STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV031985-590

ALCOF III NUBT, L.P. et al.,

Plaintiffs,

v.

JAMES M. CHIRICO, JR., KIERAN MCGRATH, and STEPHEN D. SPEARS,

Defendants.

ORDER AND OPINION ON MOTIONS TO DISMISS BY DEFENDANTS JAMES M. CHIRICO, JR. AND KIERAN J. MCGRATH

MECKLENBURG COUNTY

23CV031948-590

BRIGADE CAVALRY FUND LTD. et al.,

Plaintiffs,

and

CANYON DISTRESSED OPPORTUNITY MASTER FUND III, L.P. et al.,

Intervenor Plaintiffs,

v.

JAMES M. CHIRICO, JR. and KIERAN J. MCGRATH,

Defendants.

1. These related cases arise in the wake of Avaya, Inc.'s bankruptcy in early 2023.[1] Plaintiffs are investors that hold interests in loans made to Avaya or in its

[1] Some allegations refer to both Avaya and its parent company, Avaya Holdings Corp. For ease of comprehension, the Court will follow the parties' lead and refer to the two Avaya entities simply as "Avaya."

secured notes, all of which lost value when the company went bankrupt. Defendants are some of Avaya's former officers, including James M. Chirico, Jr. (former president and chief executive officer) and Kieran J. McGrath (former executive vice president and chief financial officer). As alleged, Chirico and McGrath wrongfully induced Plaintiffs to invest in Avaya by trumpeting revenue and earnings guidance that they knew the company could not meet.

2. One group of Plaintiffs—the Brigade Plaintiffs—sued Chirico and McGrath for negligent misrepresentation, fraudulent inducement, and related securities violations. *See Brigade Cavalry Fund Ltd. v. Chirico* (23CV031948-590) ["*Brigade*"]. A second group—the Canyon Plaintiffs—intervened in the *Brigade* action and assert similar claims against Chirico and McGrath. *See id.* A third group—the ALCOF Plaintiffs—began a separate action and assert claims for negligent misrepresentation, fraudulent inducement, and fraudulent omission against Chirico, McGrath, and Stephen D. Spears (a third former officer of Avaya). *See ALCOF III NUBT, L.P. v. Chirico* (23CV031985-590) ["*ALCOF*"].

3. This opinion addresses motions to dismiss filed by Chirico and McGrath in both actions.[2] (*See Brigade*, ECF Nos. 38, 42, 89, 93; *ALCOF*, ECF Nos. 79, 84.) They argue that Plaintiffs filed these lawsuits in the wrong venue and that each complaint fails to state a claim for relief. For the following reasons, the Court **GRANTS** the

[2] Spears has also moved to dismiss the only claim asserted against him in the *ALCOF* action. Because his motion differs materially from the motions filed by Chirico and McGrath, the Court addresses it in a separate opinion.

motions to dismiss for improper venue and **DISMISSES** the claims against Chirico and McGrath without prejudice.

Parker Poe Adams & Bernstein LLP, by Melanie Black Dubis and Andrew Tabeling, and Glenn Agre Bergan & Fuentes LLP, by Andrew Glenn, Marissa E. Miller, Eric J. Carlson, George L. Santiago, and Trevor J. Welch, for Plaintiffs ALCOF III NUBT, L.P. et al.

Womble Bond Dickinson (US) LLP, by Jesse Andrew Schaefer and Raymond M. Bennett, and Debevoise & Plimpton LLP, by Erica Weisgerber, Morgan Davis, and Maeve O'Connor, for Plaintiffs Brigade Cavalry Fund, Ltd. et al.

Wyrick Robbins Yates & Ponton LLP, by Lee M. Whitman and Douglas Scott Hazelgrove, and Sullivan & Cromwell LLP, by Adam S. Paris and Pierre-Arnaud Barry-Camu, for Intervenor Plaintiffs Canyon Distressed Opportunity Master Fund III, L.P. et al.

Johnston, Allison & Hord, P.A., by William D. McClelland, Kenneth Lautenschlager, and Austin R. Walsh, and Dorsey & Whitney, LLP, by Thomas O. Gorman and Stephen Weingold, for Defendant James M. Chirico, Jr.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, Adam Doerr, and Ethan R. White, and Kellogg, Hansen, Todd, Figel & Frederick, PLLC, by Reid Mason Figel, Minsuk Han, and Jordan Gonzalez, for Defendant Kieran McGrath.

James, McElroy & Diehl, P.A., by Jennifer M. Houti and Adam L. Ross, for Defendant Stephen D. Spears.

Conrad, Judge.

I.
BACKGROUND

4. The following background treats Plaintiffs' allegations as if they are true. To avoid citation clutter (and the reader fatigue that comes with it), and because the three complaints overlap to a large degree, the Court will cite the Brigade Plaintiffs' complaint for allegations that are common to all pleadings. (*See* Brigade Compl.,

Brigade, ECF No. 3; Canyon Compl., *Brigade*, ECF No. 77; ALCOF Am. Compl., *ALCOF*, ECF No. 76.)

5. Avaya is a digital communications company that sells software, hardware, and support services to businesses around the globe. A few years ago, the company decided to bet on the growth of its cloud-based product and deemphasize its more conventional on-premises offerings. Moving to the cloud meant big changes were in store—not only for what Avaya sold (bundled services with better technology, in theory) but also how it made sales (through subscriptions rather than licensing). The bet may have been risky, but by 2022, it seemed that it would pay off. That May, while touting "record growth" for cloud-based revenue, Chirico stated that the new "strategy [was] clearly taking hold faster than we anticipated." Avaya's regulatory filings were equally upbeat, heralding a rosy outlook for the rest of the year even as they reported having undershot financial projections for the quarter just ended. (Brigade Compl. ¶¶ 32, 33, 40, 43, 44.)

6. Fresh off this burst of optimism, Avaya began looking to raise half a billion dollars to repay existing debt and for general corporate purposes. Company officials worked throughout June 2022 to secure commitments from prospective investors, including Plaintiffs. The ALCOF Plaintiffs pledged $236 million toward a term loan (called the B-3 Term Loan), while the Brigade Plaintiffs and the Canyon Plaintiffs agreed to buy $125 million and $25 million in secured notes. Each deal closed in mid-July 2022.[3] (*See* Brigade Compl. ¶¶ 61, 65, 69–71; *see also* Brigade Agrmt.,

[3] Avaya did not negotiate individually with each Plaintiff. The Brigade and Canyon Plaintiffs delegated authority to investment managers and advisors to represent them in the

Brigade, ECF No. 38.1; Canyon Agrmt., *Brigade*, ECF No. 90.9; ALCOF Agrmt., *ALCOF*, ECF No. 84.1.)

7. All the good vibes turned to ashes just two weeks later when Avaya published preliminary results for the third quarter of its fiscal year (which was the second quarter of the calendar year). They were grim: Avaya expected to miss its quarterly revenue and adjusted earnings projections by miles. Worse news was yet to come. In August, Avaya warned of "substantial doubt about [its] ability to continue as a going concern." In November, it confessed that it hadn't maintained effective internal controls over financial reporting, tainting its most recent annual SEC report and delaying its next report. Then, in February 2023, it filed for bankruptcy protection. (Brigade Compl. ¶¶ 92, 93, 101, 104, 106.)

8. Avaya's sudden fall carried Plaintiffs' investments with it. Their loans and notes plummeted in value, and once the bankruptcy began, they jostled with the other creditors of the estate to recover what they could. When all was said and done, they came away tens of millions of dollars in the hole. (*See* Brigade Compl. ¶ 106; *see also* Canyon Compl. ¶ 80; ALCOF Am. Compl. ¶¶ 1, 104.)

9. Plaintiffs now say that Avaya's bullish messaging from May to July 2022 was just a smokescreen. Avaya's leadership—namely, Chirico and McGrath—allegedly knew that the strategic transition to the cloud was failing even as they told Plaintiffs that it was succeeding. Key members of Avaya's finance team had sounded

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negotiations and in closing their deals. (*See* Brigade Compl. ¶¶ 4, 31; Canyon Compl. ¶ 4.) The ALCOF Plaintiffs include original lenders, entities that manage lender funds, and successors that purchased debt from other original lenders. (*See* ALCOF Am. Compl. ¶¶ 14–31.)

the alarm, calling third-quarter revenue targets "scary" and "impossible" and saying that it would take "more than one miracle" to hit them. Once the fourth quarter began, any hope for a miracle vanished. An unofficial, internal report showed that Avaya's actual performance badly lagged its projections. Though allegedly aware of this information, Chirico and McGrath told Plaintiffs a different story entirely. They reaffirmed Avaya's financial guidance in marketing presentations, investor calls, and public filings. As late as the day of closing, McGrath certified that Avaya was solvent and would remain solvent "immediately after." According to Plaintiffs, they would not have gone through with closing had Chirico and McGrath told them the truth. (*See* Brigade Compl. ¶¶ 46–64, 73–78, 80–89.)

10. In these lawsuits, Plaintiffs seek to hold Chirico and McGrath personally liable for wrongfully inducing them to invest in Avaya. The Brigade and Canyon Plaintiffs have asserted claims for negligent and fraudulent misrepresentation as well as related claims for violations of the North Carolina Securities Act. The ALCOF Plaintiffs have asserted claims for negligent and fraudulent misrepresentation as well, added a claim for fraudulent omission, and omitted the securities claim.

11. Chirico and McGrath have moved to dismiss all claims asserted against them in both cases. (*See Brigade*, ECF Nos. 38, 42, 89, 93; *ALCOF*, ECF Nos. 79, 84.) They contend, first, that Plaintiffs sued them in the wrong forum and are instead contractually bound to litigate these claims in New York. In addition, they contend that Plaintiffs have not sufficiently stated a claim for relief.

12. The Court held a hearing on all six motions on 21 May 2024. The motions are ripe for decision.

II.
ANALYSIS

13. Venue, like jurisdiction, is a threshold matter. Jurisdiction is indispensable; without it, "a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590 (2006). Venue isn't quite as vital as that but is still an important inquiry in its own right. Though endowed with jurisdiction, a plaintiff's chosen forum may not be the best, the most convenient, or even an appropriate place to adjudicate a dispute. *See Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc.*, 195 N.C. App. 577, 582–83 (2009) (affirming order granting motion to dismiss for improper venue).

14. Chirico and McGrath contend that Plaintiffs' claims belong in New York, not North Carolina. This is because all of Avaya's contracts with Plaintiffs contain New York forum-selection clauses. Although not parties to those contracts, Chirico and McGrath say that the forum-selection clauses protect them as agents of Avaya just as much as Avaya itself. Chirico and McGrath also contend that Plaintiffs should be equitably estopped from evading their own forum choices.

15. Plaintiffs concede the validity of the forum-selection clauses but contend that Chirico and McGrath cannot enforce them.[4] Each contract contains language

[4] The Canyon Plaintiffs contend that Chirico forfeited his argument concerning the forum-selection clauses because he did not cite Rule 12(b)(3) of the North Carolina Rules of Civil Procedure as the basis for his motion. This is incorrect. What matters is the substance of Chirico's argument, not whether he cited the right or wrong procedural rule. *See Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 511–12 (2003) (addressing "application of the forum selection clause" even though "defendant termed the motion to dismiss for lack of jurisdiction rather than venue"); *see also Carter v. Clowers*, 102 N.C. App. 247, 253 (1991)

stating that it does not confer any remedy on anyone other than the contracting parties. This language, according to Plaintiffs, forecloses any equitable right that Chirico and McGrath might otherwise have to enforce the forum-selection clauses. Plaintiffs also contend that estoppel applies only when a claimant tries to avoid a forum-selection clause while at the same time seeking to enforce the contract's other terms, which is not true here.

16. There's some uncertainty about which State's law ought to govern these matters. Most of the parties advocate North Carolina law because the law of the forum usually governs procedural rights. *See, e.g.*, *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 83 (2015). The others advocate New York law because the three contracts at issue have choice-of-law clauses selecting that State's law to govern their validity, enforcement, and interpretation. (*See* Brigade Agrmt. § 6.9; Canyon Agrmt. § 6.9; ALCOF Agrmt. § 13.12.) But no one argues the point in depth, and no one explains what difference the choice of law makes. Indeed, the Court sees no reason to pick one over the other because both point to the same result.[5]

(observing that "nomenclature is unimportant" and that "mislabeled" motion "may be treated as" if it had been made under the appropriate rule).

[5] For what it's worth, the answer isn't obvious. New York courts have identified "a division in authority as [to] whether the law of the forum chosen pursuant to a choice of law clause governs the enforceability of the forum selection clause." *USA-India Export-Import, Inc. v. Coca-Cola Refreshments USA, Inc.*, 2015 N.Y. Misc. LEXIS 255, at *18–19 (N.Y. Sup. Ct. Jan. 30, 2015). North Carolina courts seem unsure as well. *Compare, e.g.*, *Peter Millar, LLC v. Shaw's Menswear, Inc.*, 274 N.C. App. 383, 390–91 (2020) (applying Georgia law designated by choice-of-law clause to determine validity of forum-selection clause), *with Apex Tool Grp., LLC v. Ingersoll-Rand Co.*, 2013 NCBC LEXIS 24, at *5–8 (N.C. Super. Ct. May 14, 2013) (applying both North Carolina and Texas law). Again, there is no need to try to untangle this authority because North Carolina law and New York law are in sync.

17. Let's start with the basics: forum-selection clauses are generally valid and enforceable. Gone are the days when judges would jeer the litigants' bargained-for choice of forum as a gambit to "oust the jurisdiction" of the court. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). A more welcoming stance prevails today. Outside of arrangements that offend public policy, "contracting parties are free to choose which law will govern disputes arising out of their contract and where they will litigate those disputes, just as they are free to choose the other terms of their bargain." *Karriker v. Harpoon Holdings, L.P.*, 2024 NCBC LEXIS 23, at *4–5 (N.C. Super. Ct. Feb. 12, 2024); *see also LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 408 (2013); *Sony Ericsson*, 195 N.C. App. at 580 (citing *Brooke Grp. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996)); *Reynolds v. JOPAL Bronx, LLC*, 193 N.Y.S.3d 298, 300 (N.Y. App. Div. 2023).

18. Naturally, the scope of a forum-selection clause depends on what it says. In the B-3 Term Loan agreement, Avaya and the ALCOF Plaintiffs promised to submit all disputes "relating to" the agreement to "the exclusive general jurisdiction of" New York state and federal courts. (ALCOF Agrmt. § 13.13(a).) The investment agreements between Avaya and the Brigade and Canyon Plaintiffs say the same thing using slightly different words. (*See* Brigade Agrmt. § 6.9; Canyon Agrmt. § 6.9.)

19. All three clauses are indisputably mandatory in effect. New York is not just a preferred or permitted forum; it is the exclusive forum for litigation relating to the contracts. *See Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 568 (2002) (highlighting "language that indicates the parties' intent to make jurisdiction

exclusive"); *Fear & Fear, Inc. v. N.I.I. Brokerage, L.L.C.*, 851 N.Y.S.2d 311, 313 (N.Y. App. Div. 2008) (same).

20. All three clauses are also about as broad as forum-selection clauses get. The phrase "relating to" is expansive, and disputes "relating to" a contract include disputes about not only contract "performance" but also contract "formation" and other matters touching on the parties' contractual relationship. *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 25 (1985). In fact, both sides take it as a given that Plaintiffs' claims relate to their contracts with Avaya. And for good reason: whether a contract was wrongfully induced by fraud or negligence is a controversy that relates to the contract. *See, e.g.*, *Speedway Motorsports Int'l, Ltd. v. Bronwen Energy Trading, Ltd.*, 2009 NCBC LEXIS 17, at *16–18 (N.C. Super. Ct. Feb. 18, 2009); *Freeford Ltd. v. Pendleton*, 857 N.Y.S.2d 62, 65–66 (N.Y. App. Div. 2008).[6]

21. In short, the clauses at issue are valid, they're mandatory, and they cover Plaintiffs' claims. The bigger question is this: can Chirico and McGrath, as nonparties to the contracts, enforce them? The answer is yes.

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[6] *See also, e.g.*, *McMillan v. Unique Places, LLC*, 2015 NCBC LEXIS 3, at *19–20 (N.C. Super. Ct. Jan. 14, 2015) (citing *McQueen*, 76 N.C. App. at 18, 25) (holding that claim for fraudulent inducement arose "in connection with" contracts and thus fell under their arbitration clauses); *Montoya v. Cousins Chanos Casino, LLC*, 2012 N.Y. Misc. LEXIS 86, at *3–5, *13–15 (N.Y. Sup. Ct. Jan. 12, 2012) (concluding that claims for "fraud" and "fraudulent concealment" fell under forum-selection clause because they grew "out of the contractual relationship between the parties"); *Stein v. United Wind, Inc.*, 2021 N.Y. Misc. LEXIS 472, at *6 (N.Y. Sup. Ct. Feb. 8, 2021) ("Such language has been held to include . . . fraud-in-the-inducement claims . . . ."); *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 2006 N.Y. Misc. LEXIS 3406, at *15–30 (N.Y. Sup. Ct. Nov. 24, 2006) ("[P]ublic policy favors enforcement of forum selection clauses and supports a broad reading of these clauses, which may govern tort claims.").

22. True, a contract usually binds the parties to it and no one else. But various equitable doctrines allow nonparties to enforce, or require nonparties to follow, terms in a contract executed by others. Take agency law, for example. North Carolina courts have allowed "non-signatory agents to avail themselves of the protection of their principal's" agreement to arbitrate disputes on the theory that "an agent can assume the protection of the contract which the principal has signed." *Brown v. Centex Homes*, 171 N.C. App. 741, 745 (2005) (citation and quotation marks omitted); *accord Ellison v. Alexander*, 207 N.C. App. 401, 411–13 (2010). An arbitration clause is just a type of forum-selection clause, so these agency principles carry over to this context too. *See Se. Auto., Inc. v. Genuine Parts Co.*, 2017 NCBC LEXIS 34, at *39 n.14 (N.C. Super. Ct. Apr. 17, 2017) (citing *Ellison* and allowing corporate agent to enforce principal's forum-selection clause); *Big League Analysis, LLC v. Off. of the Comm'r of Baseball*, 2016 NCBC LEXIS 68, at *21 (N.C. Super. Ct. Aug. 29, 2016) (same).

23. New York courts hew to the same doctrinal line. Agents generally get "the benefit of arbitration agreements entered into by their principals to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation." *Revis v. Schwartz*, 140 N.Y.S.3d 68, 81 (N.Y. App. Div. 2020) (quoting *Hirschfeld Prods., Inc. v. Mirvish*, 673 N.E.2d 1232, 1233 (N.Y. 1996)); *see also Kim v. Cho*, 2015 N.Y. Misc. LEXIS 4816, at *4 (N.Y. Sup. Ct. Dec. 22, 2015) (stating that "arbitration clauses" are "a type of forum selection clauses"). More broadly, "a nonparty that is 'closely related' to one of the signatories

can enforce a forum selection clause." *Freeford*, 857 N.Y.S.2d at 67; *see also Siroy v. Jobson Healthcare Info. LLC*, 2016 N.Y. Misc. LEXIS 1920, at *6–7 (N.Y. Sup. Ct. May 23, 2016) (collecting cases concluding that a "non-signatory employee was sufficiently close to the employer who did sign the contract" to enforce a forum-selection clause).

24. There are good reasons why North Carolina, New York, and most other jurisdictions have taken this approach.[7] A corporation can act only through its agents, and contracting parties know full well that a corporate signatory's agents are the ones who will negotiate on its behalf to make a deal and then carry out its obligations once the deal has been made. It is easy to foresee that the agents would look to the contract, including its forum-selection clause, to protect them for acts done on the corporation's behalf to further the contractual relationship. *See, e.g.*, *Bernstein v. Wysoki*, 907 N.Y.S.2d 49, 57–58 (N.Y. App. Div. Aug. 24, 2010). A rule barring agents from enforcing the forum-selection clause would upset the expectations of the agents and signatories alike, undermine the clause's purpose to provide certainty about where contract-related disputes will be litigated, and make it too easy for a

[7] Federal appellate courts around the country have held that "a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses," especially when a nonparty defendant's alleged misconduct "is closely related to the contractual relationship." *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007) (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988)); *accord Franlink Inc. v. Bace Servs., Inc.*, 50 F.4th 432, 441 (5th Cir. 2022); *Carlyle Inv. Mgmt. LLC v. Moonmouth Co.*, 779 F.3d 214, 219 (3d Cir. 2015); *Magi XXI, Inc. v. Stato della Città del Vaticano*, 714 F.3d 714, 722–23 (2d Cir. 2013); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757–58 (8th Cir. 2001); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998); *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209–10 (7th Cir. 1993).

plaintiff to evade the clause by suing the agents rather than the corporation. *See Ellison*, 207 N.C. App. at 412; *Revis*, 140 N.Y.S.3d at 81; *see also Adams v. Raintree Vacation Exch., LLC*, 702 F.3d 436, 442 (7th Cir. 2012) (reasoning that a default rule that allowed only the named parties to enforce forum-selection clauses "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").

25. Plaintiffs argue that their contracts with Avaya leave no room for equitable enforcement by nonparties. The Brigade and Canyon agreements state that they are "intended for the benefit of all the parties hereto" and "not for the benefit of, nor may any provision hereof provide any remedy (for enforcement, damages or otherwise) to, any other Person." (Brigade Agrmt. § 6.12; Canyon Agrmt. § 6.12.) Comparable language appears in the B-3 Term Loan agreement. (*See* ALCOF Agrmt. § 13.6(a).) According to Plaintiffs, this extinguishes any equitable right that Chirico and McGrath might have as agents to enforce the forum-selection clauses.

26. At least one court applying New York law has rejected an identical argument. As that court put it, "[t]his sort of limiting language might" affect who can enforce a forum-selection clause as "a third party beneficiary" under ordinary principles of contract law but not who can enforce one based on an agency or similarly "close relationship" for equitable reasons. *Bonanno v. VTB Holdings, Inc.*, 2016 Del. Ch. LEXIS 24, at *24 n.83 (Del. Ch. Feb. 8, 2016). Courts in other jurisdictions with kindred equitable rules have drawn the same conclusions. *See Quintillion Subsea*

Operations, LLC v. Maritech Project Servs., Ltd., 2023 U.S. Dist. LEXIS 3546, at *36–39 (S.D. Tex. Jan. 6, 2023) (stating that "whether a party can be a third-party beneficiary and whether it can be bound to a particular contractual provision under the closely-related doctrine are separate inquiries"); *Smith v. Swaffer*, 566 F. Supp. 3d 791, 799–800 (N.D. Ohio 2021) (allowing officer of contracting party to "enforce the forum-selection clause notwithstanding its third-party beneficiary language"); *Ashall Homes Ltd. v. ROK Ent. Grp. Inc.*, 992 A.2d 1239, 1248–49 (Del. Ch. 2010) (allowing agents who solicited plaintiffs' investments to enforce forum-selection clause on equitable grounds despite contract language stating that no term could be enforced by anyone other than the parties).

27. Plaintiffs do not discuss these cases. They do rely on others in which courts cited a disclaimer of third-party rights as a reason not to let a nonparty enforce a forum-selection clause. But Plaintiffs' cases offer little guidance here: in none of them was the nonparty an agent of a corporate signatory. All involved weaker or more distant relationships that typically do not give rise to equitable rights in the first place. *See, e.g.*, *Fiesta Mart, LLC v. ACON Invs., LLC*, 2019 U.S. Dist. LEXIS 121940, at *9–14 (S.D. Tex. June 11, 2019) ("entity sold in" transaction); *Norcast S.àr.l. v. Castle Harlan, Inc.*, 2014 U.S. Dist. LEXIS 1197, at *24 (S.D.N.Y. Jan. 6, 2014) (nonparty that lacked essential element of agency); *Casville Invs., Ltd. v. Kates*, 2013 U.S. Dist. LEXIS 95426, at *16–18 (July 8, 2013) (shareholders); *Dean St. Cap. Advisors, LLC v. Otoka Energy Corp.*, 2017 U.S. Dist. LEXIS 15426, at *2–3, 13 (S.D.N.Y. Feb. 2, 2017) (unrelated "consulting services" provider); *McMahan Sec. Co.*

v. Aviator Master Fund, Ltd., 862 N.Y.S.2d 747, 750–52, 756 (N.Y. Sup. Ct. 2008) (forum-selection clause that covered disputes involving "the parties" and "their . . . agents" did not apply to "placement agent" acting as "independent contractor").

28. Put simply, the contracts' disclaimers of third-party rights do not suggest that Avaya and Plaintiffs intended to bar equitable enforcement of the forum-selection clauses by corporate agents. If there were any doubt about their intent, other parts of the contracts would dispel it. All parties to the Brigade and Canyon investment agreements represented that the agreements would be "enforceable in accordance with [their] terms except as enforceability may be subject to . . . general principles of equity." (Brigade Agrmt. §§ 4.3, 5.3; Canyon Agrmt. §§ 4.3, 5.3.) So did the parties to the B-3 Term Loan agreement. (*See* ALCOF Agrmt. § 8.2.) The contracts do not spurn equitable interpretation; they embrace it.

29. Thus, Chirico and McGrath may enforce the forum-selection clauses. Every claim is based on statements that Chirico and McGrath made or actions that they took in their capacities as Avaya's officers and agents to induce Plaintiffs to invest in the company. No allegations or claims arise from actions that either took in a personal capacity. As a result, the forum-selection clauses apply, and North Carolina is not the proper venue for these cases. *See, e.g.*, *Se. Auto.*, 2017 NCBC LEXIS 34, at *39 n.14; *Big League Analysis*, 2016 NCBC LEXIS 68, at *21; *Westaub II LLC v. Westermann*, 160 N.Y.S.3d 214, 216 (N.Y. App. Div. 2021); *Hudak v. Roe*, 2023 N.Y. Misc. LEXIS 3460, at *3, *6 (N.Y. Sup. Ct. July 11, 2023).

30. Having so concluded, the Court need not and will not address whether equitable estoppel also allows Chirico and McGrath to enforce the forum-selection clauses. Nor will the Court decide whether Plaintiffs have adequately stated a claim; those merits questions are for another court in another place.

III.
CONCLUSION

31. For these reasons, the Court **GRANTS** Chirico's and McGrath's motions to dismiss. Plaintiffs' claims against Chirico and McGrath are **DISMISSED** without prejudice to their right to refile in an appropriate venue.

SO ORDERED, this the 21st day of August, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases