UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:17-cv-23429-MGC

JEFF RODGERS, et. al.,
individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

HERBALIFE LTD., et. al.

Defendants.
_____/

DEFENDANTS' JOINT MOTION TO COMPEL ARBITRATION

Defendants Herbalife Ltd., Herbalife International, Inc., and Herbalife International of America, Inc. (collectively "Herbalife"), and Defendants Mark Addy, Jillian Addy, Dennis Dowdell, Garrain S. Jones, Cody Morrow, Christopher Reese, Gabriel Sandoval, Emma Sandoval, John Tartol, Leslie R. Stanford, Fernando Rancel, Lori Baker, Manuel Costa, Mark Davis, Jenny Davis, Danielle Edwards, Graeme Edwards, Thomas P. Gioiosa, Sandra Gioiosa, Alcides Mejia, Miriam Mejia, Paulina Riveros, Ron Rosenau, Carol Rosenau, Amber Wick, Jason Wick, Jorge De La Concepcion, Disney De La Concepcion, Jennifer Micheli, Guillermo Rasch, Claudia Rasch, Samuel Hendricks, Amy Hendricks, Bradley Harris, Paymi Romero, Ryan Baker, Kristopher Bickerstaff, Mark Matika, Enrique Carillo, Daniel J. Waldron, Susan Peterson, Michael Katz, Arquimedes Valencia, and Debi Katz (collectively the "Individual Defendants") (Herbalife and the Individual Defendants are referred to collectively herein as "Defendants") jointly move the Court for an order compelling arbitration of all claims asserted by Plaintiffs in this action and staying any further litigation of those claims in the Court.

I. INTRODUCTION.

Plaintiffs expressly agreed to arbitrate precisely the types of claims that they now bring against Herbalife and the Individual Defendants in this lawsuit. Despite that

contractual promise, Plaintiffs filed this lawsuit and seek to avoid their obligation to arbitrate—and to do so on an individual basis only—without providing any justification. The Court should enforce those agreements and compel Plaintiffs to arbitrate their claims for the following reasons:

First, there is an express, written agreement to arbitrate between the parties that broadly covers all disputes that arise between them. To the extent that Plaintiffs wish to challenge the enforceability of the agreements to arbitrate, or argue that their claims are outside the scope of the arbitration agreements, both well-established law and the unambiguous terms of the parties' agreements to arbitrate dictate that any such challenges must be decided by the arbitrator.

Second, even if the Court concludes that it needs to address issues of arbitrability in the first instance, all of Plaintiffs' claims are arbitrable. The agreements to arbitrate are present in the contractual documents that bind each of the Plaintiffs (four of the named Plaintiffs executed distributor agreements containing arbitration provisions, and **all** of the Plaintiffs' distributor agreements incorporate the Rules of Conduct applicable to distributors, which contain agreements to arbitrate), and there is no question as to the enforceability of the agreements to arbitrate. Also, the agreements to arbitrate could hardly be broader; they apply to **all** disputes or claims between Herbalife and the Plaintiffs as well as disputes arising from or relating to Plaintiffs' relationships with other distributors, such as the Individual Defendants. Finally, the agreements to arbitrate contain express class action waivers. Thus, the claims that Plaintiffs bring in this action are squarely within the scope of the agreements to arbitrate.

Finally, to the extent that the Court finds that the agreements to arbitrate do not extend to the Plaintiffs' claims against the Individual Defendants, Plaintiffs are equitably estopped from avoiding arbitration of those claims. Under well-settled California law, which should apply to this question of arbitrability, a non-signatory to an arbitration contract can compel arbitration of a signatory's claims under the doctrine of equitable estoppel where (1) the signatory's claims rely on the underlying agreement, or (2) the signatory's claims against a non-signatory are based on alleged concerted misconduct with a

signatory, which misconduct is connected to the underlying agreement. Both of those circumstances apply here.[1]

II. FACTUAL BACKGROUND.

Herbalife operates a global nutrition company that sells nutritional products around the world exclusively through a network of independent Distributors ("Distributors").[2] (Herbalife's Distributors are also referred to, including in this Motion, as "Members".) Plaintiffs are former and current Distributors and their spouses, and the Individual Defendants are all current Distributors. [*See* D.E. 1 ¶¶ 147-327.]

To become Distributors, Plaintiffs (or their spouses) each executed a Distributor Agreement (collectively the "Distributor Agreements") with Herbalife. [*See* Declaration of Roxane Romans ("Romans Decl."), ¶¶ 5, 12-17 & exhs. I-O thereto (The Romans Declaration is attached as **Exhibit 2** to this Motion).][3] Patricia Rodgers enrolled on June 23, 2010; Jennifer Lavigne enrolled on December 2, 2014; Jennifer Ribalta enrolled February 14, 2011; Cody Pyle enrolled on July 7, 2014; and Felix Valdez enrolled on June 15, 2008. All of them remain Distributors to this day. [*See id.* ¶¶ 12-16 & exhs. I-M thereto.] Izaar Valdez enrolled on March 22, 2013, and her distributorship was terminated on June 21, 2016 for nonpayment of the annual fee.[4] [*See id.* ¶ 17 & exh. O thereto.]

Four of these Plaintiffs—Jennifer Lavigne, Michael Lavigne (who allegedly pursued the Herbalife business opportunity under his wife's distributorship), Cody Pyle, and Felix Valdez executed Distributor Agreements containing binding arbitration provisions. [*See id.*

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[1] Concurrently with this Motion, the Defendants are filing a Joint Motion to Transfer Venue to the Central District of California Pursuant to 28 U.S.C. § 1404(A). The Motion to Transfer is being brought in the alternative to this Motion to Compel Arbitration. To the extent any portion of this action is not sent to arbitration, Defendants seek transfer of whatever claims remain to the Central District of California. For the Court's and the parties' convenience, attached as **Exhibit 1** to this Motion is a chart identifying each named Plaintiff and the provisions (arbitration, forum selection) to which they are subject.

[2] *See* About Herbalife, http://company.herbalife.com/ (last visited December 14, 2017).

[3] Plaintiff Jeff Rodgers is the husband of Plaintiff Patricia Rodgers, and Plaintiff Michael Lavigne is the husband of Plaintiff Jennifer Lavigne.

[4] Izaar Valdez previously was a Distributor from June 15, 2008 until June 15, 2011, when her distributorship was terminated for failure to pay the annual fee. [Romans Decl., ¶ 17 & Exh. N thereto.] That prior Distributor Agreement was superseded when Izaar Valdez executed a new Distributor Agreement on March 22, 2013. [*Id.*]

¶¶ 13, 15-16 & exhs. J, L-M.] Moreover, the Distributor Agreements entered into by all of the Plaintiffs expressly incorporate by reference Herbalife's Distributor Rules of Conduct (the "Rules") and the Sales and Marketing Plan (the "Marketing Plan") in their most current forms (collectively, the Distributor Agreements, the Rules, and the Marketing Plan are referred to as the "Contract"). [*See id.* exh. I thereto (§ 4); *id.* exh. J thereto (§ 3); *id.* exh. K thereto (§ 4); *id.* exh. L thereto (§ 8); *id.* exh. M thereto (§ 5); *id.* exh. O thereto (§ 3).] The Contract provides the terms and conditions under which a Distributor operates an Herbalife Distributorship, including, among other things, the compensation plan that governs how Distributors are compensated for product sales made by them or by Distributors in their downline. [*See* Romans Decl. ¶¶ 5-6.][5] The Rules permit spouses to operate only a single distributorship, and the spouse of a Distributor is bound by the Rules. [Romans Decl., exh. D thereto (§§ 2.1.5, 2.1.7); *id.* exh. G thereto (§§ 2.1.5, 2.1.7).]

By executing the Contract, Plaintiffs agreed to be bound by the arbitration provision, which was added to the Rules in August 2013 and made available to Distributors in October 2013.[6] [*See* Romans Decl. ¶ 7 & exh. A thereto (§ 29); *see also id.* exh. I thereto (§ 4); *id.* exh. J thereto (§ 3); *id.* exh. K thereto (§ 4); *id.* exh. L thereto (§ 8); *id.* exh. M thereto (§ 5); *id.* exh. O thereto (§ 3).]. The arbitration provision was added to the distributorship agreement at this time as well, and when the arbitration provision was added, the Rules provided that the arbitration provision in the Rules was "**the Arbitration Agreement incorporated into the Distributorship Application and Agreement**."[7] [Romans Decl.,

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[5] The version of the Rules attached as Exhibit G to the Romans Declaration was in effect from November 2016 until October 2017. Because Plaintiff Izaar Valdez terminated her distributorship in June 2016, a previous version of the Rules, which was in effect from May 2014 until July 2016 and applied during the term of her distributorship, is also attached as Exhibit D to the Romans Declaration.

[6] At the time the arbitration provision was added in 2013, all Distributors—including the five named Plaintiffs who were Distributors at the time—were subject to Rule 8(C) ("Keep Informed of Herbalife's Policies"), which required each Distributor to "Stay informed of Herbalife's policies by . . . regularly visiting Herbalife's official website MyHerbalife.com." [Romans Decl., ¶ 8 & exh. C thereto.]

[7] Four of the eight Plaintiffs became Distributors prior to these August 2013 modifications to the Rules, and their distributorship agreements did not contain an arbitration provision: Plaintiffs Jeff and Patricia Rodgers, Jennifer Ribalta, and Izaar Valdez. These plaintiffs are nonetheless bound by the arbitration provision in the Rules as discussed herein. Although

exh. A thereto (§ 29).] The arbitration provision in the Rules was amended in May 2014 and then again in November 2016.[8] [*See id.* ¶¶ 9, 11 & exh. D thereto (Ch. 12—the "2014 Arbitration Provision") and exh. G thereto (Ch. 12—the "2016 Arbitration Provision").] After May 2014, all of the Plaintiffs continued to operate as Distributors by pursuing the business opportunity, purchasing products, and receiving commissions. [*See* Decl. of Silvia Ramirez ¶¶ 6-11 ("Ramirez Decl.") (The Ramirez Declaration is attached as **Exhibit 3** to this Motion).] Izaar Valdez's distributorship was terminated in June 2016, after she failed to pay the annual fee, but she had continued to receive commissions after May 2014, including commissions last received on September 15, 2015 for $24.52. [*See* Romans Decl., ¶ 17.]

After the 2016 Arbitration Provision went into effect, all Plaintiffs (besides Izaar Valdez) again continued to operate as Distributors. [Ramirez Decl. ¶¶ 6-10.] Indeed, all Plaintiffs (besides Izaar Valdez) have actually earned commissions since the 2016 Arbitration Provision went into effect: the Rodgers last earned commissions on November 15, 2017 for $70.73; the Lavignes last earned commissions on October 15, 2017 for $22.84; Jennifer Ribalta last earned commissions on May 15, 2017 for $28.50; Cody Pyle last earned commissions on June 15, 2017 for $124.09; and Feliz Valdez last earned commissions on December 15, 2016 for $11.71. [*Id.*] Further, all Plaintiffs (besides Izaar Valdez) remain Distributors to this day. [*Id.*]

The 2016 Arbitration Provision, which applies to all Plaintiffs besides Izaar Valdez, provides:

> Herbalife and Distributor agree, with two exceptions, to **arbitrate all disputes and claims between them**, including, without limitation, disputes or claims arising out of or relating to the Agreement, the Rules of Conduct, Sales & Marketing Plan decisions, relationships with other Distributors, and the

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Felix Valdez also became a distributor prior to August 2013, his Distributor Agreement contained an arbitration provision. [Romans Decl., ¶ 16 & exh. M thereto.] Plaintiffs Cody Pyle and Jennifer and Michael Lavigne became Distributors after the 2014 Arbitration Provision went into effect in the Rules, and their distributor agreements contained arbitration provisions. [*See id.* ¶¶ 13, 15 & exhs. J, L thereto.] Felix Valdez, Cody Pyle, and Jennifer and Michale Lavigne are thus bound by the arbitration provision contained in the Rules and in their Distributor Agreements.

[8] The 2016 Arbitration Provision and the 2014 Arbitration Provision collectively are referred to herein as the "Arbitration Provisions."

> purchase, sale or use of Herbalife® products, and regardless of whether the dispute or claim arose before Distributor's contractual relationship with Herbalife. The two exceptions are: (1) either Herbalife or Distributor may bring suit in court to enjoin infringement or other misuse of intellectual property rights, and (2) Distributor may bring an individual action for monetary damages (but no other relief) in small claims court where permitted by law.

[Romans Decl., exh. G thereto (§ 12.3) (emphasis added).] It further explicitly provides that "**Herbalife and Distributor both waive the right to trial by jury.**" [*Id.* exh. G thereto (§ 12.2) (emphasis in original).]

The 2014 Arbitration Provision, which applies only to Izaar Valdez, provides:

> (1) Scope
>
> (a) This agreement to arbitrate is intended to be broadly interpreted. Except as provided in Section (2) below, **Herbalife and Member agree to arbitrate all disputes and claims between them**, including, but not limited to:
>
> • claims that arise out of or relate to terminations, enforcement of Member Rules of Conduct, and Sales & Marketing Plan decisions;
>
> • **claims that arise out of or relate to any dispute between Member and another Herbalife Member**;
>
> • claims that arise out of or relate to any aspect of the relationship between Herbalife and Member, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory;
>
> • claims that arose before Member's contractual relationship with Herbalife;
>
> • claims that are the subject of purported class action litigation in which Member is not a member of a certified class; and
>
> • claims that may arise before, after or as a direct or indirect result of the termination of Member's relationship with Herbalife.[9]

[9] The 2014 Arbitration Provision is also expressly included in the Distributor Agreements that Jennifer Lavigne (on behalf of herself and her husband, Michael Lavigne) and Cody Pyle executed. [Romans Decl., exhs. J, L thereto.] The Distributor Agreement that Felix Valdez executed in 2008 also contains a mandatory mediation and arbitration provision, which covers "any claim or dispute arising out of or related to my Distributorship,

[Romans Decl., exh. D thereto (§ 12(1)(a)) (emphasis added).] The 2014 Arbitration Provision provides that "**Member agrees that Herbalife and Member are each waiving the right to a trial by jury**." [*Id.* exh. D thereto (§ 12(1)(e)) (emphasis in original).] Importantly, both Arbitration Provisions contain an express class action waiver; arbitration "shall take place on an individual basis; class or representative actions shall not be permitted." [*Id.* exh. D thereto (§ 12); *id.* exh. G thereto (§ 12.2).]

The Arbitration Provisions require hearings to take place in the Distributor's county of residence, unless the parties agree otherwise. [Romans Decl., exh. G thereto (§ 12.7); *id.* exh. D thereto (§ 12(4)(g)).] The Arbitration Provisions are governed by California substantive law, the Federal Arbitration Act, and the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA"). [*Id.* exh. G thereto (§§ 11.4, 12.4); *id.* exh. D thereto (§§ 11.1.3, 12(1)(c), 12(4)(f)).] Further, the Arbitration Provisions require Herbalife to pay *all arbitration fees* unless the claim is for more than $75,000 in damages or the claim is frivolous. [*Id.* exh. G thereto (§ 12.6); *id.* exh. D thereto (§ 12(4)(h)).] And while the Rules generally grant Herbalife the sole and absolute discretion to amend the Rules, the right to amend the Arbitration Provisions is limited such that any amendments do not apply to claims that "have accrued or are otherwise known to Herbalife at the time." [*See id.* exh. G thereto (§ 12.9); *id.* exh. D thereto (§ 12(6)).]

Plaintiffs did not submit their individual claims to arbitration as required by the Arbitration Provisions; instead, they brought this class action lawsuit in federal court. Their complaint contains five claims: a RICO claim and RICO conspiracy claim (brought against all Defendants), and a Florida Deceptive and Unfair Trade Practices Act claim, an unjust enrichment claim, and a negligent misrepresentation claim (brought against Herbalife only). [D.E. 1 ¶¶ 341-388.] Those claims are all premised on the theory that Defendants' alleged misrepresentations regarding Herbalife events induced the Plaintiffs to attend those events,

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including, without limitation, my rights, obligations and relationships with Herbalife (including any of its corporate affiliates or any of their respective officers, directors or employees), and/or with other Distributors." [*Id.* exh. M thereto.] Defendants contend that these Plaintiffs are bound both by the arbitration provisions in their Distributor Agreements and Herbalife's current Rules.

as Distributors, in pursuit of the business opportunity. [*See id.* ¶¶ 1-12.] For the reasons set forth below, the Court should compel Plaintiffs to arbitrate all of their claims.

III. ARGUMENT.

A. The Court Should Order The Parties To Arbitration And Allow The Arbitrator To Resolve Any Challenges To The Scope and Enforceability of the Arbitration Provisions.

1. An Agreement to Arbitrate Exists Between the Parties.

Each of the Plaintiffs (or their spouses) executed Distributor Agreements with Herbalife, which expressly incorporated the Rules by reference. [*See* Romans Decl., exh. I thereto (§ 4); *id.* exh. J thereto (§ 3); *id.* exh. K thereto (§ 4); *id.* exh. L thereto (§ 8); *id.* exh. M thereto (§ 5); *id.* exh. O thereto (§ 3).] In August 2013, Herbalife amended the Rules (and the distributor agreement) to include an agreement to arbitrate and expressly stated that this agreement to arbitrate was "the Arbitration Agreement incorporated into the Distributor[] [Agreements]." [*Id.* ¶ 7 & exh. A thereto (§ 29).] This arbitration agreement also was incorporated directly into the Distributor Agreement, which binds three Plaintiffs.[10] The arbitration provision in the Rules was amended in May 2014 and then again in November 2016. In other words, **for each plaintiff, an agreement to arbitrate remained in effect from August 2013 through the filing of this lawsuit**. Each of the Plaintiffs either became Distributors after the agreement to arbitrate was adopted, or continued operating as Distributors long after the Rules were amended to add the arbitration provision. Thus, an agreement to arbitrate exists between the parties, and the Court should grant the Motion and order the parties to arbitration.

2. The Parties Agreed that the Arbitrator Shall Determine the Scope and Enforceability of the Arbitration Provisions.

The Arbitration Provisions expressly provide that "**the arbitrator shall determine the scope and enforceability of this Arbitration Agreement and the arbitrability of any disputes.**" [*See* Romans Decl., exh. G thereto (§ 12.7) (emphasis added); *see also id.* Exh. D

[10] Plaintiffs Jennifer Lavigne, Michael Lavigne, and Cody Pyle are all governed by Distributor Agreements that contained arbitration agreements. [*See* Romans Decl., exh. J, L thereto.] The Distributor Agreement that Felix Valdez executed in 2008 also contained an arbitration provision. [*See id.* exh. M thereto.]

thereto (§ 12(1)(b)) ("The arbitrator shall also have exclusive authority to the extent permitted by law to decide the arbitrability of any claim or dispute between Member and Herbalife.").] Further, the Arbitration Provisions are "governed by the Commercial Arbitration Rules ("AAA Rules") of the American Arbitration Association ("AAA")." [Romans Decl., exh. G thereto (§ 12.4); *id.* exh. D thereto (§ 12(1)(c)).] The AAA Rules empower the arbitrator to decide matters relating to the arbitrator's jurisdiction and provide that the arbitrator, not the Court, decide issues of arbitrability:

> R-7. Jurisdiction
>
> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
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> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

It is well-established that "the question 'who has the power to decide arbitrability' turns upon **what the parties agreed about that matter.**" *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (emphasis added). Here, the parties unmistakably agreed to have the arbitrator, not a court, resolve all arbitrability questions (in addition to resolving the underlying dispute and claims). Both the Ninth and Eleventh Circuits have expressly held that a clear and unmistakable agreement that the arbitrator should decide the issue of arbitrability revokes the court's ability to determine that threshold question. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005).

Accordingly, an arbitrator, not the Court, must decide any threshold challenges raised by Plaintiffs to the enforceability of the Arbitration Provisions as well as any challenges to the scope of the Arbitration Provisions. This litigation should be stayed in the interim.

B. If the Court Decides Arbitrability, Plaintiffs' Claims Still Must be Arbitrated.

1. The Arbitration Provisions are Binding and Enforceable.

There is a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. The Federal Arbitration Act ("FAA"), which governs the Arbitration Provisions, "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."[11] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Indisputably, Plaintiffs agreed to arbitrate their claims against Herbalife and expressly waived their rights to bring their claims in court (and to bring a class action). [*See* Romans Decl., exhs. D, G thereto.] When Plaintiffs signed up as Herbalife Distributors, they expressly agreed to be bound by the Rules, as amended from time to time, and those Rules were amended in August 2013 to add an arbitration provision. [*See id.* exh. I thereto (§ 4); *id.* exh. J thereto (§ 3); *id.* exh. K thereto (§ 4); *id.* exh. L thereto (§ 8); *id.* exh. M thereto (§ 5); *id.* exh. O thereto (§ 3).] And, it is well-established that "[a]n agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference." *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.*, 6 Cal.App.4th 1266, 1271, 8 Cal.Rptr.2d 587, 589 (1992). [12]

Further, Plaintiffs Cody Pyle and Jennifer Lavigne did not become Distributors until *after* the 2014 Arbitration Provision already was in effect and incorporated into their Distributor Agreements. [*See id.* exhs. J, L thereto.] And, while Izaar Valdez terminated her distributorship before the 2016 Arbitration Provision went into effect, she continued to

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[11] The FAA governs the enforceability of arbitration agreements in contracts that involve interstate commerce, which the Contract clearly does, and Plaintiffs expressly agreed to the application of the FAA. *See* 9 U.S.C. § 2; [Romans Decl., exh. G thereto (§ 12.4); *id.* exh. D thereto (§ 12(1)(c)).].

[12] The Rules state that they are governed by California substantive law. [*See* Romans Decl., exh. G thereto (§ 11.4); *id.* exh. D thereto (§ 11.1.3).] Under the FAA, state contract law determines whether there is a valid arbitration agreement. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009).

operate as a Distributor for over *two years after* the 2014 Arbitration Provision went into effect, last earning commission of $24.52 on September 15, 2015. [Ramirez Decl. ¶ 11.] All other Plaintiffs remain Distributors to this day, operating as Distributors for years, and earning substantial commissions after the effective date of the 2014 Arbitration Provision and for months after the effective date of the 2016 Arbitration Provision. [*Id.* ¶¶ 6-10.] Thus, Plaintiffs are bound by the Arbitration Provisions. *See Pinnacle Museum Tower Assn. v. Pinnacle Market Dev. (US), LLC*, 282 P.3d 1217, 1224 (Cal. 2012) ("A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in fact . . . ."); *see also Craig v. Brown & Root, Inc.*, 84 Cal.App.4th 416, 420-22, 100 Cal.Rptr.2d 818, 820-21 (2000) (holding that an employee was bound by an arbitration agreement with her employer where the employer mailed her copies of a memorandum and brochure concerning dispute resolution and the employee thereafter continued to work for the employer).

That conclusion applies equally to Plaintiffs Jeff Rodgers and Michael Lavigne—who were not express signatories to a Distributor Agreement—because, as spouses of Distributors, they are indisputably bound by the Rules and, therefore, the Arbitration Provisions contained therein. [Romans Decl., exh. G thereto (§§ 2.1.5, 2.1.7); *id.* exh. D thereto (§§ 2.1.5, 2.1.7).] Indeed, even beyond the Rules, Plaintiffs Patricia Rodgers' and Jennifer Lavigne's Distributor Agreements expressly extend numerous provisions to their spouses, Jeff Rodgers and Michael Lavigne. [*See* Romans Decl., exh. I thereto (§§ 2, 8(a)-(b)); *id.* exh. J thereto (§§ (A)(2), (D)(6)).]

Even if the Contract did not expressly extend to Distributors' spouses, any argument that Distributors' spouses are not bound by the agreement to arbitrate would not be well-founded. Under California law, a nonsignatory to an arbitration agreement is compelled to arbitrate under either of the following circumstances: "(1) where the nonsignatory is a **third-party beneficiary** of the contract containing the arbitration agreement; and (2) where a **preexisting relationship** existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim." *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158

Cal.App.4th 1061, 1069-70, 70 Cal.Rptr.3d 605, 611 (2008) (emphasis added). Here, Plaintiffs Jeff Rodgers and Michael Lavigne are both third-party beneficiaries of the Contract, and they obviously have preexisting relationships with signatories (their wives).[13]

There is also no plausible argument that the Arbitration Provisions are unconscionable. The Arbitration Provisions apply equally to both parties (Herbalife and the Distributor), require Herbalife to pay arbitration fees, require Herbalife to pay the Distributor's attorneys' fees (if the Distributor prevails), require hearings in the Distributor's own county, and prohibit retroactive amendments. Under controlling California law, the Arbitration Provisions are ***per se*** **not** unconscionable. *See Pinnacle Museum*, 282 P.3d at 1232-33 (explaining that unconscionability requires both procedural unconscionability ("oppression or surprise") and substantive unconscionability (terms that are "so one-sided as to shock the conscience")); *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal.App.4th 1425, 1465, 140 Cal.Rptr.3d 38, 68 (2012) ("An arbitration agreement that expressly exempts all claims, accrued or known, from contract changes is valid and enforceable . . . .").

2. Plaintiffs' Claims Are Within The Scope Of The Arbitration Provisions.

Where a "contract contains an arbitration clause, there is a presumption of arbitrability." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). "The presumption of arbitrability is particularly applicable where an arbitration clause is broadly worded." *Int'l Broth. Of Elec. Workers Sys. Council U-4 v. Florida Power & Light Co.*,

[13] Mr. Rodgers and Mr. Lavigne are also bound to arbitrate for the same reasons provided in the concurrently filed Motion to Transfer Venue to bind them to the forum selection clause in their wives' distributor agreements. Their interests in this action are "completely derivative" of the interests of their wives and their wives' Herbalife distributorships. *See Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998) (enforcing forum selection clauses against spouses because their "interests . . . in this dispute are completely derivative of those of the Name plaintiffs—and thus [are] directly related to, if not predicated upon the interests of the Name plaintiffs."); *see also Bahamas Sales Assoc.*, LLC v. Byers, 701 F.3d 1335, 1342 n.7 (11th Cir. 2012) ("Although all of the cases we cite concern the application of equitable estoppel to contracts with arbitration clauses rather than forum-selection clauses, the equitable estoppel analysis is the same. Arbitration clauses are similar to forum-selection clauses.") (citing *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519 (1974)).

627 F. App'x 898, 903 (11th Cir. Oct. 30, 2015). A clause that applies to "any" or "all" disputes is the paradigm of a broad arbitration clause. *See Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003) (holding that an arbitration provision that covers "any" or "all" disputes "could not have been broader").

The Arbitration Provisions are extremely broad. They cover "**all disputes and claims**" between a Distributor and Herbalife, with two exceptions that have no application here. [*See* Romans Decl., exh. G thereto (§ 12.3); *id.* exh. D thereto (§ 12(1)-(2)) (emphases added).] There is no credible argument that Plaintiffs' claims against Herbalife, which arise entirely out of their status as **Herbalife** Distributors attending **Herbalife** events to pursue the **Herbalife** business opportunity, fall outside of the scope of the Arbitration Provisions.

Similarly, Plaintiffs' claims against the Individual Defendants also are covered by the Arbitration Provisions. Those provisions expressly extend to disputes or claims with Herbalife "arising out of or relating to a **Distributor's relationship with other Distributors**." [*Id.* (emphasis added).] Importantly, in this case Plaintiffs' claims are pled jointly against Herbalife and the Individual Defendants. Plaintiffs allege that all of the defendants engaged in concerted conduct—jointly conducting the affairs of a RICO enterprise and entering into a conspiracy to violate the RICO statute.[14] Such claims certainly arise out of or relate to Plaintiffs' relationships with other Distributors, and those claims therefore are within the scope of the Arbitration Provisions. *See, e.g.*, *Griggs v. SGE Mgmt., LLC*, 2015 WL 11423656, at *5 (W.D. Tex. Oct. 15, 2015) (requiring RICO claims by former distributors of direct sales company against high-level distributors and company to be arbitrated even though the defendant distributors were not signatories to contract because the arbitration provision extended to claims "between two or more [distributors]".), *report and recommendation approved by*, 2015 WL 11438110 (W.D. Tex. Nov. 4, 2015).

[14] A corporate entity like Herbalife cannot conspire with itself or its subsidiaries or affiliates. *See Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999); *Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 883 F. Supp. 1362, 1371 (D. Neb. 1993); *Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington*, 633 F. Supp. 386, 405 n.23 (D. Del. 1986). And, as a practical matter (to avoid the risk of inconsistent results), it makes no sense to allow a conspiracy claim to be adjudicated in arbitration while the alleged co-conspirators simultaneously defend the same claims in federal court.

Moreover, it is well settled that all doubts must be resolved *in favor of arbitration*. *See Moses H. Cone*, 460 U.S. at 24-25.

Also, because of the class action waivers contained within the Arbitration Provisions, arbitrations will proceed on an individual basis. [Romans Decl., exh. G thereto (§ 12.2); *id.* exh. D thereto (§ 12).][15]

3. In The Alternative, Plaintiffs Are Equitably Estopped From Arguing That Their Claims Against The Individual Defendants Are Not Arbitrable.[16]

Plaintiffs assert two claims against the Individual Defendants: (1) civil racketeering in violation of 18 U.S.C. § 1962(c) (the "RICO Claim"); and (2) conspiracy to commit civil racketeering in violation of 18 U.S.C. § 1962(d) (the "RICO Conspiracy Claim"). [D.E. 1 ¶¶ 341-65.] Those claims are jointly asserted against the Individual Defendants and Herbalife. Both claims rely on Plaintiffs' main argument that Defendants misrepresented the correlation between attendance and qualification at Herbalife events and success in the Herbalife business opportunity as a Distributor. [*Id.* ¶¶ 1-12.] Specifically, for the RICO Claim, Plaintiffs allege that Defendants misrepresented to Distributors that attending events was the "secret to becoming financially successful" in the Herbalife business opportunity. [*Id.* ¶ 356.] They also allege that Defendants "had a duty to disclose that there was no correlation between event attendance and success." [*Id.* ¶ 357.]

Whether a non-signatory to an arbitration agreement can compel arbitration under equitable estoppel is determined by state law. *See Arthur Andersen*, 556 U.S. at 630-31. Under well-established California law, a nonsignatory may compel arbitration when either (1) a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory; **or** (2) the signatory alleges "substantially interdependent and concerted misconduct by the nonsignatory and another signatory and "the allegations of

[15] Class action waivers in arbitration agreements have been repeatedly upheld. *See e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

[16] The doctrine of equitable estoppel is "equally applicable to a nonsignatory plaintiff" and even allows a nonsignatory plaintiff to "be compelled to arbitrate a claim even against a nonsignatory defendant." *JSM Tuscany, LLC v. Super. Ct.*, 193 Cal.App.4th 1222, 1239-40, 123 Cal.Rptr.3d 429, 443 (2011). Accordingly, Defendants' equitable estoppel arguments herein apply equally to Plaintiffs Jeff Rodgers and Michael Lavigne, even if those Plaintiffs are not considered formal signatories to the Contract.

interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement." *Goldman v. KPMG LLP*, 173 Cal.App.4th 209, 219, 221, 92 Cal.Rptr.3d 534, 541, 543 (2009). Plaintiffs' claims against the Individual Defendants satisfy both of these tests.

a. Plaintiffs' Claims Against the Individual Defendants Rely on the Terms of the Contract.

This doctrine applies if 'the claims the plaintiff asserts against the nonsignatory [are] dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause.'" *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 186 Cal.App.4th 696, 715, 111 Cal.Rptr.3d 876, 894 (2010) (quoting *Goldman*, 173 Cal.App.4th at 217-218, 92 Cal.Rptr.3d at 541-42); *see also Rodriguez v. Shen Zhen New World I LLC*, 2014 WL 908464, at *5-6 (C.D. Cal. March 6, 2014) (finding that plaintiff's claims against a nonsignatory to an employment agreement were arbitrable because they related to the plaintiff's terms of employment). The fact that claims are "cast in tort rather than contract does not avoid the arbitration clause." *Molecular Analytical Sys.*, 186 Cal.App.4th at 716, 111 Cal.Rptr.3d at 894. Instead, the Court must focus on "the nature of the claims asserted by the plaintiff against the nonsignatory defendant" to determine whether they "rely upon, make reference to, or are intertwined with claims under the subject contract." *Id.*

Here, both the RICO Claim and the RICO Conspiracy Claim against the Individual Defendants necessarily rely on and are intertwined with the Contract. Specifically, both claims are based on the predicate element that Defendants allegedly misrepresented the importance of event attendance for success in the Herbalife business opportunity. [*See* D.E. 1 ¶¶ 356, 363.] The foundation of that predicate element—*i.e.*, whether those statements are false—requires an in-depth analysis of the Contract, including, among other things, the compensation plan within the Marketing Plan, and the terms and conditions of a distributorship in the Rules. Whether or not event attendance really is the key to success in the business opportunity depends upon how the business opportunity works (which is governed by the Rules) and how compensation is paid (which is governed by the Marketing Plan). Further, Plaintiffs attempt to impose upon the Individual Defendants "a duty to

disclose that there was no correlation between event attendance and success." That alleged duty likely could only arise from Defendants' roles as upline Distributors to the Plaintiffs—roles that are determined by the Contract. [*See id.* ¶ 357.]

Liability against the Individual Defendants relies on and is intertwined with the Contract. Accordingly, Plaintiffs are equitably estopped from arguing that the Contract's arbitration provision does not apply to their claims against the Individual Defendants.

b. Plaintiffs' Claims Against the Individual Defendants are Based on Alleged Interdependent Misconduct Between Herbalife and the Individual Defendants, Which is Connected with the Contract.

"[A] non-signatory is entitled to arbitration when the claims against it involve 'interdependent and concerted' events with a defendant who did sign and are 'founded in or intimately connected with the obligations of the underlying agreement.'" *Jacobson v. Snap-on Tools Co.*, 2015 WL 8293164, at *6 (N.D. Cal. Dec. 9, 2015).

Plaintiffs are clearly alleging interdependent misconduct between the Individual Defendants and Herbalife by alleging the same RICO Claim and RICO Conspiracy Claim against both groups, jointly: "Defendants jointly conduct, manage, and control the affairs of the Circle of Success enterprise"; "All Defendants jointly affect the strategic direction of the Circle of Success enterprise"; "Defendants have collectively persuaded hundreds of thousands of victims to invest substantial sums into attending events". [*See* D.E. 1 ¶¶ 352, 355, 356.] In fact, California courts have specifically held that RICO claims against a non-signatory and a signatory raise allegations of substantially interdependent and concerted misconduct sufficient for equitable estoppel to apply. *See, e.g.*, *Moore v. Chavez*, 2009 WL 10672578, at *5 (C.D. Cal. May 4, 2009).

Thus, the only issue is whether those allegations are connected to the Contract. For the same reasons identified above (*see supra* § III.B.3.a), this element is met. Indeed, the necessary predicate for all of Plaintiffs' claims of concerted misconduct between the Individual Defendants and Herbalife is that all of them misrepresented the importance of event attendance for success in the Herbalife business opportunity. The existence of that predicate element can **only** be determined by the Rules and the Marketing Plan.

Plaintiffs raise allegations of concerted misconduct against the Individual Defendants and Herbalife, and that alleged misconduct is connected to the Contract. Therefore, Plaintiffs are equitably estopped from arguing that their claims against the Individual Defendants are not subject to the Arbitration Provisions.

IV. CONCLUSION.

For all of the foregoing reasons, Defendants respectfully urge the Court to stay this litigation and compel Plaintiffs to arbitrate their claims.

CERTIFICATE OF PREFILING CONFERENCE

Pursuant to Local Rule 7.1(a)(3), counsel for Defendants certify that they conferred with counsel for Plaintiff on December 5 and 12, 2017 in a good faith effort to resolve the issues raised in this Motion but were unable to resolve those issues.

Date: December 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appearance was served electronically using the CM/ECF system, on December 14, 2017, on all electronic filing to all counsel or parties of record on the service list.

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