No. 18-14048-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFF RODGERS, PATRICIA RODGERS, MICHAEL LAVIGNE, JENNIFER LAVIGNE, CODY PYLE, JENNIFER RIBALTA, IZAAR VALDEZ, AND FELIX VALDEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS-APPELLEES

V.

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,

DEFENDANTS-APPELLANTS

Appeal from the United States District Court

for the Southern District of Florida, No. 17-23429-CIV

Hon. Marcia G. Cooke, District Judge

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

1. Addy, Jillian - Appellant
2. Addy, Mark - Appellant
3. Baker, Lori - Appellant
4. Baker, Ryan - Appellant
5. Bickerstaff, Kristopher - Appellant
6. Carillo, Enrique - Appellant
7. Catlett, Michael S. - Appellants' Counsel
8. Cooke, Marcia G. – District Court Judge
9. Costa, Manuel - Appellant
10. Davis, Mark - Appellant
11. Davis, Jenny - Appellant
12. de la Concepcion, Disney - Appellant
13. de la Concepcion, Jorge - Appellant
14. Dowdell, Dennis - Appellant
15. Edwards, Danielle - Appellant
16. Edwards, Graeme - Appellant
17. Foster, Zachary S. – Appellants' Counsel
18. Gioiosa, Sandra - Appellant

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19. Gioiosa, Thomas P. - Appellant
20. Goodman, Jonathan - Magistrate Judge
21. Harris, Bradley - Appellant
22. Hayden, Donald John - Appellees' Counsel
23. Hendricks, Amy - Appellant
24. Hendricks, Samuel - Appellant
25. Herbalife International, Inc. - former Defendant
26. Herbalife International of America, Inc. - former Defendant
27. Herbalife Nutrition Ltd. - former Defendant
28. Howie, Brian A. - Appellants' Counsel
29. Jones, Garrain S. - Appellant
30. Jones, Jason M. - Appellees' Counsel
31. Katz, Debi - Appellant
32. Katz, Michael - Appellant
33. Lavigne, Jennifer - Appellee
34. Lavigne, Michael - Appellee
35. Mark, Etan - Appellees' Counsel
36. Mark Migdal & Hayden - Appellees' Counsel
37. Matika, Mark - Appellant

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38. Mejia, Alcides - Appellant
39. Mejia, Miriam - Appellant
40. Micheli, Jennifer - Appellant
41. Morrow, Cody - Appellant
42. O'Donnell, Lara - Appellees' Counsel
43. Peterson, Susan - Appellant
44. Pyle, Cody - Appellee
45. Quarles & Brady LLP – Appellants' Counsel
46. Quigley, Kevin D. - Appellants' Counsel
47. Rancel, Fernando - Appellant
48. Rasch, Claudia - Appellant
49. Rasch, Guillermo - Appellant
50. Reese, Christopher - Appellant
51. Ribalta, Jennifer - Appellee
52. Riveros, Paulina - Appellant
53. Rodgers, Jeff - Appellee
54. Rodgers, Patricia - Appellee
55. Romero, Paymi - Appellant

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56. Rosenau, Carol - Appellant

57. Rosenau, Ron - Appellant

58. Salanga, Edward - Appellants' Counsel

59. Sandoval, Emma - Appellant

60. Sandoval, Gabriel - Appellant

61. Stanford, Leslie R. - Appellant

62. Tartol, John - Appellant

63. Valdez, Felix - Appellee

64. Valdez, Izaar - Appellee

65. Valencia, Arquimedes - Appellant

66. Waldron, Daniel J. - Appellant

67. Wick, Amber - Appellant

68. Wick, Jason - Appellant

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I. INTRODUCTION

According to Plaintiffs, Defendants and Herbalife banded together "in close association" to promote and profit from training and team-building events offered to Herbalife distributors. [Doc. 1, ¶ 4.] Defendants and Herbalife allegedly jointly led Plaintiffs to believe that qualifying for and attending these events guaranteed success in Herbalife's business opportunity. [*See id.*, ¶ 2.] Plaintiffs claim that the entire event initiative was an organized racketeering enterprise. [*Id.*, ¶¶ 346, 354.] They filed suit in the Southern District of Florida to recoup money they spent qualifying for and attending events. [*Id.*, ¶ 360.]

Before ever spending a dime on any of the events, however, each Plaintiff (or his or her spouse) signed a distributor agreement with Herbalife. Some of the Plaintiffs signed distributor agreements containing arbitration provisions. All of the Plaintiffs' distributor agreements incorporated Herbalife's Rules for distributors. [Doc. 62 at 3-4.] Given that Herbalife operates in a highly competitive, regulated industry, it is not surprising that those Rules have changed over time. Indeed, Plaintiffs' agreements with Herbalife expressly contemplated such changes. Well before Plaintiffs brought this action, the Rules had been amended to require arbitration of all disputes or claims between distributors and Herbalife, as well as all disputes arising from or relating to Plaintiffs' relationship with other distributors.

[*Id.* at 4-6.] Under these binding arbitration provisions, all claims asserted in this litigation must be arbitrated.

Defendants provided the District Court more than one legally-sound basis for compelling arbitration of all claims against Defendants. The District Court, however, summarily rejected Defendants' arguments (along with Defendants' alternative Motion to Transfer Venue) in a two-page ruling. The ruling does not provide much explanation as to why the District Court ruled as it did. For example, the District Court did not address the parties' agreement to delegate to an arbitrator all threshold questions of arbitrability. [*See* Doc. 106.]

As a result of the District Court's combined ruling on the Motion to Compel Arbitration and Motion to Transfer Venue, Plaintiffs' RICO and RICO conspiracy claims (which are jointly pled against Herbalife and Defendants) are now severed. All of Plaintiffs' claims *against Defendants* remain as a putative nationwide class action in the Southern District of Florida. Half of the Plaintiffs' claims *against Herbalife* have been transferred to the Central District of California, where those Plaintiffs now pursue a parallel putative nationwide class action involving the same alleged concerted conduct, the same RICO claims, and the same damages. The remaining Plaintiffs must arbitrate their claims against Herbalife.[1] In partitioning

[1] After filing the Opening Brief, Defendants learned that two members of the group compelled to arbitrate (Jennifer and Michael Lavigne) withdrew from the litigation. Even though Mr. and Mrs. Lavigne have not appeared in this appeal, their claims are

Plaintiffs' claims in this manner, the District Court committed legal error (as to the Motion to Compel Arbitration) and abused its discretion (as to the Motion to Transfer).

Two points stand out in Plaintiffs' Answering Brief. First, Plaintiffs suggest that equitable estoppel is Defendants' only avenue for arbitrating against Plaintiffs. [*See, e.g.*, Ans. Br. at xi.] In so doing, Plaintiffs fail to acknowledge or respond to Defendants' argument that, under the plain language of the arbitration agreement, Plaintiffs agreed to arbitrate their claims against Defendants. Second, Plaintiffs argue that equitable estoppel does not apply because Plaintiffs "do not seek to enforce" the distributor agreements containing (or incorporating) the arbitration provision. Plaintiffs insist that, because the distributor agreements "were never invoked in the Complaint, they are unrelated to [Plaintiffs'] claims." [*Id.*] This argument is unfaithful to both the applicable legal test and Plaintiffs' own allegations.

When presenting the remaining arguments in the Answering Brief, Plaintiffs depart from the questions properly at issue in this appeal. For example, Plaintiffs argue that the arbitration provision at issue is not enforceable against *any* Plaintiff because it is unconscionable. But the District Court already enforced the arbitration

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still properly at issue because Mr. and Mrs. Lavigne have not dismissed their claims against Defendants in the District Court.

provision as to four of the Plaintiffs, and Plaintiffs did not appeal that ruling.[2] Whether, as a general matter, Herbalife's arbitration provision is unconscionable and unenforceable is not an issue before the Court.

The only issues before this Court surrounding arbitration, then, are (1) whether threshold questions of arbitrability should be delegated to an arbitrator; (2) whether the four Plaintiffs who did not sign agreements with arbitration provisions are bound by arbitration provisions incorporated by reference; and (3) whether, as to all Plaintiffs, the arbitration agreement covers claims against Defendants or, alternatively, whether Plaintiffs are equitably estopped from resisting arbitration of their claims against Defendants.

This appeal also presents the question whether the District Court abused its discretion in denying Defendants' Motion to Transfer Venue and, by granting it in part as to Herbalife, allowing for parallel litigation of the same issues in multiple forums.

II. STANDARD OF REVIEW

This appeal concerns the District Court's ruling on Defendants' Motion to Compel Arbitration. The Eleventh Circuit reviews rulings on motions to compel

[2] Plaintiffs also suggest that the distributor agreement does not bind the spouse of the distributor who signed it. [Ans. Br. at 6, 33.] The District Court rejected that argument, however, and held two non-signatory Plaintiffs to the agreements of their respective spouses. Plaintiffs did not appeal that ruling, either.

arbitration *de novo*. *See Entrekin v. Internal Med. Assocs. of Dothan, P.A.*, 689 F.3d 1248, 1251 (11th Cir. 2012) ("We review de novo the district court's denial of a motion to compel arbitration."). In the Answering Brief, Plaintiffs ask the Court to apply an abuse of discretion standard to its review of the Motion merely because Defendants argue (in the alternative) that equitable estoppel requires Plaintiffs to arbitrate against Defendants. [Ans. Br. at 11.] The Eleventh Circuit cases Plaintiffs cite for support, however, either do not involve a motion to compel arbitration (*Dresdner Bank AG v. M/W OLYMPIA VOYAGER*, 465 F.3d 1267 (11th Cir. 2006)), were reversed with no support for Plaintiffs in the ruling after remand (*In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd on other grounds, PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), *on remand sub nom. Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) (reviewing the "district court's denial of a motion to compel arbitration de novo")), or are an unpublished per curium ruling that does not discuss, explain, or cite precedent for the applicable standard of review. *See Corp. Am. Credit Union v. Herbst*, 397 F. App'x 540 (11th Cir. 2010).

In a published ruling post-dating each of those cases, this Court clarified that it reviews motions to compel arbitration *de novo*, regardless of the proposed basis for compelling arbitration—and even when the *only* argument is based on equitable estoppel. *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d

1351, 1354 (11th Cir. 2017) (reviewing *de novo* the district court's denial of motion to compel arbitration, where non-signatories moved to compel arbitration "by using Florida's doctrine of equitable estoppel"). Defendants' Motion to Compel Arbitration should be reviewed *de novo*. The only aspect of this appeal that should be reviewed for abuse of discretion is the District Court's ruling on Defendants' Motion to Transfer Venue. *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 654 (11th Cir. 1993).

III. THE DISTRICT COURT SHOULD HAVE COMPELLED ARBITRATION.

All Plaintiffs should have been compelled to arbitrate their claims against Herbalife and Defendants because they are subject to arbitration provisions covering their claims. Alternatively, even if Plaintiffs are contractually required to arbitrate only as against Herbalife, Plaintiffs are equitably estopped from avoiding arbitration of their claims against Defendants. However, the Court need not reach these questions because Plaintiffs agreed that an arbitrator should resolve all threshold arbitrability issues.

A. An Arbitrator Should Decide Which Claims Are Arbitrable.

The parties agreed to delegate all questions of arbitrability to an arbitrator. The district court erred in failing to enforce that delegation.

"[Q]uestion[s] of arbitrability . . . are fundamental questions that will determine whether a claim will be brought before an arbitrator, and include questions

about whether particular parties are bound by an arbitration clause and questions about whether a clause 'applies to a particular type of controversy'" *See JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018). The Supreme Court recently confirmed, in no uncertain terms, that when a parties' contract delegates arbitrability questions to an arbitrator, "a court may not override the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Indeed, "[i]n those circumstances, a court possesses no power to decide the arbitrability issue . . . even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Id.*

Herbalife and Defendants moved to compel arbitration because all Plaintiffs agreed, one way or another, to arbitrate their claims against Herbalife and other distributors. [Op. Br. at 9-13.][3] Even if some Plaintiffs did not sign an agreement containing an arbitration provision within its four corners, each agreed to abide by Herbalife's Rules as amended. As Plaintiffs concede, each had notice of an amendment incorporating the arbitration provision, at the latest, in February 2014. [Ans. Br. at 5.] All Plaintiffs impliedly accepted the new term by continuing to operate as Distributors for years. [Op. Br. at 22; Doc. 62-3 at 2-3.] Plaintiffs' consent to arbitrate claims covered by the arbitration provisions is thus, at least,

[3] Defendants, too, are distributors and are contractually obligated to arbitrate claims involving Herbalife and other distributors, like Plaintiffs. [Op. Br. at 11-12.]

implied in fact. *See Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 282 P.3d 1217, 1224 (Cal. 2012) ("A signed agreement [to arbitrate] is not necessary . . . and a party's acceptance may be implied in fact."); *Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373, 384 (Cal. Ct. App. 2016). The Answering Brief fails to respond to this argument, or otherwise refute Plaintiffs' implied acceptance of the amended Rules.

The Rules arbitration provision (and the provision in the Lavigne's and Pyle's distributor agreements) expressly delegates all questions of arbitrability to an arbitrator. The arbitration provision also invokes AAA rules, which itself represents a clear and unmistakable agreement that an arbitrator must rule on arbitrability. [Op. Br. at 24.] *JPay*, 904 F.3d at 937; *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'Ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005).

The District Court failed to heed these provisions and instead determined for itself the arbitrability of Plaintiffs' claims against Defendants. Plaintiffs do not squarely address whether the District Court exceeded its authority in doing so. Plaintiffs instead argue that "[t]he delegation clause is inapplicable to the question of equitable estoppel." [Ans. Br. at 27.] Plaintiffs also suggest that Defendants "waived the delegation argument as to equitable estoppel." [*Id.*] Both arguments fail.

First, the arbitrability issues that *should* have been determined by the arbitrator are not limited to the application of equitable estoppel. The arbitrator—and not the Court—should have determined whether the Plaintiffs who did not sign agreements containing arbitration agreements were nonetheless bound by the arbitration agreements in the Rules that were incorporated by reference. *JPay*, 904 F.3d at 930. The arbitrator—and not the Court—should have determined whether the scope of the arbitration agreement covered Plaintiffs' claims against Defendants. *Id.* And, alternatively, the arbitrator—and not the Court—should have determined whether Defendants can enforce the arbitration provisions under equitable estoppel. *Id.* Each is a question of arbitrability. *Id.*; *see also Bd. of Trustees of City of Delray Beach Police & Firefighters Ret. Sys. v. Citigroup Glob. Markets, Inc.*, 622 F.3d 1335, 1342 (11th Cir. 2010) ("The determination whether a signatory like Adams had the authority to bind a non-signatory like the Board to arbitrate 'turns on the specific facts of each case.' This issue is for us, not an arbitrator, to resolve, *unless the parties have clearly delegated to the arbitrator responsibility for this determination*." (emphasis added; citations omitted)); *see also Brittania-U Nigeria Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208-09 (2d Cir. 2005) ("In the present case, neither we nor the district court must reach the question whether Remote Solution is estopped from avoiding arbitration with Contec Corporation because, under the 1999

Agreement, the circumstances indicate that arbitration of the issue of arbitrability is appropriate.").[4]

Second, Defendants did not "waive" their delegation argument as to equitable estoppel. [Ans. Br. at 27.] Defendants extensively discussed the issue of delegating arbitrability questions in Section (1)(B) of the Opening Brief—and specifically argued that equitable estoppel is one such question. [Op. Br. at 25.] In a footnote within that section, Defendants made an additional, specific reference to the equitable estoppel question. [*Id.* at 24 n.16.] No cases in the Answering Brief preclude a party from using a footnote to emphasize a nuanced point that relates back to an argument that was otherwise fully fleshed out.

Plaintiffs also focus on the fact that each Defendant did not sign each Plaintiff's arbitration agreement. [Ans. Br. at 30-31.] That does not mean it does not bind Plaintiffs or that it does not cover Plaintiffs' claims against Defendants. The agreement clearly contemplates arbitration of claims that involve both Herbalife and other distributors. Plaintiffs thus agreed they would arbitrate disputes against Herbalife involving their relationship with other distributors. Plaintiffs' RICO and

[4] Even if the Court disagrees that equitable estoppel is an arbitrability issue delegable to an arbitrator, the case should be sent to arbitration for determination whether Plaintiffs' claims against Defendants fall within the scope of the arbitration agreement. Only if an arbitrator determines that Plaintiffs' claims fall outside the scope of the arbitration provision, should the case proceed back to the District Court to determine the issue of equitable estoppel.

RICO conspiracy claims are indisputably claims (pled jointly against Herbalife and Defendants) involving their relationship with Defendants. And nothing requires thousands of distributors to sign the same agreement to be held to a commitment to arbitrate a particular type of claim.[5]

To avoid delegation, Plaintiffs must establish that the particular delegation of arbitrability in this case is independently unconscionable. *See, e.g.*, *Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 419 (N.D. Cal. 2015) (delegation of arbitrability may be found unenforceable only if "the delegation *itself* is unconscionable"). An unconscionability defense must relate specifically to the delegation clause itself, separate and apart from the rest of an arbitration provision, for the defense even to be potentially viable. *Id.* Plaintiffs have not met that burden.

All issues of arbitrability, including equitable estoppel, should be sent to the arbitrator pursuant to the delegation clause. Only if the Court determines that the delegation clause is unenforceable should it reach the remaining issues on appeal.

B. All Plaintiffs Must Arbitrate Their Claims Against Defendants.

Even if the Court concludes the parties did not delegate all issues of arbitrability to an arbitrator, Plaintiffs should be made to arbitrate their claims

[5] For the first time on appeal, Plaintiffs also argue that the provision should not be interpreted to apply to claims against the Distributors because the agreement does not specify who will pay arbitration fees, if not Herbalife. [Ans. Br. at 14.] Absent contractual language, the AAA default rules govern the fees issue.

against Defendants. All Plaintiffs are subject to arbitration agreements that, on their face, cover disputes with Defendants. Alternatively, the doctrine of equitable estoppel requires arbitration.

1. Thosee Plaintiffs compelled to arbitrate against Herbalife must also arbitrate their claims against Defendants.

The District Court held that Plaintiffs Lavignes, Pyle, and Felix Valdez were subject to enforceable arbitration agreements with Herbalife, and that Plaintiffs' claims against Herbalife were covered by the scope of the arbitration agreements. Based on the plain language of the arbitration agreements, the Court should have compelled these Plaintiffs to arbitrate their claims against Defendants, too.

The arbitration provision binding Felix Valdez covers disputes "arising out of or related to [his] Distributorship including, without limitation, [his] rights, obligations and relationships with Herbalife . . . and/or with other Distributors." [Op. Br. at 34 n.10; Doc. 62-2 at 751-54.] The arbitration provision binding the Lavignes and Pyle covers claims "which arise out of or relate in any way to any dispute between Member and another Herbalife member." [Op. Br. at 34; *see also*, *e.g.*, Doc. 62-2 at 746.] All Plaintiffs assert a single RICO claim and a single RICO Conspiracy claim jointly against Defendants and Herbalife. They are not separate claims, and they cannot stand alone. Indeed, a corporate entity like Herbalife cannot conspire with itself or its subsidiaries or affiliates. *E.g.*, *Fogie v. THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999). Plaintiffs' claims indisputably rise out of or relate

to their relationships with Defendants, who are "other Distributors" and Herbalife members. [*E.g.*, Doc. 1, ¶ 54 ("Defendants aggressively encouraged Plaintiffs and Class Members to attend a Circle of Success event every month"); ¶ 82 ("Tickets are now purchased from the same shifting list of top distributor-related entities and individuals who sell STS tickets to Circle of Success participants.").] The governing arbitration provisions contemplate including the claims against Defendants in arbitration and, in any event, must be interpreted in favor of arbitration.[6] *See Seaboard Coast Line R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982).

In the Answering Brief, Plaintiffs do not address the scope of the arbitration agreement or the unseverable nature of the jointly-pled claims. They instead argue that the arbitration agreement is unenforceable against any Plaintiff—even by Herbalife. [*E.g.*, Ans. Br. at 47-48.] The District Court held otherwise, however, when it compelled four Plaintiffs to arbitrate pursuant to that provision. Whether the arbitration provision is unconscionable is not properly before this Court because Plaintiffs chose not to cross-appeal the District Court's order enforcing it.

[6] Plaintiffs suggest "the ambiguity in Herbalife's continually shifting, multi-document adhesion contract must be construed against Herbalife." [Ans. Br. at 36.] Plaintiffs, however, do not identify any specific, material ambiguities within the arbitration provision.

Moreover, Plaintiffs support their argument that the arbitration provision is unconscionable with arguments not made in the District Court. Plaintiffs now argue, for the first time, that the arbitration provision is oppressive. [*Id.* at 41.] For the first time, Plaintiffs now point to the arbitration provision applicable to Felix Valdez and complain that it "mak[es] it prohibitively expensive … to bring claims to arbitration." [*Id.* at 49-50.] Without even providing or discussing the actual contractual language at issue, Plaintiffs also lodge a brand-new complaint about the "rigid confidentiality clauses" in the arbitration provision. [*Id.* at 44.] Plaintiffs did not raise any of these arguments below.[7] Thus, even if the enforceability of the Lavignes', Pyle's, and Felix Valdez's arbitration provisions were properly at issue on appeal (it's not), Plaintiffs' arguments as to unconscionability are waived.[8] *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.").

[7] The sole unconscionability theory that Plaintiffs raised in the District Court was that their contract with Herbalife was illusory because Herbalife reserved the right to amend it at any time, and the Plaintiffs who signed up before the arbitration agreement was added to the Rules did not agree to it. [Doc. 86 at 5, 16-18.] The District Court rejected this argument as to the Lavignes, Pyle, and Felix Valdez, and Plaintiffs did not appeal that ruling.

[8] Plaintiffs argue that Felix Valdez was not able to see the Rules until after he had executed a distributor agreement. [Ans. Br. at 42.] This point is irrelevant because Plaintiffs concede in the Answering Brief that Felix Valdez signed a distributor agreement containing an agreement to arbitrate. [*Id.* at 5.]

2. The remaining Plaintiffs must arbitrate their claims against both Herbalife and Defendants.

The remaining Plaintiffs (whose claims are now pending in the Central District of California) should have been compelled to arbitrate their claims against Herbalife and Defendants.[9] These Plaintiffs executed distributor agreements that incorporate by reference Herbalife's Rules. The Rules contain an arbitration agreement with Herbalife that is identical to the provision enforced against the Lavignes and Pyle. [Op. Br. at 10-12.] Below, Defendants did not argue procedural or substantive unconscionability of the terms of the arbitration provision itself (besides that it is unilaterally amendable by Herbalife), and cannot do so now. As explained above, the scope of this incorporated arbitration provision (on its face) covers claims against Defendants (and Plaintiffs do not argue otherwise).

The District Court refused to enforce this arbitration agreement (even as to claims against Herbalife) on grounds that the covenant of good faith and fair dealing prevents Herbalife from relying on the amended Rules to enforce arbitration by Plaintiffs whose distributor agreement itself did not contain the arbitration agreement. This was legal error.

[9] Plaintiffs' Answering Brief highlights the fact that Herbalife did not appeal the District Court's ruling denying the Motion to Compel Arbitration as to these Plaintiffs. [*E.g.*, Ans. Br. at xi.] Herbalife, however, received the alternative relief it sought as to these Plaintiffs (a transfer of venue). Its decision not to appeal the ruling as to arbitration neither binds Defendants nor bears on whether the District Court's ruling was correct.

Under California law, "the implied covenant of good faith and fair dealing prohibits a party from making unilateral changes to an arbitration agreement that apply retroactively to accrued or known claims . . . ." *Cobb v. Ironwood Country Club*, 233 Cal. App. 4th 960, 966 (Cal. Ct. App. 2015). Thus, an arbitration provision is illusory (and unenforceable) only where one party has the unlimited right to unilaterally amend the provision and apply those amendments retroactively. *Harris*, 248 Cal. App. 4th 385. On the other hand, "[a]n arbitration agreement that expressly exempts all claims, accrued or known, from contract changes is valid and enforceable." *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal. App. 4th 1425, 1465 (Cal. Ct. App. 2012).

The arbitration agreement in the Rules expressly exempts all claims, accrued or known at the time, from arbitration. That clause prevents Herbalife from retroactively applying the arbitration agreement to disputes that arose before the arbitration agreement was in place. That clause prevents Herbalife from unilaterally changing the terms of the agreement to its benefit when it anticipates that a particular, existing claim will be filed. [Op. Br. at 27-28.] As a result, the agreement is not illusory. *Cf. Harris*, 248 Cal. App. 4th at 386 (modification provision that applied only to claims "arising after the effective date of the modification" did not render agreement illusory).

In the Answering Brief, Plaintiffs argue that Herbalife knew of Plaintiffs' claims when Herbalife instituted the arbitration provision because, at the time, Herbalife knowingly promoted an event system "premised on falsehoods." [Ans. Br. at 40.] Even if this were true (it's not), it would not establish knowledge of any of the Plaintiff's *specific* claims, which is required to find that a modification provision violates the implied covenant. *Peleg*, 204 Cal. App. 4th at 1459 ("The vice of the modification provision in this case is that it allows the employer to manipulate the arbitration process, tailoring it to fit ***specific cases*** . . . ." (emphasis added)).

There was no finding by the district court that Herbalife knew that Plaintiffs' specific claims had accrued at the time its Rules were amended to incorporate an arbitration provision in 2013. Nor for that matter do Plaintiffs allege that their claims had accrued by this point either.[10] The district court's conclusion that the implied covenant bars the application of the arbitration provision to Plaintiffs' claims was therefore legal error.

Plaintiffs also argue that the arbitration provision is superseded by the Terms of Use on Herbalife's website. Yet, Plaintiffs are careful not to argue that the Terms of Use actually govern this dispute—because, then, Plaintiffs would have been

[10] And if Plaintiffs' injuries *were* apparent in 2013, Plaintiffs' claims would be time-barred by RICO's four-year statute of limitations.

subject to a Los Angeles forum selection clause and a shorter limitations period. [*See* Ans. Br. at 8, 45-47.] Plaintiffs' Terms of Use argument attempts to obscure the facts and manufacture confusion.[11] The Terms of Use apply only to the "use of [Herbalife's] website" and the purchase of products and services through the website. [Doc. 86 at 10.] They do not purport to replace the Rules and, in fact, recognize and incorporate by reference Herbalife's "Other Policies," which, of course, include the Rules. [*Id.*; Doc. 86-1 at 73:12-74:16, 125:5-24.] *Cf. Cione v. Foresters Equity Servs., Inc.*, 58 Cal. App. 4th 625, 637-38 (Cal. Ct. App. 1997) (employment agreement with integration clause limited to the "subject matter contained" therein did not supersede previously-entered arbitration agreement).

3. <u>Arbitration should be compelled under equitable estoppel.</u>

As explained, whether equitable estoppel is grounds for compelling arbitration is a question of arbitrability to be decided by an arbitrator. *See Brittania-U*, 866 F.3d at 715. This is true even where the argument that a claim is covered by arbitration seems frivolous. *Schein*, 139 S. Ct. at 529. To the extent the district court had the authority to determine whether equitable estoppel is a proper basis for compelling arbitration, its silent rejection of Defendants' argument was incorrect.

[11] Plaintiffs made this same Terms of Use argument below, and the Court overruled it when enforcing the arbitration agreement against the Lavignes, Pyle, and Felix Valdez. Plaintiffs did not appeal that ruling.

The Answering Brief incorrectly narrows equitable estoppel to cases where plaintiffs "seek to enforce rights created by contract while simultaneously avoiding a binding arbitration provision contained within the same contract." [Ans. Br. at 19.] In reality, California law permits a non-signatory to an arbitration agreement to compel arbitration when either (1) the signatory must rely on the terms of a written agreement with an arbitration provision to assert its claims against the non-signatory; or (2) the signatory alleges "substantially interdependent and concerted misconduct by signatories and nonsignatories" that is intimately connected with the underlying agreement. *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 218-19 (Cal. Ct. App. 2009). Both situations apply here.

First, Plaintiffs' claims necessarily rely on their contracts with Herbalife. At base, Plaintiffs allege that Herbalife and Defendants defrauded them with respect to how distributors are compensated and financially succeed within the Herbalife business opportunity. Specifically, Plaintiffs allege that the "primary purpose" of the alleged RICO enterprise was three-fold: "disseminate misleading and fraudulent income claims," "recruit new members into the fraudulent business opportunity scheme," and "increase the investment and engagement of those already ensnared in the scheme." [Doc 1, ¶ 347.] Whether "income claims" are fraudulent cannot be determined without reference to the compensation plan, which is a part of Plaintiffs' contract with Herbalife. [Op. Br. at 10.] Whether the Herbalife business opportunity

was a fraudulent pyramid scheme cannot be determined without examining the compensation plan and Rules—all of which are incorporated by reference into the distributor agreement.

Moreover, a key omission allegedly made by Defendants in furtherance of the RICO scheme is that they achieved success with Herbalife by using "banned" practices. [Doc. 1 ¶ 333(8) (alleging that one of the key common issues in this case is "[w]hether Defendants failed to disclose that President's Team members built their downlines by using now banned methods").] Plaintiffs cannot prove any practice was "banned" without looking to the Rules.

The Complaint focuses heavily on alleged fraud regarding "qualification for events." [*Id.*, ¶ 123.] Plaintiffs allege that, at events promoted and organized by Defendants, distributors were told "that there would be a direct correlation between VIP qualifications and the size of their Herbalife paychecks." [*Id.*, ¶ 178.] Plaintiffs allege they were told that "'qualifying' for a new rank, an achievement recognized with great fanfare at Circle of Success events, correlates with an increased earning potential." [*Id.*, ¶ 124.] They further assert that "[q]ualification and recognition at monthly events works in conjunction with the marketing plan levels to continually convince Plaintiffs that there is reason to invest in one more months' worth of qualifying volume." [*Id.*, ¶ 135.] The veracity of these alleged statements can only be determined by looking to the payment structure that Plaintiffs agreed to in their

contracts with Herbalife. [*See also, e.g., id.*, ¶ 125 ("Recognition levels are qualifications celebrated with pins and certificates at Circle of Success events, but which do not actually have an effect on a distributor's compensation"); ¶ 126 ("These [rank] qualifications are completely detached from the compensation scheme.").]

Second, the claims against Herbalife and Defendants could not be more intertwined. Plaintiffs claim that Herbalife and Defendants together created an illegal RICO enterprise and together conspired to use that illegal RICO enterprise to defraud them. Plaintiffs go to great lengths in the Complaint to allege a close relationship between Herbalife and Defendants. [*E.g., id.*, ¶ 4 ("Herbalife and [Defendants] jointly produce and sell these events in close association."); ¶ 56 (alleging that fraudulent seminars are "produced in conjunction with Herbalife"); *see also id.* ¶¶ 78, 118, 138, 146, 352.]

Plaintiffs agreed to arbitrate claims against Herbalife, and because they have lumped Defendants into the exact same alleged fraudulent scheme, they are equitably estopped from refusing to arbitrate the claims as against Defendants, too. *See Temple v. Best Rate Holdings LLC*, 2018 WL 6829833, at *3-4 (M.D. Fla. Dec. 27, 2018) (granting non-signatory's motion to compel arbitration because "this is not a case where a non-signatory is a 'complete stranger' to a contract").

IV. THE DISTRICT COURT SHOULD HAVE TRANSFERRED VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA.

A. The Court Should Exercise Pendent Appellate Jurisdiction over the Motion to Transfer.

The Court should exercise its discretion to consider Defendants' Motion to Transfer Venue in conjunction with the Motion to Compel Arbitration. The district court simultaneously considered and ruled upon both motions, and as the result of its joint ruling, the case is now split between arbitration and two separate district courts. *See Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997) (exercising pendent jurisdiction to review an otherwise nonappealable compel order because appealable order was issued in part because of it); *United States v. Lopez–Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) (exercising pendent jurisdiction over otherwise nonappealable order because it was "closely related to" appealable order and "[b]oth orders resulted from the same determination"); *Smith v. LePage*, 834 F.3d 1285, 1292 (11th Cir. 2016).

The Answering Brief artificially treats the two Motions as if they were "collateral orders." [Ans. Br. at 52.] They are not. The district court scheduled both Motions for oral argument at the same time, and ruled on both motions in one summary ruling. Moreover, a ruling on one Motion necessarily affects the other. Both Motions simultaneously determine the proper forum for Plaintiffs' claims, and this Court should consider them together.

B. The District Court Abused its Discretion in Denying the Motion to Transfer Venue.

The district court denied the Motion to Transfer Venue as to Defendants, but granted it (in part) as to Herbalife, transferring the claims of the four Plaintiffs whose distributor agreements contain a forum selection clause. This ruling splits the litigation of this case between two federal district courts on opposite sides of the country. The Court abused its discretion for two reasons.

First, equitable estoppel applies.[12] This Court enforces a forum selection clause under equitable estoppel when either: (1) the signatory relies on the terms of a written agreement containing a forum selection clause in asserting its claims against the nonsignatory; or (2) the signatory alleges substantially interdependent and concerted misconduct by both the nonsignatory and a signatory. *Liles v. Ginn-La W. End, Ltd.*, 631 F.3d 1242, 1256 (11th Cir. 2011). The second test is satisfied where the claims against a nonsignatory "are based on the same facts and are inherently inseparable" from the claims against the signatories, without any showing that those facts are tied to the underlying agreement (unlike the California standard discussed above). *See Blixseth v. Disilvestri*, 2013 WL 12063940, at *15-16 (S.D. Fla. Jan. 31, 2013). Both tests are satisfied here, as established above.

[12] Plaintiffs did not appeal the district court's ruling that the forum selection clause is enforceable, and thus it is not properly at issue.

In the Answering Brief, Plaintiffs argue with no elaboration that "the district court correctly refused to enforce the forum selection clauses through equitable estoppel because [Plaintiffs'] claims are unrelated to the Agreements containing those clauses." [Ans. Br. at 55.] This response is unavailing because no relation to the Agreement is required under the second test. Plaintiffs also suggest that equitable estoppel allows a non-signatory to enforce a forum selection clause only when the non-signatory is a third-party beneficiary, agent, or "closely related to the signatory." [*Id.* at 56.] That is not a requirement. And even if it were, Plaintiffs expressly allege that Herbalife and Defendants are closely associated when it comes to the conduct at issue. [*Supra*, p. 21; *see also* Doc. 1 ¶ 138 ("Herbalife's Circle of Success is the product of a close association between Herbalife and its highest-ranking Distributors.").]

Second, even if there were not an enforceable forum selection clause, the 1404(a) factors clearly favor transfer. There is no indication of how the district court weighed the factors in denying Defendants' motion. The one consideration noted (choice of venue) appears misplaced; half of Plaintiffs reside outside of Florida, which means "less deference" is owed. [Op. Br. at 57; Doc. 63-2 at 13, 25, 42.] *Elite Advantage, LLC v. Trivest Fund, IV, L.P.*, 2015 WL 4982997, at *10 (S.D. Fla. Aug. 21, 2015); *see also Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007).

Review of the 1404(a) factors should result in the transfer of this case to the Central District of California (where identical claims against Herbalife are now proceeding). [Op. Br. at 50-57.] For example, as a result of the ruling, there are now two putative nationwide class actions covering the same conspiracy, on opposite sides of the country. *See, e.g.*, *McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290, 131 (M.D. Ga. 2003) (when some of the plaintiffs' claims are covered by a binding forum selection clause, the interests of justice require a transfer of the entire action). This presents a host of potential problems including duplicative discovery, inconsistent rulings, undue expense, and duplicative recovery for Plaintiffs. This is particularly problematic considering the Central District of California is familiar with, and has continuing jurisdiction over, claims regarding alleged deceptive business practices by Herbalife. [Op. Br. at 53-54.] *See, e.g.*, *Koehler v. Green*, 358 F. Supp. 2d 346, 347 (S.D.N.Y. 2005) ("Given that court's familiarity with and continuing jurisdiction over the matters that form the basis of the instant complaint, the Court finds that transfer of the case to the Eastern District of Missouri pursuant to 28 U.S.C. § 1404(a) is warranted."); *Great Lakes Transp. Holding LLC v. Yellow Cab Serv. Corp. of Florida, Inc.*, 2012 WL 12930665, at *8 (S.D. Fla. Feb. 6, 2012) ("The interest of justice weighs heavily in favor of transfer when related actions are pending in the transferee forum.") (citation omitted).

A transfer facilitates the convenience of witnesses and the parties, as well. Scores of witnesses will need to be called in both the Central District of California and the Southern District of Florida. It would be more convenient for all necessary witnesses to be called only a single time in California, rather than once in Florida and once in California. Foreshadowing what is to come, one Defendant has already been subpoenaed for a deposition and for production of documents in the case transferred to Central District of California. If this case is to remain in Florida, he will almost certainly be subject to a second deposition notice and additional discovery requests—about the exact same conspiracy and claims. In fact, Plaintiffs served the Defendants with requests for production (some of which overlap with the California subpoena requests) prior to the district court's order staying this case.[13] Notably, only one out of the 52 parties in this case who is a Florida resident contests transfer. [Op. Br. at 55-56.]

Plaintiffs do not discuss any of the 1404(a) factors in the Answering Brief. In fact, they cover the entire analysis in only one sentence, arguing only that "this lawsuit has substantial ties to Florida," which, of course, is not the applicable test. [Ans. Br. at 56.] In any event, this lawsuit has substantial ties to California, too—and, under all the circumstances, the ties to the Central District of California further

[13] Defendants have separately filed a Request for Judicial Notice, asking the Court to take notice of the California subpoena and the Florida requests for production.

the interests of justice far more than the ties to Florida. Based on the totality of the 1404(a) factors, the district court abused its discretion in refusing to transfer Plaintiffs' claims against Defendant to California.

CONCLUSION

Defendants respectfully request that the Court reverse the district court's denial of the Motion to Compel and remand the case with instructions to enter an ordering compelling all Plaintiffs to arbitrate their claims against Defendants. Alternatively, that the Court reverse the district court's denial of the Motion to Transfer and remand the case with instructions to enter an order transferring this entire action to the Central District of California.

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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 April 18, 2019, on all electronic filing to all counsel or parties of record on the service list.

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