a parent company automatically passes to a subsidiary upon the independent incorporation of that subsidiary. Nor is the court familiar with such a principle.

Quite the contrary, it seems that one of two scenarios must necessarily be manifest. First, it could be the case that USC took no affirmative steps to convey to E-Time its tortious interference claims against VoiceStream. If so, then USC would remain the owner of those claims today, and as such the claims clearly would be subject to the dealer agreement’s arbitration clause.²¹ Second, it might be that USC has taken some positive measure to assign its tortious interference claims to E-Time. Although under these circumstances E-Time could be considered the owner of the claims, this sort of conveyance would not remove those claims from the ambit of the arbitration provision.

It is true, as plaintiff argues and VoiceStream concedes, that as a general rule non-signatories to an arbitration agreement can be required to adhere to such a provision under only a constricted range of circumstances. *See* Pl.’s Memo. at 6 (so arguing); Reply at 3 n.2 (conceding

²⁰ Given the importance of this question to the disposition of the pending motion, the court finds it curious that plaintiff’s counsel has not devoted more attention to specifying with particularity the means by which the tortious interference claims were transferred to E-Time. Indeed, the amended complaint features no allegation that bears on this issue. Moreover, as indicated above, plaintiff’s memorandum in opposition to VoiceStream’s motion states only that these claims “passed to [E-Time] just as the e-pin technology itself was transferred from USC to [E-Time].” Pl.’s Memo. at 12; *see also* Sur-Reply at 2 (“[T]he owners of USC took only the e-pin technology business assets of USC (including these claims based on VoiceStream’s tortious interference with Urban Wireless), and ultimately spun them off into [E-Time] . . .”). Not only are these explanations substantively inadequate, however, they are non-evidentiary as well.

²¹ Moreover, E-Time would lack standing to advance the claims.

the accuracy of this contention). However, it is equally unquestionable as a matter of “FAA doctrine that arbitration agreements are to be treated like other contracts, subject to the policy favoring arbitration.”²² In light of this, the law respecting rights and duties of assignees to arbitrate should follow standard contract doctrine respecting the rights and duties of assignees generally.” I. MacNeil, R. Speidel, & T. Stipanowich, *Federal Arbitration Law* § 18.7.1.1 (Supp. 1999); *see also Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 532 (5th Cir. 2000) (Dennis, J., dissenting) (“[A] non-signatory may be bound by . . . an arbitration agreement under ordinary state-law principles of agency or contract.”).

Importantly, it is a universal and uncontroversial tenet of contract law that an assignee of a claim takes the same subject to all defenses that could validly have been raised by the defendant against the assignor at the time of the assignment. *See North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U.S. 596, 620 (1894) (“It is hardly necessary to observe that the appellee [], having taken an assignment [of a cause in action] . . ., occupies the same position as his assignor, and is subject to the same equity.”); *American Lumber Corp. v. Nat’l R.R. Passenger Corp.*, 886 F.2d 50, 55 (3d Cir. 1989) (“[A]n assignee of a chose of action takes it subject to all defenses . . . existing at the time of the assignment” (quoting *General Elec. Credit Corp. v. Sec. Bank*, 244 A.2d 920, 923 (D.C. 1968))); Restatement (Second) of Contracts § 336(2) (“The right of an assignee is subject to any defense . . . of the obligor which accrues

²² As the Supreme Court has stated, “[t]he FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement. . . . We have read these provisions to “manifest a ‘liberal federal policy favoring arbitration agreements.’” *E.E.O.C. v. Waffle House, Inc.*, 122 S. Ct. 754, 761-62 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991)).

before the obligor receives notification of the assignment . . .”).

As is particularly relevant to this case, included within the universe of such defenses is the applicability of a mandatory arbitration provision. Indeed, the applicability of such a clause to an assignee of rights or claims under the contract in which that provision is contained has been confirmed on multiple occasions. *See, e.g., Gruntal & Co., Inc. v. Steinberg*, 843 F. Supp. 1, 9-10 (D.N.J. 1994) (collecting cases).

Notably, the veracity of both of these propositions—i.e., that an assignee of a cause of action takes that claim subject to all defenses that could have been raised against the assignor and that the applicability of a mandatory arbitration provision is precisely such a defense—has recently been confirmed by the Pennsylvania courts.²³ In *Smith v. Cumberland Group, Ltd.*, a

²³ Although federal law governs questions concerning the interpretation and enforcement of the dealer agreement’s arbitration clause, *see supra*, federal jurisprudence in turn calls for an examination of “standard contract doctrine respecting the rights and duties of assignees generally” to determine whether an assignee of a claim covered by an arbitration provision is bound thereby. I. MacNeil et al., *Federal Arbitration Law* § 18.7.1.1. In ascertaining the specific legal principles to be applied in a given case, the court is to look to state law regarding the validity of contracts, including defenses thereto. *See generally Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (holding that state law contract defenses may be employed in the context of arbitration agreements that are covered by the FAA); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

The parties to the present litigation do not specify a particular state’s corpus juris as being that from which the court should glean the applicable principles of contract law. E-Time appears to be of the impression that Pennsylvania law governs this suit. *See* Pl.’s Memo. at 6-7 (arguing that as a matter of Pennsylvania law it would be inappropriate to pierce E-Time’s corporate veil). Defendant does not contest this supposition, and accordingly I will apply Pennsylvania law regarding the duties of assignees of claims. Notably, however, even if the parties were to dispute the applicability of Pennsylvania law in this case, the choice of law question is unlikely to be of significance, as the proposition that an assignee of a cause of action is subject to all defenses that could validly be asserted by the defendant against the assignor is, to the court’s knowledge, universally accepted. Under Pennsylvania choice of law rules—which the court is obligated to apply in all cases, given its situs in this state—no choice of law analysis is

contract featuring a mandatory arbitration provision was entered into by a property owner and a general contractor. *See* 687 A.2d 1167, 1169 (Pa. Super. Ct. 1997). This provision was similar to that at issue in the present case, as it required the arbitration of “any disputes between the contractor and the owner arising out of or relating to the contract documents.” *Id.* The general contractor subsequently assigned its rights under the contract to another contractor, which ultimately was sued by the owner for several alleged breaches of the construction contract. *See id.* at 1170. The assignee sought to compel arbitration pursuant to the provision contained in the contract between the owner and the original general contractor. Though this scenario differs from that with which the court presently is confronted, it is nonetheless instructive to consider the Superior Court’s statements that “[w]here an assignment is effective, the assignee stands in the shoes of the assignor and assumes all of his rights,” and that “[a]mong these rights are the remedies the assignor once possessed.” *Id.* at 1172. “Conversely,” the court continued, “an assignee’s right against the obligor is subject to all of the limitations of the assignor’s right, to all defenses thereto, and to all set-offs and counterclaims which would have been available against the assignor had there been no assignment, provided that these defenses and set-offs are based on facts existing at the time of the assignment.” *Id.* (citing *Peoples Pittsburgh Trust Co. v. Commonwealth*, 60 A.2d 53, 56 (1948)). Based on these legal maxims, the court held that because the owner was contractually obligated to arbitrate with the assignor all disputes that arose under the contract, it was likewise bound to arbitrate such a disagreement with the

necessary at all in cases in which there is no relevant substantive divergence between two bodies of competing law. *See Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. Ct. 2000) (“Pennsylvania choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary.”).

assignee. *See id.* at 1173.

In this case, it is undisputed that USC’s tortious interference claim(s)²⁴ against VoiceStream fell within the arbitration clause of the dealer agreement, which, to reiterate, provided for the submission to binding arbitration of “all disputes” between the parties to that agreement. USC clearly recognized this, as prior to the incorporation of E-Time it included in its arbitration demand the present claims. Thus, even assuming that USC validly assigned to plaintiff its tortious interference claim(s) against VoiceStream, this assignment necessarily included the obligation to arbitrate, as opposed to litigate, the relevant claims. This is so as a matter of general principles of contract law in addition to both federal and Pennsylvania jurisprudence addressing specifically the binding character of an arbitration clause on parties to whom claims covered by that provision have been assigned. Accordingly, to the extent that the claims presently advanced by E-Time were assigned to it by USC—as all claims that arose prior to plaintiff’s incorporation must have been, if E-Time currently possesses them—plaintiff took these claims subject to VoiceStream’s right to pursue their resolution via arbitration. Accordingly, to the extent that E-Time’s complaint sounds in actions taken by VoiceStream prior to July, 2001, the instant proceedings must be stayed pursuant to 9 U.S.C. § 3.

²⁴ Although E-Time presently advances two distinct claims sounding in VoiceStream’s alleged tortious interference with its existing and/or prospective business relations—one of which pertains to its relations with Urban, the other of which relates to plaintiff’s relations with its retail customers (who would buy from E-Time the e-pins purchased by plaintiff from Urban)—the tortious interference claim brought by USC in its demand for arbitration may be read to have encompassed both of E-Time’s present assertions, as it was more general in its phrasing. Specifically, USC sought recovery from defendant based on VoiceStream’s alleged “[i]nterference with [its] [p]rospective [e]conomic [a]dvantage.” Demand for Arbitration at 18.

Upon consideration, it becomes clear that there exists a second, policy-based rationale for this conclusion as well. Indeed, were the court to conclude that E-Time is not bound by the arbitration clause in the dealer agreement, such would permit USC to circumvent that provision by simply creating a new legal entity and assigning to that entity an otherwise arbitrable claim. In so doing, USC would be depriving VoiceStream of the benefit of a contractual provision on the existence of which it relied in assenting to the dealer agreement ab initio. This result would be both inequitable and without any basis in law. *See generally Gilbert Switzer & Assocs. v. Nat'l Hous. P'ship Ltd.*, 641 F. Supp. 150, 156 (D. Conn. 1986) (rejecting an argument the implication of which would be that “parties to a contract could . . . simply assign their arbitrable claims to unrelated persons and thereby avoid the binding effect of any unfavorable decision by the arbitrator”); MacNeil et al., Federal Arbitration Law § 18.7.1.2 (“[A]n assignee of rights under a contract should be bound by the arbitration clause in the assigned contract in the sense that the assignee cannot bypass the arbitration clause to enforce its rights against obligor by litigation.”). Moreover, this outcome would stand in diametric opposition to the federal policy in favor of arbitration. *See generally Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 475-76 (1989).

Notably, however, the foregoing analysis is inapplicable insofar as E-Time’s present claims concern acts that allegedly were committed by VoiceStream after plaintiff’s incorporation. Any claim that is based on actions taken by defendant during this period never was possessed by USC, and thus could not have been assigned by USC to E-Time. Instead, such a claim accrued to E-Time ab initio, and thus, it would appear, falls outside the scope of the dealer agreement, to which plaintiff—as it repeatedly emphasizes—is not a signatory. Indeed, to

the extent that they are based on tortious conduct that allegedly was undertaken by VoiceStream subsequent to E-Time’s incorporation, plaintiff’s claims could be deemed subject to the arbitration provision only if E-Time presently can be considered the alter ego of USC.²⁵

Pennsylvania law—which, the parties appear to agree, governs this matter to the extent that issues not encompassed within federal arbitration law are implicated—features a strong presumption against the propriety of piercing the corporate veil. *See Lumax Indus., Inc. v. Aultman*, 669 A.2d 893, 895 (Pa. 1995). Although there is no iron-clad rule under Pennsylvania law as to when piercing warranted, *see Good v. Holstein*, 787 A.2d 426, 430 (Pa. Super. Ct. 2001), the applicable standard has been articulated as follows: piercing is appropriate when the corporate form must be disregarded in order to “prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.” *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484 (3d Cir. 2001) (quoting *Zubik v. Zubik*, 384 F.2d 267, 272 (3d Cir. 1967)). In *Lumax Indus.*, the Pennsylvania Supreme Court cited with approval several specific factors that had been denoted by the Commonwealth Court as informing the determination of whether piercing is warranted in a given case. These are: “undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud.” 669 A.2d at 895.

VoiceStream advances two arguments in favor of piercing. First, it contends that because USC and E-Time currently share a common ownership and address, E-Time actually is

²⁵ If E-Time could in fact be considered the alter ego of USC, then harms accruing directly to E-Time would be considered as actually being injurious to USC, thus bringing claims based thereon within the scope of the dealer agreement’s arbitration clause.

the alter ego of USC.²⁶ *See* Def.'s Memo. at 8. Second, it asserts that by spinning off E-Time and subsequently conveying to it USC's tortious interference claims, USC has perpetrated a fraud on VoiceStream. *See id.* at 8-9. Neither of these contentions is persuasive, however, and I will address them seriatim.

As for defendant's first argument, the alter ego theory of piercing is "is applicable where the individual or corporate owner controls the corporation to be pierced and the controlling owner is to be held liable." *Miners, Inc. v. Alpine Equip. Corp.*, 722 A.2d 691, 695 (Pa. Super. Ct. 1998). As the *Miners* court explained, this theory is conceptually distinct from "the situation where two or more corporations share common ownership and are, in reality, operating as a corporate combine. This latter theory has been labeled the *enterprise entity* theory or the *single entity* theory." *Id.* (emphasis original). As also was explicitly stated in *Miners*, however, the single entity theory has yet to be adopted in Pennsylvania. *See id.* Thus, the alter ego theory is the only one that is potentially available to VoiceStream.

Yet common ownership and the sharing of office space, standing alone, are insufficient to warrant the conclusion that E-Time actually is the alter ego of USC. Instead, there must be some evidence that plaintiff is undercapitalized, has failed to adhere to corporate formalities, or that there has been significant intermingling of corporate and personal affairs or funds. *See Lumax Indus.*, 669 A.2d at 895. Plaintiff contends that it was incorporated for valid business purposes, that it observes all corporate formalities, that both it and USC are adequately

²⁶ Given the court's conclusion that E-Time is obligated to arbitrate its claims against VoiceStream to the extent that they concern actions taken prior to its incorporation, my concern presently is with the propriety of piercing from the standpoint of the present, i.e., is piercing appropriate given the current relationship between E-Time and USC?

capitalized, that with one exception these two corporations have separate employees and officers, and that they maintain separate finances. Pl.'s Memo. at 7-8 (citations omitted). Defendant does not contest these assertions. Under these circumstances, there is no basis for concluding that E-Time is the alter ego of USC, and accordingly, piercing is not warranted on this basis.

More fundamentally, the court could not possibly conclude that E-Time is the alter ego of USC, because USC does not own E-Time.²⁷ As stated, *supra*, plaintiff is owned by Gil Barzeski and Harvey Mindel, who also own USC. *See* Amended Complaint ¶ 5. At most, then, were the court to conclude that one or both of these individuals so completely dominated the workings of plaintiff as to render E-Time his (or their) alter ego, this would render Barzeski and/or Mindel liable for plaintiff's contractual liabilities and debts. It would not generate the conclusion that E-Time and USC are a cohesive unit such that one is bound by the contractual obligations of the other. Such would be the product of the successful assertion of the single entity theory of piercing, which, as stated, presently is not recognized in Pennsylvania.

Defendant's second argument in favor of piercing is similarly unavailing.

VoiceStream is correct in asserting that the corporate veil will be pierced under Pennsylvania law where such is necessary to prevent the use of the corporate form to perpetrate a fraud on a third party. *See generally Village at Camelback Prop. Owners Ass'n v. Carr*, 538 A.2d 528, 461-62 (Pa. Super. Ct. 1988). However, even assuming that USC's circumvention of the dealer

²⁷ Again, piercing on an alter ego theory is appropriate where "the individual or corporate owner controls the corporation to be pierced." *Miners*, 722 A.2d at 695. Although piercing on this basis may also be possible where a "parent corporation . . . wholly controls [its] subsidiary and ignores corporate formalities," *Eisen v. Independence Blue Cross*, 2002 WL 1023441, at *6 (Pa. Ct. Common Pleas May 6, 2002), defendant does not sufficiently allege that E-Time has been operated without the benefit of corporate formalities.

agreement's arbitration clause through the assignment of its tortious interference claim(s) to E-Time could properly be considered fraudulent, piercing is not necessary to avoid such inequitable consequences, as E-Time is bound by USC's obligation to arbitrate as a matter of contract law, as discussed above. Moreover, VoiceStream does not appear to—nor could it viably—argue that the accrual of tortious interference claims directly to E-Time after its incorporation constitutes fraud on the part of USC. Thus, defendant's fraud-based piercing argument is unnecessary with respect to claims based on actions allegedly taken by VoiceStream prior to E-Time's incorporation, and is ill-conceived (to the extent that it is advanced at all) as to plaintiff's claims insofar as they arose after E-Time's separate incorporation.

For these reasons, plaintiff's claims are not arbitrable under the dealer agreement insofar as they stem from actions taken subsequent to its incorporation, and thus to this extent do not implicate 9 U.S.C. § 3. Moreover, because the claims that presently are before the court are not in every respect arbitrable, I will deny defendant's motion insofar as it seeks the dismissal of this action. *Cf. Seus*, 146 F.3d at 179 (holding that the court is permitted to dismiss a suit in its entirety if "all of the claims involved . . . are arbitrable").²⁸

²⁸ In its memorandum in opposition to defendant's motion, plaintiff contemplates the result ultimately reached in this case, and contends such would be "anomalous." Pl.'s Memo. at 12 (stating, in pertinent part, that "the argument posited by VoiceStream would lead to the anomalous result that these claims would be split between USC for pre-incorporation damages and [E-Time] for post-incorporation damages"). Quite the contrary, the conclusion that plaintiff's claims must be stayed pursuant to 9 U.S.C. § 3 to the extent that they are based on actions taken by VoiceStream prior to July, 2001, and not insofar as they are rooted in wrongful acts allegedly committed by defendant after that date, is compelled by the legal principles that govern this case. Indeed, as the Supreme Court stated in *Moses H. Cone*: "[F]ederal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis original).

IV Conclusion

For the foregoing reasons, there is no genuine factual question that precludes the court from concluding that it is required to stay the instant proceedings pursuant to 9 U.S.C. § 3 insofar as plaintiff's claims stem from wrongdoing allegedly committed by VoiceStream prior to the incorporation of E-Time. However, there is no basis for extending this stay to encompass plaintiff's claims to the extent that they are based on actions allegedly taken by defendant subsequent to E-Time's incorporation. Because plaintiff's claims are presently justiciable in that respect, its complaint will not be dismissed.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

E-TIME SYSTEM, INC.,
Plaintiff,

v.

VOICESTREAM WIRELESS CORP.,
Defendant.

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CIVIL ACTION
NO. 01-5754

Order

And now, this ____ day of August, 2002, upon consideration of plaintiff's amended complaint (Doc. # 6), defendants' motion to dismiss plaintiff's amended complaint, or, in the alternative, to stay litigation pending arbitration (Doc. # 9) and the exhibits submitted in support thereof (Doc. # 11), plaintiff's memorandum of law in opposition to defendant VoiceStream Wireless Corp.'s motion to dismiss plaintiff's amended complaint, or in the alternative, to stay litigation pending arbitration (Doc. # 15), defendants' reply thereto (Doc. # 16) and plaintiff's sur-reply thereto (Doc. # 18), it is hereby ORDERED that defendants' motion to stay the instant litigation is GRANTED insofar as plaintiff's claims concern actions allegedly taken by defendant prior to the date of plaintiff's incorporation. Insofar as plaintiff's claims sound in actions allegedly taken by defendant subsequent to plaintiff's incorporation, however, defendant's motion to stay the instant litigation is DENIED. Defendant's motion to dismiss plaintiff's complaint is DENIED.

William H. Yohn, Jr., Judge

