No. 18-14048-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFF RODGERS, PATRICIA RODGERS, 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

ANSWER BRIEF OF APPELLEES

Dated: February 11, 2019

Respectfully submitted,

MARK MIGDAL & HAYDEN
80 SW 8th Street
Suite 1999
Miami, FL 33130
Telephone: 305-374-0440

By: *s/ Etan Mark*
Etan Mark, Esq.
Florida Bar No. 720852
etan@markmigdal.com
Lara O'Donnell Grillo, Esq.
Florida Bar No. 37735
lara@markmigdal.com
eservice@markmigdal.com
Counsel for Appellees

AND

Jason Jones, Esq.
JASON JONES
jason@jonesatlaw.com
1147 Hunter Ave
Columbus, OH 43201
Admitted *Pro Hac Vice*
Co-Counsel for Appellee

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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. Cooke, Honorable Marcia G. (District Judge, United States District Court, Southern District of Florida)
8. Costa, Manuel (Appellant)
9. Davis, Jenny (Appellant)
10. Davis, Mark (Appellant)
11. De La Concepcion, Disney (Appellant)
12. De La Concepcion, Jorge (Appellant)
13. Dowdell, Dennis (Appellant)
14. Edwards, Danielle (Appellant)
15. Edwards, Graeme (Appellant)
16. Gioiosa, Sandra (Appellant)
17. Gioiosa, Thomas P. (Appellant)

18. Goodman, Honorable Jonathan (Magistrate Judge, United States District Court, Southern District of Florida)
19. Grillo, Lara O'Donnell (counsel for Appellees)
20. Hayden, Donald J. (counsel for Appellees)
21. Harris, Bradley (Appellant)
22. Hendricks, Amy (Appellant)
23. Hendricks, Samuel (Appellant)
24. Jones, Garrain S. (Appellant)
25. Jones, Jason (counsel for Appellees)
26. Katz, Debi (Appellant)
27. Katz, Michael (Appellant)
28. Mark Migdal & Hayden, (counsel for Appellees)
29. Mark, Etan (counsel for Appellees)
30. Matika, Mark (Appellant)
31. Mejia, Alcides (Appellant)
32. Mejia, Miriam (Appellant)
33. Micheli, Jennifer (Appellant)
34. Morrow, Cody (Appellant)
35. Orne, Kyle T. (counsel for Appellants)

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36. Peterson, Susan (Appellant)

37. Pyle, Cody (Appellant)

38. Quarles & Brady, LLP (counsel for Appellants)

39. Rancel, Fernando (Appellant)

40. Rasch, Claudia (Appellant)

41. Rasch, Guillermo (Appellant)

42. Reese, Christopher (Appellant)

43. Ribalta, Jen (Appellee)

44. Riveros, Paulina (Appellant)

45. Rodgers, Jeff (Appellee)

46. Rodgers, Patricia (Appellee)

47. Romero, Paymi (Appellant)

48. Rosenau, Carol (Appellant)

49. Rosenau, Ron (Appellant)

50. Salanga, Edward A. (counsel for Appellants)

51. Sandoval, Emma (Appellant)

52. Sandoval, Gabriel (Appellant)

53. Stanford, Leslie R. (Appellant)

54. Tartol, John (Appellant)

55. Valdez, Felix (Appellee)

56. Valdez, Izaar (Appellee)

57. Valencia, Arquimedes G. (Appellant)

58. Waldron, Daniel J. (Appellant)

59. Wick, Amber (Appellant)

60. Wick, Jason (Appellant)

By: *s/ Etan Mark*
Etan Mark, Esq.

STATEMENT REGARDING ORAL ARGUMENT

This appeal from the district court's order denying Appellants' motion to compel arbitration concerns the question of a nonsignatory's right to compel arbitration under the narrow exception of equitable estoppel. The remaining arguments pertaining to arbitrability are inapplicable if Appellants cannot compel arbitration as nonsignatories, and the Court need not reach them.

The question concerning the district court's denial of Appellants' motion to transfer is similarly straightforward, as the Court lacks pendent appellate jurisdiction over the transfer order.

Appellees believe that the law on the doctrine of the equitable estoppel and pendent appellate jurisdiction in these circumstances is sufficiently clear, and the facts and arguments are adequately presented in the briefs and record such that the decisional process is unlikely to be aided by oral argument. Accordingly, Appellees are not requesting oral argument pursuant to Fed. R. App. P. 34(a)(2).

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STATEMENT OF JURISDICTION

The Court has jurisdiction over the district court's order denying Appellants' motion to compel arbitration as nonsignatories. *See* 28 U.S.C. §1331; 18 U.S.C. §1962; 9 U.S.C. §16(a).

For the reasons set forth in *infra* section II, the Court lacks pendent appellate jurisdiction over the district court's order denying Appellants' motion to transfer venue because the transfer order is not inextricably intertwined with the arbitration order and the transfer order is unnecessary to ensure meaningful review of the order denying arbitration.

INTRODUCTION

There is no contract between Appellants and Appellees. Appellants seek, as nonsignatories, to compel arbitration under Distributor Agreements between the corporate Herbalife entity and Appellees which were never invoked in the Complaint and are unrelated to Appellees' claims. Three of the Appellees' Distributor Agreements contained no arbitration provision when signed. Yet, Appellants are pursuing a position even their co-defendants (collectively, "Herbalife") have abandoned: that each of the Appellees should be compelled to arbitration.

Appellants do not contend that they are agents of Herbalife or third-party beneficiaries of the Distributor Agreements. Herbalife has rejected this premise in its own documents. Thus, Appellants must show they are entitled to enforce Herbalife's agreements as nonsignatories by some other means. The theory they pursue is equitable estoppel. However, equitable estoppel does not apply because as shown here, Appellees' claims do not pertain to the Distributor Agreements.

Appellants do not address the threshold issue of their nonsignatory status until late in their brief. Instead, they urge the Court to apply an arbitration agreement contained within a collection of rules which the company insists are incorporated by reference into Appellees' executed Agreements despite its frequent, unilateral amendment of those rules without notice. The district court roundly rejected this concept. Appellants now seek a nonsensical result in which nonsignatories would be

permitted to enforce arbitration agreements that the signatory company, and contract drafter, was unable to enforce.

Appellants also seek pendent review of the district court's order denying their motion to transfer venue. Appellants' transfer analysis is also unavailing. Although Appellants bemoan the alleged impracticality of the district court's ruling, the outcome Appellants seek would only muddy the waters further without resolving their concerns about fractured litigation. The district court correctly determined that transfer was not warranted. However, because the transfer analysis has no bearing on the Court's resolution of the arbitration issue, the exercise of pendent appellate jurisdiction over the transfer ruling would be improper.

For the foregoing reasons and those stated herein, the Court should affirm the district court's arbitration order and decline to exercise pendent jurisdiction over the transfer order.

STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion in refusing to allow the nonsignatory Appellants to compel arbitration of non-contractual claims under the limited exception of equitable estoppel?

2. Are the arbitration provisions at issue nevertheless unenforceable as unconscionable and illusory?

3. Was the district court required to delegate any issues to the arbitrator where Appellants never argued that an arbitrator should decide equitable estoppel, there is no clear and unmistakable delegation of disputes with Appellants to an arbitrator, and the delegation clause is independently unconscionable and illusory?

4. Does the Court have pendent appellate jurisdiction over the transfer order when the arbitration order may be reviewed without reference to the transfer and the two inquiries involve consideration of numerous unrelated factors?

5. Did the district court correctly deny Appellants' motion to transfer when there was no applicable forum selection clause and the factors weighed in favor of Appellees' choice of forum?

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Herbalife is a so-called "multi-level marketing" company that sells a business opportunity to participants around the globe through a network of salespersons ("Distributors") who themselves participate in the business opportunity. Defendants/Appellants[1] claim to be among the most successful Distributors in the world, while Appellees/Plaintiffs claim to have suffered significant losses and hardships resulting from Defendants' orchestration of an unlawful scheme to dupe Plaintiffs into attending expensive events that Defendants knew were manipulative, misleading, and bereft of value.

Plaintiffs assert two claims against Defendants for: Conducting the Affairs of a Racketeering Enterprise under RICO 18 U.S.C. §1962(c) (Count I), and Conspiracy to Conduct the Affairs of a Racketeering Enterprise under RICO 18 U.S.C. §1962(d) (Count II). App.v.1, Tab 1 ¶¶341-365. The Complaint is unconcerned with a participant's distributor status and seeks certification of a nationwide class consisting of:

> All **persons** who purchased tickets to and attended at least two Circle of Success events from 2009 until the present, in pursuit of Herbalife's business opportunity.

[1] In the Statement of the Case, Appellees/Plaintiffs shall be referred to as "Plaintiffs" and Appellants/Defendants shall be referred to as "Defendants".

App.v.1, Tab 1 ¶330 (emphasis added); *but see* Initial Br. at 1, 14 (stating incorrectly that Plaintiffs seek to certify a class of "current and former Herbalife distributors").

Defendants joined Herbalife in a Motion to Compel Arbitration based on an arbitration agreement contained in the unilaterally amended 2016 Rules of Conduct ("Rules"), purportedly incorporated in Plaintiffs' Distributor Agreements. App.v.4, Tab 62. Defendants also joined Herbalife in an alternative Motion to Transfer Venue to the Central District of California based on various versions of the Distributor Agreements that some Plaintiffs had signed with Herbalife. App.v.8, Tab 63. Defendants were not parties to the Distributor Agreements or incorporated Rules, but joined in the motions on the theory that they could enforce Herbalife's agreements by equitable estoppel. App.v.4, Tab 62; App.v.8, Tab 63.

By Order dated August 23, 2018, the district court denied in part and granted in part Herbalife's motions while denying all motions as to the Defendants. App.v.11, Tab 106. Ultimately, the court concluded that it would enforce the contracts as signed by the Plaintiffs. *See id*. Those Plaintiffs who signed agreements to arbitrate with Herbalife had their claims against Herbalife delegated to arbitration. *Id*. Those Plaintiffs who signed agreements to litigate claims against Herbalife in California, along with Plaintiff Jeff Rodgers (who did not sign any agreement), had their claims against Herbalife transferred there. *Id*. Plaintiffs did not sign any agreements with the Defendants, therefore, Plaintiffs' claims against Defendants

remain in the Southern District of Florida – Plaintiffs' choice of forum and the location of substantial alleged misconduct, witnesses, parties and evidence. *See id*.; *see also* App.v.11, Tab 98.

Defendants appealed. App.v.11, Tab 113. Herbalife did not appeal and is currently litigating against the Plaintiffs who did not have arbitration clauses in their original Distributor Agreements in the Central District of California, Western Division, in the case styled *Jeff Rodgers, et al. v. Herbalife Ltd., et al.*, Case No. 2:18-cv-07480-JAK (MRWx). Accordingly, only the nonsignatories to Herbalife's arbitration provisions have appealed the district court's order denying arbitration.

II. STATEMENT OF FACTS

A. The documents and terms comprising the Herbalife Distributor Agreements.

Although Plaintiffs' claims do not rely on the Distributor Agreements, Defendants have placed them at issue, requiring review of the varied dispute resolution provisions.

With the exception of Jeff Rodgers, Plaintiffs each signed, or clicked on, some version of an Agreement with Herbalife, each of which is between three to eleven pages long. App.v.7, Tab 62-2 at 719-771. Defendants are not parties to these Agreements. *See id*.

The Distributor Agreements purport to incorporate various external terms and policies, including the Herbalife Rules – a lengthy and complicated compilation of

documents, hundreds of pages long and available on Herbalife's website, which Herbalife claims an unfettered right to amend at its "sole and absolute discretion." *See*, *e.g.*, App.v.4, Tab 62 at 7; App.v.5, Tab 62-2 at 192, 209, 327, 255 n.1; App.v.6, Tab 62-2 at 445, 450, 470. Roxane Romans, Herbalife's Senior Director of Member Policy Administration, testified that Herbalife has made numerous such post-contractual amendments. App.v.10, Tab 86-1 at 3. For example, Defendants contend that amendments to the Rules, including the addition of the arbitration provision, became effective on October 28, 2013 without any notice to Distributors. App.v.10, Tab 86-1 at 22. Four months later, on February 13, 2014, Herbalife emailed a summary announcement covering the previous four versions of the Rules of Conduct, including the addition of the arbitration provision. App.v.10, Tab 86 at 3, 86-1 at 22-24, 86-12, 86-13.

Herbalife has also changed the location of arbitration, the circumstances under which Herbalife would pay for arbitration, and the time period in which arbitration may purportedly be brought. For instance, when Felix Valdez signed up for Herbalife in 2008, the Agreement contained an arbitration provision requiring a claim against Herbalife to be brought in California. App.v.7, Tab 62-2 at 754. When Patti Rodgers signed up two years later, the Herbalife Agreement called for litigation in Los Angeles. App.v.7, Tab 62-2 at 722. In 2014, when Cody Pyle clicked his assent on the Herbalife Agreement, the arbitration provision was back, but stated

that arbitration would take place in the district in which Plaintiff resides, and Herbalife would pay for it under certain conditions. App.v.7, Tab 62-2 at 746-47. The Distributor Agreements expressly disclaim an agency relationship between Herbalife and its Distributors. App.v.7, Tab 62-2 at 719-771.

Defendants and Herbalife jointly argued below that *none* of these were the relevant provisions. Instead, Defendants sought to enforce the most recent version of the Rules (and therefore arbitration provision), retroactively and without notice, based on Herbalife's alleged right to unilaterally amend the Agreements at any time. App.v.4, Tab 62. The district court declined to do so. App.v.11, Tab 106.

Plaintiff Jeff Rodgers is not an Herbalife distributor and did not sign a Distributor Agreement. App.v.10, Tab 86 at 18 n.19.[2] Jeff Rodgers is the spouse of Plaintiff Patricia Rodgers and was similarly lured into attending events at great personal expense. App.v.1, Tab 1 ¶¶149-63. The Distributor Agreements do not provide a signature block for spouses and contain a disclaimer under the block for spousal information stating: "Spouse's name is for recognition purposes only and is not an indication of ownership or entitlement." App.v.7, Tab 62-2 at 724. Herbalife actively encourages spouses to "attend every event" and to make bulk purchases of nonrefundable event tickets. App.v.1, Tab 1 ¶¶149-73. The putative class includes

[2] Michael LaVigne and his wife, Jennifer LaVigne, withdrew from the case during the pendency of this appeal.

all individuals falling within the class definition irrespective of whether they signed Distributor Agreements because being an Herbalife distributor is not required for event attendance. App.v.1, Tab 1 ¶330.

In the court below, Herbalife claimed, and Defendants similarly argue, that changes to the Herbalife Rules – including the addition or subtraction of mandatory arbitration provisions – are effective upon publication and without notice. App.v.10, Tab 86 at 3-4, 4 n.8, 5-7, 7 n.14. Specifically, when asked whether "there are any parameters as to Herbalife's ability to amend the Rules of Conduct," Ms. Romans testified that there were not. App.v.10, Tab 86-1 at 22. She further testified that Plaintiffs were bound by these unilateral amendments regardless of whether they actually received notice of them. App.v.10, Tab 86-1 at 25. Defendants produced no evidence showing Plaintiffs were actually notified of the amendments. App.v.10, Tab 86 at 4 n.8 (Ms. Romans could not say whether Plaintiffs received notice), 7 n.14 (no records of actual notice sent to the Plaintiffs were produced). The district court rejected Defendants' position that post-contractual, unilateral amendments could bind Plaintiffs, and Herbalife did not appeal the district court's rejection of this core argument.

While the 2016 Rules version of the arbitration provision states that changes will not be applied to claims accrued or "otherwise known" to Herbalife, App.v.5,

Tab 62-2 at 390, none of the Plaintiffs' executed Agreements contained such language, App.v.4, Tab 62 at 34 (citing App.v.7, Tab 62-2 at 720-771).

Rule changes are published to myherbalife.com, a membership website governed by a separate set of "superseding" dispute resolution terms which call for litigation in Los Angeles. Initial Br. at 11, 21-22, App.v.10, Tab 86 at 4 n.6 (citing "Terms of Use" available at http://myherbalife.com), Tab 86-1 at 24-28.

B. The separate events system and enterprise alleged in the complaint

Plaintiffs sue Defendants based on Defendants' participation in, and conspiracy to carry out the operation and management of a classic racketeering enterprise in violation 18 U.S.C. §1962(c) and (d). App.v.1, Tab 1. Defendants utilize social media, text, chat, telephone, and the internet to convince current and future Herbalife business opportunity participants that attending live events is critical to achieving financial success within Herbalife, and that the key to success is to be revealed at these events. *See*, *e.g.*, App.v.1, Tab 1 ¶¶33, 67, 104, 106, 120-21, 160, 165-67, 175, 274. This is a coordinated and consistently repeated lie. *See* App.v.1, Tab 1 ¶¶26-146. Defendants did not achieve financial success in legitimate pursuit of the Herbalife business opportunity through attending events. *See id*.; *see also id*. ¶¶147-202. Attendees do not learn, as Defendants' claim, the key to Defendants' financial success by attending events. *See id*. In selling and speaking at events, Defendants fail to disclose that they are either fabricating their "success" out

of whole cloth, or that the true key to their success, or apparent success, is the use of banned or unlawful methods – not event attendance. *See* App.v.1, Tab 1 ¶¶30-53. Defendants experiencing financial difficulties fail to disclose that fact and continue to represent that they have achieved substantial success by attending events. *See id*. ¶¶49-53.

The events enterprise (the "Circle of Success") exists separate and apart from Herbalife's product purchasing scheme. Plaintiffs' claims are not about the Herbalife pyramid scheme, its products, or the commissions it pays. *See generally* App.v.1, Tab 1; *see*, *e.g*., *id*. ¶1 ("This action seeks recovery from a corrupt organization of individuals and entities who act together, using misrepresentation and deceit, to sell access to a series of emotionally manipulative live events."). The Complaint does not reference or incorporate Herbalife's Distributor Agreement. *See* App.v.1, Tab 1. It is undisputed that Defendants are not parties to Plaintiffs' Distributor Agreements with Herbalife and that Plaintiffs have not signed an arbitration agreement with any of the Defendants. *See* App.v.7, Tab 62-2 at 720-771.

Herbalife's current Rules of Conduct ("Rules") and Distributor Agreement guarantee a "Gold Standard" return and refund policy for unsold products, App.v.7, Tab 62-2 at 544-547; Circle of Success event tickets are completely nonrefundable. App.v.1, Tab 1 ¶¶75, 80, 83, 89. While Herbalife products are purchased directly from Herbalife under the terms of Distributor Agreements, most Circle of Success

event tickets are sold by a web of outside businesses owned and operated by the Defendants. App.v.1, Tab 1 ¶¶56, 72, 80. Various entities identified in the Complaint: Gioiosa Marketing, Orlando STS, Telos, and Miami STS, along with dozens of others, are not controlled by Herbalife; they are operated by the Defendants, their agents, and proxies. App.v.1, Tab 1 ¶¶56, 63-75. Plaintiffs' claims against these individuals do not involve Herbalife's Distributor Agreement or incorporated Rules, and are stated entirely without reference to them. *See* App.v.1, Tab 1; *see also* App.v.10, Tab 86 at 2, 19-20.

The Complaint alleges that the Defendants defraud Plaintiffs and prospective class members by pressuring them to attend expensive Circle of Success events on the false promise that the events will reveal the key to Defendants' financial success. App.v.1, Tab 1. At these events, Defendants then misrepresent how much money they have made; how they made it; they fail to disclose their expenses; their reliance on the proceeds of unrelated criminal or banned conduct; and the low probability that attendees will achieve those same fictionalized outcomes through dedicated event attendance. App.v.1, Tab 1. There is no contract that governs the relationship between Plaintiffs and Defendants. Plaintiffs sue Defendants not for their roles as Herbalife Distributors, but for their roles as operators and managers of a web of third-party companies that sell non-refundable event tickets. App.v.1, Tab 1.

III. STANDARD OF REVIEW

The issue of whether the district court properly declined to apply equitable estoppel to compel arbitration of the nonsignatories' claims is reviewed for an abuse of discretion. *See Corp. Am. Credit Union v. Herbst*, 397 F. App'x 540, 542 (11th Cir. 2010) (district court did not abuse its discretion in refusing to compel arbitration under the doctrine of equitable estoppel); *see also Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267, 1273 (11th Cir. 2006) ("We review for abuse of discretion a district court's exercise of its equitable power.") (citations omitted); *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 975–76 (11th Cir. 2002), *rev'd on other grounds, PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003) (decision whether to apply equitable estoppel is reviewed for abuse of discretion) (citing *Hill v. G E Power Systems, Inc.,* 282 F.3d 343 (5th Cir. 2002); *Grigson v. Creative Artists Agency, L.L.C.,* 210 F.3d 524, 527 (5th Cir. 2000)); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395 (4th Cir. 2005) ("We review such equitable estoppel decisions for abuse of discretion.").

If the Court finds that Appellants can enforce Herbalife's arbitration clause by estoppel, the Court reviews a district court's denial of a motion to compel arbitration *de novo*. *Entrekin v. Internal Medicine Assoc. of Dothan, P.A.*, 689 F.3d 1248, 1251 (11th Cir. 2012).

The district court's denial of the motion to transfer is reviewed for an abuse of discretion. 28 U.S.C. §1404(a). *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 654 (11th Cir. 1993).

The Court reviews the decision whether to enforce a forum selection clause *de novo*. *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1339–40 (11th Cir. 2012).

SUMMARY OF THE ARGUMENT

Appellants fail to support the only potential basis for compelling arbitration under agreements to which they are not parties. While Appellants spend a majority of their brief making an extensive, albeit flawed, case for *Herbalife's* ability to compel arbitration under *Herbalife's* agreements and incorporated terms, they fail to establish how *Appellants* propose to enforce those provisions as nonparties. The sole basis Appellants assert for compelling arbitration as nonsignatories is the narrow exception of equitable estoppel. As demonstrated herein, Appellants have not established that the exception applies.

The estoppel exception requires Appellants to show that Appellees' claims rely upon or are inextricably intertwined with the terms of Herbalife's contracts containing the arbitration provisions. The Complaint, however, does not reference, much less rely upon, Herbalife's agreements. The Complaint is based upon Appellants' participation in a nationwide scheme to lure Appellees and those similarly situated into attending fraudulent events. Nothing in the record supports the conclusion that Appellees' claims are intertwined with Herbalife's Distributor Agreements, which govern Herbalife distributorships and product purchases. A distributorship is not required to attend events, and the class includes all affected persons, irrespective of their distributor status.

The district court was correct not to delegate the question of equitable estoppel to an arbitrator. Not only did Appellants abandon that argument below and again on appeal, but prevailing law holds that estoppel should be determined by the court. Appellees did not agree to delegate threshold standing issues, or for that matter, any disputes with nonsignatories to an arbitrator. Moreover, the delegation clause is independently unconscionable.

Appellants fail to explain how the arbitration provision in the Agreements could apply as a practical matter, considering its provisions foist significant obligations on *Herbalife* relating to items such as payment of fees, notice and confidentiality. Appellants do not state whether they would be subject to the same provisions. Accordingly, the district court did not abuse its discretion in declining to apply equitable estoppel to compel arbitration against the nonsignatories.

Appellants complain that the district court failed to address all of the arguments made in favor of arbitration. However, as here, the court did not need to reach those questions because Appellants failed to establish equitable estoppel as a basis for compelling arbitration. The question of whether Herbalife's contracts are unconscionable, illusory, or superseded by other terms is irrelevant if Appellants cannot enforce them through equitable estoppel.

Even assuming estoppel applied, Herbalife's arbitration agreements are unenforceable. There was no meeting of the minds or mutual assent to be bound by

the contract terms. The Distributor Agreements are classic contracts of adhesion to be construed against Herbalife. The ever-shifting provisions of Herbalife's Rules of Conduct, which Herbalife claims are incorporated into its Distributor Agreements, are amended continually without notice. Those unilaterally imposed amendments have repeatedly altered Herbalife's arbitration clause without notice to the Appellees, even going so far as to add an arbitration requirement and other important waivers (such as the constitutional right to a jury trial) to contracts that did not previously have them. In violation of the covenant of good faith and fair dealing, Herbalife's routine unilateral amendments impose these requirements retroactively to claims and misconduct already known to Herbalife.

Making matters worse, other *directly conflicting* terms are also incorporated into Herbalife's Distributor Agreements. Specifically, the incorporated terms in Herbalife's website state that they supersede all prior agreements and provide for litigation rather than arbitration. Herbalife's own Director of Member Policy Administration admitted that she had no idea what to make of this patchwork of terms. An ordinary consumer could not be expected to understand them, particularly in the absence of notice. Accordingly, the arbitration provisions are unconscionable and illusory. There is no discernable governing contract or meeting of the minds. For the same reasons, the delegation clauses found within this jumble of terms that Appellants call a contract are independently unenforceable.

Finally, the Court lacks pendent appellate jurisdiction over the district court's interlocutory transfer ruling, which Appellants seek to piggyback onto this Court's review of the arbitration ruling. This Court has held, and the Supreme Court has cautioned, that pendent appellate jurisdiction is reserved for those circumstances in which the immediately appealable and unappealable rulings are inextricably intertwined. Because review of the transfer ruling is irrelevant to the determination of the appealable arbitration ruling, the Court should not exercise pendent jurisdiction over the transfer order.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT CORRECTLY DENIED THE NONSIGNATORIES' MOTION TO COMPEL ARBITRATION.

A. The district court correctly declined to apply the equitable estoppel exception to the nonsignatories.

Appellants spend a substantial portion of their brief arguing under the false premise that they are entitled to enforce Herbalife's arbitration agreement as nonsignatories. It is not until late in the brief that Appellants even attempt to tackle the threshold, case dispositive issue of equitable estoppel. As demonstrated here, the district court properly refused to delegate the equitable estoppel issue to an arbitrator and correctly declined to allow Appellants to enforce Herbalife's agreements under equitable estoppel.

1. No presumption of arbitrability applies because Appellants are not parties to the arbitration agreements.

As nonsignatories, Appellants lack the independent right to enforce the arbitration clauses in Herbalife's Agreements. Arbitration is a contractual right predicated on mutual assent to waive the judicial forum. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). Although the Federal Arbitration Act creates a presumption in favor of arbitration, the Supreme Court has held that a party "cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T*, 475 U.S. at 648. "Generally speaking,

one must be a party to an arbitration agreement to be bound by it or invoke it." *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. Inc.*, 129 Cal. App. 4th 759, 763 (2005). Federal courts have no authority to mandate arbitration in the absence of a binding agreement between the parties. *See id*. While courts favor arbitration, the burden rests squarely on Appellants to prove its applicability by a preponderance of the evidence. *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 721 (N.D. Cal. 2012), *aff'd*, 549 F. App'x 692 (9th Cir. 2013).

Appellees never agreed to arbitrate disputes against Appellants. Statement of the Case ("SOC") §II.A-B; *see also* Initial Br. at 9-10 (Appellees' contractual relationship is with Herbalife, not the Appellants); App.v.4, Tab 62 (no statement or argument that Appellees have an agreement with Appellants). Instead, Appellants argue that they should be allowed to enforce Herbalife's contract under the limited exception of equitable estoppel. Initial Br. at 36-40. However, equitable estoppel does not apply here because Appellees' claims are not based upon or intertwined with the contract terms.

2. Equitable estoppel is a limited exception not applicable here.

Courts have sometimes recognized exceptions to the principle preventing nonsignatories from enforcing arbitration clauses. *Lawson v. Life of the S. Ins. Co*., 648 F.3d 1166, 1175 (11th Cir. 2011) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009)) (traditional state law principles

may allow a contract to be enforced by nonparties through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel); *see also Thomson-CSF, SA v. American Arbitration Ass'n*, 64 F. 3d 773, 776 (2d Cir. 1995). Appellants argue that one such exception – equitable estoppel – applies. It does not.

The doctrine of equitable estoppel holds that plaintiffs cannot unfairly seek to enforce rights created by contract while simultaneously avoiding a binding arbitration provision contained within the same contract. *See Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (citations omitted) (signatory to an arbitration agreement "cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory"); *see also Goldman v. KPMG, LLP*, 173 Cal. App. 4th 209, 221 (2009) (The doctrine of equitable estoppel prevents "a party from using the terms or obligations of an agreement as the basis for his claims against a nonsignatory, while at the same time refusing to arbitrate with the nonsignatory under another clause of that same agreement."). The law is clear, however, that "[p]arties who have not agreed to arbitrate may not be compelled to do so simply because two defendants, one with an arbitration agreement and one without, have

colluded to defraud the plaintiff." *Goldman*, 173 Cal. App. 4th at 233. Such is the case here.

Appellants cannot rely on equitable estoppel to compel arbitration under Herbalife's Distributor Agreements because Appellees do not seek to enforce those Agreements. SOC §II.A-B. The Complaint does not reference the Agreements and Appellees' claims are not dependent upon the enforcement or interpretation of them. *Id*. Rather, the claims are based on Appellants' roles in a distinct enterprise involving fraudulent events. *Id*.

Applicable state law provides the rule of decision for the question of whether a nonparty can enforce an arbitration clause against a party. *See Lawson*, 648 F.3d at 1170–71.[3] Under California law, a nonsignatory may compel arbitration by equitable estoppel only when (1) a signatory must ***rely on the terms of the written agreement*** in asserting its claims; or (2) the signatory alleges "substantially interdependent and concerted misconduct" between the nonsignatory and the signatory and "the allegations of interdependent misconduct [are] ***founded in or intimately connected with the obligations of the underlying agreement***." Initial Br. at 36-37 (citing *Goldman*, 173 Cal. App. 4th at 222) (emphasis added). Equitable estoppel is "much more readily applicable when the case presents both independent

[3] Appellants apply California law. *See* Initial Br. at 20 n.12, 36-37. As noted by Appellees in the court below, the same result is reached under California and Florida law on these threshold issues. Accordingly, Appellees also cite California law.

bases advanced by the Eleventh Circuit for applying the intertwined claims doctrine." *Grigson*, 210 F.3d at 527-528 (citations omitted). Neither basis for applying equitable estoppel is present here.

a. Appellees' claims do not rely on the terms of the Distributor Agreements.

Under the first prong of the equitable estoppel analysis, a party may be estopped from asserting that the lack of a written arbitration agreement precludes arbitration when they "must rely on the terms of the written agreement in asserting their claims against the nonsignatory." *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993); *see also MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). The "plaintiff's allegations ***must rely on or depend on the 'terms of the written agreement***,'… not simply on the fact that an agreement exists." *Goldman*, 173 Cal. App. 4th at 231 (emphasis added).

Appellees' do not rely upon the Herbalife Agreements to state their RICO claims. SOC §II.A.-B. Establishing the Circle of Success enterprise and Appellants' participation in it does not require the interpretation or enforcement of any term in the Agreements. Appellants have not and cannot identify a single contractual provision necessary to proving Appellees' RICO claims, which are not about the sale of Herbalife products, Herbalife's pyramid scheme, commissions, or any other areas governed by Herbalife's Agreements. *See id*. The Circle of Success involves a web of interconnected, outside entities controlled by the individual Appellants. *Id*.

There is no term in the Agreements relevant, much less necessary, to proving the conduct of an enterprise through a pattern of racketeering activity, or the conspiracy to commit same. *See Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988) (citation omitted) (citing elements of RICO claim).

In *Goldman*, 173 Cal. App. 4th 209, investors sued their accountants, attorneys and investment advisors based on breaches of fiduciary duty and fraud in connection with a tax avoidance scheme. *See Goldman* at 213. The court noted that the complaints did not "rely on or use any terms or obligations of the operating agreements as a foundation for their claims" and did not mention the agreements. *Id.* Similarly, here, Appellees do not "rely on or use" any terms or obligations in the Agreements, which are likewise not referenced in the Complaint.

In *Kramer v. Toyota Motor Corp*., 705 F.3d 1122, 1130–31 (9th Cir. 2013), the court also found that plaintiffs' claims were not sufficiently connected to the contracts containing arbitration provisions to apply estoppel. The plaintiffs alleged that Toyota violated California's consumer protection law, unfair competition law, false advertising law, and breached the implied warranty of merchantability and/or a contract due to a brake defect that it failed to repair. *Id*. Toyota sought to enforce plaintiffs' agreement to arbitrate in their Purchase Agreements by equitable estoppel. *Id*. The court declined to apply estoppel, holding that plaintiffs did not rely on the Purchase Agreements, nor were the claims "intimately founded upon" the

agreements' terms. *Id*. Although the Purchase Agreement had some connection to the purchase of the product, because the claims were not based upon terms relating to the product purchase, the arbitration clause was insufficiently connected to warrant application of equitable estoppel. Here, the Distributor Agreements are even further removed from Appellees' claims, which do not involve the purchase or sale of Herbalife products, compensation under the Agreements, or any other contract term.

Appellants' reliance on *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 186 Cal. App. 4th 696, 715 (2010), is misplaced. Appellants cite *Molecular* for the proposition that casting claims in "tort rather than contract" is not always sufficient to avoid arbitration against nonsignatories. Initial Br. at 37. Appellees do not dispute this proposition. However, *Molecular* is inapplicable because Appellees do not rely on any contract terms.

In *Molecular*, three of the five claims against the nonsignatories were contract claims. The tort claims – interference and conversion – were based on rights established under the contract. *See Molecular*, 186 Cal. App. 4th at 713. A "common theme in these cases is that the party seeking relief was suing on the contract itself, not a statute or some other basis outside the contract." *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.*, 158 Cal. App. 4th 1061, 1071 (2008).

Like the defendants in *Goldman*, Appellants are "cherry picking words from the formulations articulated by various courts" but ultimately "disregarding the core of the principle". *Goldman*, 173 Cal. App. 4th at 231. Appellants argue that the question of whether they made false statements about the value and content of *events* somehow "requires an in-depth analysis" of the Distributor Agreements, "including, among other things, the compensation plan within the Marketing Plan, and the terms and conditions of a distributorship, which are determined by the Rules." *Id*. Appellants fail to explain how the RICO and RICO conspiracy claims against them are dependent upon the terms of Appellees' Agreements with Herbalife. Contrary to Appellants' contention, Appellees' claims do not involve any statements or conduct concerning or arising under the Distributor Agreements. In fact, those Agreements expressly disclaim any agency relationship between Herbalife and its Distributors. SOC §II.A. Moreover, any conduct of Appellants "as distributors" would relate to their own Distributor Agreements with Herbalife, to which Appellees are not parties and which neither Appellants nor Appellees seek to enforce in this case. The Complaint does note that Appellants fail to follow their own rules, *see, e.g.,* App.v.1, Tab 1 ¶¶26, 41, 53, but Appellees do not sue to enforce or prevent this selective enforcement of the Rules. Appellees' claims can be fully adjudicated without reference to the Agreements.

b. Appellees' claims are not inextricably intertwined with the terms of the Distributor Agreements.

The second part of the analysis asks whether the nonsignatory engaged in interdependent and concerted misconduct with a signatory that was founded in, or inextricably intertwined with, obligations of the agreement containing the arbitration clause. *See Kramer*, 705 F.3d at 1129 (citing *Goldman*, 173 Cal. App. 4th at 229-30). Although Appellees allege concerted misconduct between Herbalife (the signatory) and the Appellants (the nonsignatories), that misconduct is not founded in or inextricably intertwined with obligations in the Agreements.

In *Goldman*, the court held that "mere allegations of collusive behavior between signatories and nonsignatories to a contract are not enough to compel arbitration between parties who have not agreed to arbitrate." *Goldman*, 173 Cal. App. 4th at 223 (citing *MS Dealer*, 177 F.3d at 947). "After all, every conspiracy claim alleges interdependent and concerted misconduct." *Id*. at 234; *see also Kramer*, 705 F.3d at 1130–31 ("many California equitable estoppel cases omit any mention of the concerted misconduct line of equitable estoppel cases, suggesting the doctrine's principal application is where plaintiffs' claims are intertwined with agreements containing arbitration provisions."). The interdependent misconduct must therefore be "founded in or intimately connected with the obligations of the underlying agreement." *Goldman*, 173 Cal. App. 4th at 219; *In re Humana Inc. Managed Care Litigation*, 285 F. 3d 971 (11th Cir. 2002) ("The plaintiff's actual

dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.").

Appellants conclude, but fail to explain, how Herbalife's Distributor Agreements could form the basis of Appellees' claims concerning the Circle of Success enterprise. The nature and extent of Appellants' participation in this corrupt scheme is not predicated on any terms of the Herbalife Agreements, or incorporated Rules and Marketing Plan. The Complaint alleges that Appellants misrepresented the role event attendance played in their success, the (often unlawful) methods they utilized to achieve their apparent success, the content and value of events, and that many misrepresented the extent of their success. SOC §II.A-B (citing App.v.1, Tab 1). None of this alleged misconduct is governed by or done pursuant to Herbalife's Distributor Agreements, nor could it be. The alleged RICO enterprise stands apart from the chain recruiting scheme Herbalife markets. Appellants have argued that not less than six versions of Herbalife's Distributor Agreements should or could apply here. But their misconduct is not related to the terms of those agreements.

3. The delegation clause is inapplicable to the question of equitable estoppel.

a. *Defendants waived the delegation argument as to equitable estoppel*.

Appellants' sole argument that the district court should have delegated the issue of equitable estoppel to the arbitrator is raised in a footnote, for the first time on appeal, where Defendants argue that the "arbitrator must also decide whether equitable estoppel requires arbitration of disputes with non-signatories to the arbitration agreement when there is a clear and unmistakable delegation of arbitrability questions to an arbitrator." Initial Br. at 24 n.16. In support, Appellants cite a single, inapplicable, Fifth Circuit case, *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709 (5th Cir. 2017). Defendants have waived this argument.

This Court ordinarily will not consider an argument raised only in a footnote. *See Baer v. Silversea Cruises Ltd.*, No. 18-10911, 2018 WL 5116337, at *2 (11th Cir. Oct. 19, 2018) (citing *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1316 n.7 (11th Cir. 2006))); *see also Mock v. Bell Helicopter Textron, Inc*., 373 F. App'x 989, 992 (11th Cir. 2010) (citing *Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1330 (11th Cir. 2004); *Greenbriar, Ltd. v. Alabaster,* 881 F.2d 1570, 1573 n. 6 (11th Cir. 1989)). Appellants did not make this argument below and are not permitted to raise it for the first time on appeal. *Id*. (citing *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532–34 (11th

Cir. 1983)); *see also Bond Safeguard Ins. Co. v. Wells Fargo Bank, N.A.*, 628 F. App'x 734, 735 (11th Cir. 2016); *Killmon v. City of Miami*, 199 F. App'x 796, 800 (11th Cir. 2006) (citing *Ochran v. United States,* 117 F.3d 495, 502 (11th Cir. 1997)). "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.'" *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (collecting cases). The Court has considered issues raised for the first time on appeal only under exceptional circumstances not applicable here, and not raised or argued by Appellants. *See id*. at 1332-35 (citations omitted) ("We will not address a claim that has been abandoned on appeal or one that is being raised for the first time on appeal, without any special conditions."). Appellants have therefore waived the argument that the district court should have delegated the question of equitable estoppel to an arbitrator.

b. *The district court was correct not to delegate the equitable estoppel issue to an arbitrator*.

Even assuming Appellants did not waive the argument, relevant authority holds that estoppel remains a question for the court even where an arbitration clause purports to delegate threshold issues.

i. The question of whether an arbitration clause applies to a particular party is a matter for judicial determination.

Appellants' argument in support of delegation wrongly assumes that they are entitled to enforce the delegation clause in Herbalife's contract as nonsignatories

even before the court determines they have standing to enforce any aspect of the agreement through an applicable exception, such as estoppel. The court, however, must first determine whether equitable estoppel applies.

Although an arbitration clause may delegate questions of scope and arbitrability, "***the threshold issue of whether the delegation clause is even applicable to a certain party must be decided by the Court***." *Soto v. Am. Honda Motor Co*., 946 F. Supp. 2d 949, 954 (N.D. Cal. 2012) (emphasis added). As the court explained in *Soto*:

> The provisions granting authority to the arbitrator to decide issues of scope are by definition [] only applicable to the parties of the agreement. Thus, the Court must first decide which parties are bound by delegation clause, before the arbitrator can decide the interpretation and scope of the arbitration clause.

See id. (citing *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Products Liab. Litig.,* 828 F. Supp. 2d 1150, 1159 (C.D. Cal. 2011) ("the threshold issue of whether… a nonsignatory, may compel Plaintiffs to submit to arbitration under the Purchase Agreements must be decided by this Court")).

Thus, when a nonsignatory seeks to enforce a delegation clause, the question is not simply whether there is a clear and unmistakable delegation, but whether the arbitration clause applies to the nonsignatories:

> Because Plaintiffs are non-signatories (and did not necessarily agree to submit *any* issue to arbitration), the Court, not the arbitrator, must decide whether Plaintiffs

> are bound by the Settlement Agreement and the arbitration provision *before* Plaintiffs can be compelled to arbitrate the issue of arbitrability.

Golden Boy Promotions LLC v. Haymon, No. CV153378JFWMRWX, 2015 WL 12827758, at *3 (C.D. Cal. Aug. 18, 2015); *see also In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, 838 F. Supp. 2d 967, 984 (C.D. Cal. 2012) (issue was whether claims against third parties were sufficiently intertwined with the provisions of the contract containing the arbitration and delegation provisions such that equity required plaintiffs be precluded from repudiating those provisions). Courts must first determine whether equitable estoppel applies because absent such entitlement, the nonsignatory cannot be considered a "party aggrieved" – a condition precedent to the court's authority to compel arbitration. *Toyota*, 838 F. Supp. 2d at 985.

ii. Appellees did not agree to delegate any aspect of disputes with nonsignatories to an arbitrator.

Appellees did not clearly and unmistakably delegate the issue of the nonsignatories' standing to enforce Herbalife's Agreements, or any disputes with nonsignatories, to an arbitrator. The Agreements between Appellees and Herbalife contain no language to that effect. Although the parties to a contract may mutually delegate threshold issues, the "strict enforcement of the delegation provision can apply only to those parties who actually signed the agreement and manifested their desire to arbitrate arbitrability." *SBMH Group DMCC v. Noadiam USA, LLC*, 297

F. Supp. 3d 1321, 1326 (S.D. Fla. 2017); *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79, 83 (2002) (the liberal policy favoring arbitration does not apply to the question of "whether the parties have submitted a particular dispute to arbitration, i.e., the `question of arbitrability,' is `an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'"); *Lopez v. United Health Group, Inc.*, 8:14-CV-2925-T-30AEP, 2014 WL 7404123, at *3 (M.D. Fla. Dec. 30, 2014) ("a signatory's agreement to arbitrate the issue of arbitrability does not mean that it must arbitrate with any non-signatory."). The district court correctly refused to delegate the issue of arbitrability absent clear and unmistakable language:

> As discussed below, E&E argues that there was no clear and unmistakable delegation, and the Court ultimately agrees. However, even assuming there were such a delegation here, the delegation gives the arbitrator the authority to decide only "the existence, validity or scope of the arbitration agreement(s)." HKIAC Administered Arbitration Rules, art. 19.1. ***There is no delegation to the arbitrator with respect to the issue of who is a party to the arbitration agreement in the first place***.

E & E Co. v. Light in the Box Ltd., No. 15-CV-00069-EMC, 2015 WL 5915432, at *4 (N.D. Cal. Oct. 9, 2015) (emphasis added); *see also Kramer v. Toyota*, 705 F.3d 1122, 1127 (9th Cir. 2013) ("Given the absence of clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories, the district court had the authority to decide whether the instant dispute is arbitrable.").

Brittania-U, relied upon by Defendants, is distinguishable. The suit involved bids for foreign oil contracts and both Brittania-U and Chevron signed the arbitration agreement at issue. *Id*. at 715. While the case also involved two nonsignatories, both were considered agents of Chevron. The court relied on the Second Circuit's decision in *Contec Corp. v. Remote Sol., Co., Ltd.*, 398 F.3d 205, 207 (2d Cir. 2005). In *Contec*, Contec Corporation was a nonsignatory but its predecessor entity was a signatory. No such relationship exists between the Appellants and Herbalife. Furthermore, the court in *Toyota* found that in the context of applying California law, *Contec* "provides no persuasive value," because "while purporting to allocate the issue of equitable estoppel to the arbitrator, the *Contec* court actually applied factors meant to determine it." *Toyota*, 838 F. Supp. 2d at 986.

B. Even if equitable estoppel applies, the arbitration agreement is unenforceable.

1. Herbalife's unilaterally amended rules of conduct do not create a valid and enforceable agreement to arbitrate.

Herbalife's Distributor Agreements are incredibly confusing, purporting to consist of various incorporated rules and policies, including an open-ended set of Rules that plainly conflict with the Agreements and other incorporated terms. SOC §II.A-B. The frequently amended Rules are published to a membership website governed by a "superseding" set of conflicting "Terms of Use" that Herbalife claims are incorporated into the Agreements and like the Rules, can also be amended at any

time. *Id*. (citing App.v.10, Tab 86 at 1 n.6). Ms. Romans testified that the Terms of Use are incorporated into the Distributor Agreements in their current and future forms. App.v.10, Tab 86 at 9, Tab 86-1 at 18, 32. She further testified that one would need to be a lawyer to understand it all. App.v.10, Tab 86 at 56, 58-59, Tab 86-1 at 36-37. Appellees, however, are not lawyers; they are ordinary consumers.

In the court below, Herbalife sought to rely on its morass of documents and forms to avoid the prospect of class litigation and a jury trial. SOC §II.A-B, App.v.4, Tab 62. The company, along with Appellants, argued that the arbitration provision contained within the 2016 Rules of Conduct was the operative agreement and sought to enforce it against all eight Plaintiffs – each of whom signed up as an Herbalife Distributor and began attending Circle of Success events before 2016, and more than half of whom did not sign Agreements containing arbitration provisions (or did not sign agreements at all in the cases of spouses). *See id.*; *see also* Initial Br. at 9-10. The district court declined to enforce the 2016 Rules retroactively and Herbalife did not appeal that decision. SOC §I. Now on appeal, Appellants seek a counterintuitive result which would have nonsignatories enforcing an arbitration provision that signatory defendants were unable to enforce.[4] The arbitration provision in the 2016

[4] Appellants do not even know which version of the Rules they wish to apply to this dispute, asking this Court to determine whether the district court erred "in refusing to enforce that arbitration provision, in its original form or as later amended." Initial Br. at 8.

Rules of Conduct is an illusory, ambiguous, and unconscionable adhesion contract ostensibly superseded by other terms and agreements. Appellants cannot enforce it here.

a. Rule modifications which add, subtract, or amend arbitration provisions are invalid without notice.

A party cannot unilaterally add, subtract, or amend arbitration provisions in a consumer contract without notice. Such modification is unenforceable. *See Rodman v. Safeway, Inc.*, 694 F. App'x 612, 613 (9th Cir. 2017) (modification to a consumer contract without notice is unenforceable under California law) (citing *Nguyen v. Barnes & Noble*, *Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014); *Roling v. E*Trade Sec., LLC*, 756 F.Supp.2d 1179, 1189–91 (N.D. Cal. 2010); *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993, 101 Cal.Rptr. 347 (1972) ("When [an] offeree does not know that a proposal has been made to him" there can be no mutual assent.)). Contrary to Appellant's contention, any continued acceptance by Appellees after amendment of the 'benefit of the bargain' in the form of commissions is irrelevant if they did not know there had been a change in the contract. This is particularly applicable where a party exercises a unilateral amendment right to add or change essential contract terms, such as the manner of dispute resolution. In fact, amendment to a material term such as a dispute resolution provision is problematic even where some form of notice has been provided:

> Where, as in this case, a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner… when it attempts to "recapture" a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into. ***That is particularly true where the new term deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution***.

See Badie v. Bank of Am., 67 Cal. App. 4th 779, 796-97 (1998) (emphasis added) (citations omitted) (ADR provision that was not in original agreement could not be unilaterally added in good faith with minimal notice; jury trial waiver must be unequivocal.). There is no evidence in the record that Herbalife even complied with the "de minimus procedural requirement of 'notice'" in amending its arbitration clause, or in some cases, amending Appellees' original contract to include an arbitration provision where previously there was none. SOC §II.A. Accordingly, the amendments to the Distributor Agreements that Appellants seek to apply are unenforceable.

b. Herbalife's Rules are a contract of adhesion and must be construed against Herbalife.

Herbalife's Distributor Agreements, including the Rules, amendments, and other terms purportedly incorporated therein, are contracts of adhesion. A contract of adhesion is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity

to adhere to the contract or reject it." *Everest Biosynthesis Group, LLC v. Biosynthesis Pharma Group Ltd.*, 2018 WL 325123, at *4 (S.D. Cal. Jan. 8, 2018). Herbalife's take-it-or-leave-it Agreement incorporates Herbalife's take-it-or-leave-it Rules of Conduct and take-it-or-leave-it Terms of Use while reserving to Herbalife's "sole and absolute discretion" the right to modify those Rules and Terms at any time without notice. SOC §II.A. Distributors are required not only to accept all existing terms without a meaningful opportunity to bargain, but must also agree to adhere to all future terms which the powerful company may later decide to impose. *See id*. The rule that contractual ambiguities are construed against the drafter "applies with peculiar force in the case of a contract of adhesion." *Sandquist v. Lebo Auto*., Inc., 1 Cal. 5th 233, 248 (Cal. 2016); *Varela v. Lamps Plus, Inc*., 701 F. App'x. 670, 672 (9th Cir. 2017). Accordingly, the ambiguity in Herbalife's continually shifting, multi-document adhesion contract must be construed against Herbalife.

c. Herbalife's unilateral right to amend the Rules and apply them retroactively to known claims renders them illusory.

Even assuming Herbalife had provided adequate notice of its amendments and that Appellees accepted those changes – neither of which is not established in the record – "it does not follow that these two steps are sufficient to make a contract nonillusory." *Peleg v. Neiman Marcus Grp., Inc.,* 204 Cal. App. 4th 1425, 1455–56, 140 Cal. Rptr. 3d 38, 60 (2012) (citing *Carey v. 24 Hour Fitness, USA, Inc.* (5th Cir. 2012)). "One of the most common types of promise that is too indefinite for legal

enforcement is the promise where the promisor retains an unlimited right to decide later the nature or extent of his or her performance. This unlimited choice in effect destroys the promise and makes it illusory." *Id*. at 46 (citing 1 Williston on Contracts (4th ed. 2007) §4:27 at 804-05). The arbitration provision in Herbalife's 2016 Rules is illusory because it grants Herbalife an unrestricted right to amend its terms in perpetuity, and to foist those amendments on Appellees without notice, acceptance or otherwise fair process.

A contract is unenforceable as illusory when, as here, "one of the parties has the unfettered or arbitrary right to modify or terminate the agreement." *Harris v. Tap Worldwide*, *LLC*, 248 Cal. App. 4th 373, 385 (Cal. App. 2d Dist. 2016). Courts have held that the unilateral power to modify is not necessarily fatal to enforcement if "the exercise of the power is subject to limitations, such as fairness and reasonable notice." *Harris*, 248 Cal. App. 4th at 388. Here, there has been no limitation on Herbalife's power to modify the Agreements, nor has Herbalife exercised any restraint in doing so.

New Herbalife Rules become effective upon publication, without notice. SOC §II.A. For example, in 2013, when Herbalife reintroduced the arbitration provision into its Rules, the change became effective immediately upon publication; four months before Herbalife can claim it made even a token effort to notify Distributors of this significant change. *See id*. Appellants cite no authority for the proposition

that an adhesion contract can reserve for its drafter a unilateral right to amend without notice. It cannot. *See Harris*, 248 Cal. App. 4th at 385-88; *see also Peleg,* 204 Cal. App. 4th at 1455–56.

Appellants argue that the 2016 Rules arbitration provision is fair because it "expressly contain[s] the language regarding amendments that California law requires." Initial Br. at 41. This 'saving language' prevents changes made by Herbalife from applying "to claims that have accrued or are otherwise known to Herbalife at the time of the amendment." App.v.7, Tab 62-2 at 680. Even in the absence of such express savings language, the implied covenant of good faith and fair dealing incorporates an equivalent restriction on the retroactive application of amendments and saves otherwise sound arbitration provisions from being adjudged illusory. *Peleg,* 204 Cal. App. 4th at 1465.

The implied covenant, however, also imposes an important duty on those who have "the discretionary power to affect the rights of the other party ***to exercise that power in a manner consistent with the covenant of good faith and fair dealing***." *Badie,* 67 Cal. App. 4th at 795 (emphasis added). In *Badie*, the court refused to enforce an arbitration provision that Bank of America unilaterally inserted into its credit account agreements, reasoning that:

> It is the Bank's exercise of its discretionary right to change the agreement, not the ADR clause in and of itself, which must first be analyzed in terms of the implied covenant. If the Bank's performance under the change of terms

> provision was not consonant with the duty of good faith and fair dealing, then whether the ADR clause, considered in isolation, satisfies the implied covenant makes no difference.

Badie, 67 Cal. App. 4th at 796.

This is not a case where the Court is asked to analyze an executed arbitration agreement and determine whether the unilateral amendment rights retained by one party (usually an employer) render the contract illusory in the abstract. The arbitration provisions at issue result from Herbalife's *actual* exercise of its unilateral amendment authority in bad faith. Herbalife has repeatedly amended its Rules unreasonably and without notice, including through the insertion of jury and class waiving provisions not contemplated by many of Appellees' original Agreements. SOC §II.A. Herbalife, moreover, has attempted to enforce the 2016 Rules retroactively against known harms in direct contravention of both the express terms of the savings clause and the implied covenant. *Id*.

Appellants mistakenly argue there is no attempt at retroactive enforcement against known claims because RICO claims "do not accrue until 'the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.'" Initial Br. at 29 n.19 (citing *McCaleb v. A.O. Smith Corp*., 200 F.3d 747, 751 (11th Cir. 2000)). However, the relevant question is not when Plaintiff/Appellees' claims accrued, but rather, when Herbalife knew of the harms. *See Peleg,* 204 Cal. App. 4th at 1465. Herbalife

aggressively promotes and supports an event system that it knows is premised on falsehoods. SOC §II.B. Moreover, in arguing that all of Appellees' claims were released by the settlement in the prior *Bostick* case, Herbalife essentially admitted to knowledge of the harm as of 2013, before the current version of the arbitration provision was introduced to the Rules. *See* App.v.4, Tab 52.

As shown above, allowing Appellants to enforce this provision against Appellees would necessarily apply the 2016 Rules retroactively to known claims. This is something that Herbalife, as the drafter and signatory to these agreements, claimed in a prior judicial proceeding it would not seek to do, acknowledging that such retroactive application would be problematic. *See* App.v.10, Tab 86 at 14-16. The law prohibits such retroactive application of the Rules to Appellees. *See Badie,* 67 Cal. App. 4th at 795-96; *see also Peleg,* 204 Cal. App. 4th at 1455–56, 1464-65; *Harris*, 248 Cal. App. 4th at 388.

d. The Rules arbitration provision is unconscionable.

The Rules arbitration provision is both substantively and procedurally unconscionable. "Under California law, an arbitration agreement, like any other contractual clause, is unenforceable if it is both procedurally and substantively unconscionable." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010). California uses a sliding scale to weigh unconscionability: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is

required to come to the conclusion that the term is unenforceable, and vice versa." *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 174, 116 Cal. Rptr. 2d 671, 675 (2002) (citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000), 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669).

The Rules are a procedurally unconscionable contract of adhesion in which there is a substantial amount of oppression and surprise. "In assessing procedural unconscionability, the court, under California law, focuses on the factors of surprise and oppression in the contracting process, including whether the contract was one drafted by the stronger party and whether the weaker party had an opportunity to negotiate." *Pokorny*, 601 F.3d at 996. A contract of adhesion is intrinsically a procedurally unconscionable contract. *Flores v. Transamerica HomeFirst, Inc*., 93 Cal.App.4th 846, 113 Cal.Rptr.2d 376, 382 (2001) ("A finding of a contract of adhesion is essentially a finding of procedural unconscionability."); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) ("The threshold inquiry in California's unconscionability analysis is 'whether the arbitration agreement is adhesive.'"). As shown in Argument §II.A.2, Herbalife's Agreement and incorporated Rules are a contract of adhesion.

A contract is oppressive where, as here, it "arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *Stirlen v. Supercuts, Inc.*, 60 Cal.Rptr.2d 138, 145 (1997). Herbalife

Distributors are forced to accept all current and future Rules without an opportunity to negotiate. The Rules require Distributors who have already invested heavily in their Herbalife businesses to accept all new Rules or risk immediately losing their entire investment. *See*, *e.g.*, App.v.7, Tab 62-2 at 721 ¶6, 755 ¶¶5-7, 760 ¶¶5-7.

There is also a substantial element of unfair surprise, described as "a function of the disappointed reasonable expectations of the weaker party," *Harper v. Ultimo*, 113 Cal.App.4th 1402, 7 Cal.Rptr.3d 418, 422 (2003). Courts have held that "the degree of procedural unconscionability is enhanced when a contract binds an individual to later-provided terms." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (citing *Pokorny*, 601 F.3d at 997). Many putative class members, like Plaintiff/Appellee Felix Valdez, were not provided an opportunity to see the Rules until after they had executed Distributor Agreements, a defect that courts have held "multiplied the degree of procedural unconscionability." *Id*. at 922.

Thus, Herbalife's Rules contain a high degree of procedural unconscionability, which decreases the amount of substantive unfairness required to find the provision unconscionable.

The contract also contains a high degree of substantive unconscionability because its terms are unfairly one-sided in favor of the party with superior bargaining power. "The focus of the inquiry is whether the term is one-sided and will have an overly harsh effect on the disadvantaged party. Thus, mutuality is the 'paramount'

consideration when assessing substantive unconscionability." *Pokorny*, 601 F.3d at 997-98 (citations omitted). The Rules are substantively unconscionable in that they lack mutuality of obligation, contain a class waiver, are illusory, and include a confidentiality clause that significantly benefits Herbalife while impeding Appellees' ability to effectively litigate against them.

Several terms in the Rules arbitration provision unfairly favor Herbalife sufficiently to support a finding of substantive unconscionability. Herbalife reserves for itself the unlimited right to modify the Rules at its sole and absolute discretion, and to make those modifications enforceable upon publication without further notice or assent. SOC §II.A. Distributors have no equivalent rights to make contract modifications and have no input into the amendments imposed upon them. *See id*.; *see also* App.v.7, Tab 62-2 at 554-771. This unilateral modification right contributes to the contracts' substantive unconscionability.

The Rules further lack mutuality because they exclude intellectual property enforcement from binding arbitration. The provision allows either party to "bring suit in court to enjoin infringement or other misuse of intellectual property rights." *See* 2016 Rules, App.v.7, Tab 62-2 at 680. However, only Herbalife is positioned to bring such an action. The company retains a choice of judicial forum to enforce claims important to the company while binding Distributors to arbitration of claims most relevant to them. This exclusion is made without the required "justification

grounded in something other than the [more powerful party's] desire to maximize its advantage based on the perceived superiority of the judicial forum." *Armendariz*, 99 Cal.Rptr.2d at 772.

The rigid confidentiality clauses give the company a distinct advantage in the arbitration process. "Although facially neutral, confidentiality provisions usually favor companies over individuals." *Ting v. AT&T,* 319 F.3d 1126, 1151-52 (9th Cir. 2003). This is because plaintiffs are unable to mitigate the advantages inherent in Herbalife being a repeat player. *Santos v. Household Int'l, Inc.*, No. C03-1243 MJJ, 2003 WL 25911112, at *5 (N.D. Cal. Oct. 24, 2003) (citing *Ting*, 319 F.3d at 1152). As in *Ting*, Herbalife has "placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent" while simultaneously allowing Herbalife to accumulate "a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract." *Ting*, 319 F.3d at 1152.

The 2013 Rules and the 2014 Agreements signed by certain Plaintiffs each contain the following language:

> Any party involved in a claim or dispute under this arbitration provision shall not disclose to any other person not directly involved in the arbitration process anything having to do with the arbitration, including without limitation, (i) the substance of, or basis for, the claim; (ii) the content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery; or (iii) the terms or amount of any arbitration award.

See App.v.6, Tab 62-2 at 507. In *Pokorny*, 601 F.3d 987, the Ninth Circuit found nearly identical language in the Quixtar/Amway distributor agreement was evidence of substantive unconscionability because it unfairly favored Quixtar by preventing "Plaintiffs from discussing their claims with other potential plaintiffs and from discovering relevant precedent to support their claims." *Id*. The prohibition has the effect of "handicapping the Plaintiffs' ability to investigate their claims and engage in meaningful discovery" while doing "nothing to prevent Quixtar from using its continuous involvement in the Quixtar ADR process to accumulate 'a wealth of knowledge on how to arbitrate future claims brought by [distributors]." *Id*. at 1002.

The Rules also unfairly shift the duty to stay apprised of changes to Distributors, while Herbalife takes the position that it may unilaterally amend the Rules as often as it wishes by posting amendments to its website without notice. App.v.10, Tab 86-1 at 20.

Taken together, these terms, which provide unfair advantages to Herbalife, the party with far greater bargaining power, render the Rules substantively unconscionable.

e. The Terms of Use directly conflict with the arbitration provision.

Herbalife operates a members-only website – "myherbalife.com" – governed by Terms of Use that purport to "supersede all prior or other arrangements, understandings, negotiations and discussions, whether oral or written." *See* SOC

§II.A (citing Terms of Use). The Rules are available for viewing exclusively through this website, and Herbalife argues that the frequent unilateral changes it makes to the Rules become effective upon publication to the site. SOC §II.A.

Herbalife-sponsored Circle of Success event tickets are available for purchase over myherbalife.com and are not subject to the refund protections in the Herbalife Rules/Distributor Agreements. The Terms, as revised on February 2, 2017, provide that disputes shall be litigated in Los Angeles courts. These terms directly contradict the dispute resolution provisions in the Rules and give rise to conflicting enforcement priorities *See, e.g., Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (citing policy in favor of enforcing forum selection clauses).

Appellants argue that the Terms have only a "narrow application" while simultaneously acknowledging that they apply to the "purchase of products and services through the website," Initial Br. at 44, and despite testimony of Herbalife's Director of Member Policy Administration that they are fully incorporated into the Distributor Agreements. SOC §II.A. What is awkward, at least for Herbalife, is that those terms flatly contradict the (also incorporated) Rules. This substantially complicates Appellees' ability to remain apprised of Herbalife's dispute resolution procedures (which are already continually amended on Herbalife's website without notice) because Herbalife claims that the conflicting terms are both incorporated in

the Distributor Agreements. But one provides for arbitration and the other for litigation.

And while a majority of the financial transactions alleged in the Complaint occurred between Appellants and Appellees without involving Herbalife directly, many Circle of Success event ticket purchases from Herbalife were transacted through myherbalife.com, and thus, according to Herbalife, are subject to the forum selection clause in the Terms of Use.[5] This conflicting dispute resolution provision renders the Rules arbitration provision so ambiguous as to be unenforceable because it would be impossible for Appellees, or any reasonable person, to determine which provision applies.

2. Herbalife's distributor agreements do not create a valid and enforceable agreement to arbitrate.

Six of the eight Plaintiffs listed on the Complaint executed Herbalife Distributor Agreements. Three of those six signed one of two different Agreements containing arbitration provisions. Felix Valdez signed a version of the Agreement revised in 2006 which contained a clearly unconscionable arbitration provision ("Version 28"). SOC §II.A.; App.v.7, Tab 62-2. Cody Pyle clicked through on a 2014 revision of the Agreement ("Version 43") which contained a less offensive but

[5] The Terms of Use are themselves unconscionable and unenforceable to the extent they impose a private 90-day statute of limitations on claims. *See Ellis v. U.S. Sec. Associates*, 169 Cal. Rptr. 3d 752, 761 (Cal. App. 1st Dist. 2014).

still illusory and unconscionable arbitration provision. *Id*. As demonstrated above, the Agreements are unconscionable contracts of adhesion, are rendered illusory through the incorporation of the changing Rules, and are further confused by the "superseding" and conflicting Terms of Use. *See* Argument §I.B.1.

a. The Rules and Terms render the Agreements ambiguous.

Herbalife argued below that the dispute resolution provisions contained in the Rules were to supersede and replace the provisions contained in individual Distributor Agreements. App.v.4, Tab 62. Distributors who executed Agreements calling for litigation in Los Angeles were now to be subject to mandatory arbitration. *See id*. Distributors who executed arbitration agreements, such as Version 43, which provided for an alternative minimum payment of $10,000 and the possibility of double attorney's fees were now to be subject to the 2016 Rules which had removed both of those terms. *See* App.v.5-7, Tab 62-2.

Herbalife, the drafter of the adhesion Agreement, argued for an interpretation which gave precedence to its own unilaterally amendable Rules. App.v.4, Tab 62. The online transactions at issue in the Complaint, according to terms also drafted by Herbalife, are to be governed by another superseding, unilaterally amendable adhesion contract appearing on its website (the Terms of Use). SOC §II.A.

Analyzed together and construed against the drafter, the contract is so ambiguous and nonsensical that it cannot be enforced against Appellees as consumers alleging intentional fraud.

b. The Agreements have no saving language and are illusory or unconscionable.

Neither Version 28 nor Version 43 of the Distributor Agreement contains language preventing Herbalife from making unilateral changes to the arbitration agreement and then enforcing those changes against Distributors retroactively without notice. *See* Argument §I.B.1.c. Although the deficiency could be cured by the implied covenant of good faith and fair dealing, *see Peleg* at 1465, the implied covenant cannot save Herbalife's Agreements in this case because, as detailed above, the company and Appellants seek to retroactively enforce the terms in circumstances that violate the implied covenant. *See* Argument §I.B.1.c.

Version 28 of the Agreement is uniquely problematic. Like the others, it is a contract of adhesion. But it also creates a one-year private statute of limitations; it requires non-binding negotiation before arbitration; it requires non-binding mediation to be held in Los Angeles before arbitration; it calls for the arbitration to be held in Los Angeles regardless of the Distributor's location; and it shifts none of the costs of the arbitration onto the company. App.v.7, Tab 62-2. In other words, Version 28 forestalls a judicial remedy while also making it prohibitively expensive

for Distributors like Felix Valdez to bring claims to arbitration and is therefore unconscionable. *See* Argument §I.B.1.d.

3. The delegation clause is inapplicable and independently unenforceable.

The delegation provision is inapplicable because as discussed above, there is no clear and unmistakable delegation of disputes with Appellants. The delegation provision is also unconscionable, illusory, and superseded for the same reasons that apply to the arbitration clause as a whole, but even more so because an elevated standard applies to purported delegations of gateway issues ordinarily decided by courts. *Saravia v. Dynamex, Inc*., 310 F.R.D. 412, 419. (N.D. Cal. 2015) (citing *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 71–4 (2010)).

In *Peleg,* the court held that the delegation of gateway issues had not been clear and unmistakable because there was a conflict between the language in the delegation provision and that of the severability provision. 204 Cal. App. 4th at 1444. The court noted that the conflict created "ambiguous language" that "does not suffice" to satisfy the standard. *Id*. at 1445. Similarly, here, the Agreements and incorporated Rules contain directly conflicting dispute resolution provisions. Further obscuring matters, the apparently superseding Terms of Use conflict with language in both the Agreements and the Rules. Nothing about this contract schema can be fairly described as "clear and unmistakable."

As noted, certain Appellees signed Agreements which did not contain arbitration provisions at all; but even among those that did, there remain unresolvable conflicts between the Rules, Agreements and other incorporated and/or superseding terms. For instance, the delegation language in Cody Pyle's 2014 Distributor Agreement differs materially from the 2016 Rules. SOC §II.A; App.v.5-7, Tab 62-2. The Agreement delegation provision emphasizes the supremacy of the Agreement over the AAA Rules while the Rules provision divests all authority to the AAA Rules. Meanwhile, the Terms of Use provide for exclusive jurisdiction in the courts of Los Angeles. *Id*. It is unclear which language should apply in cases of conflict. *See* SOC §II.A (citing testimony of Roxane Romans). What is clear is that Appellees did not agree to arbitrate any disputes with Appellants as nonsignatories, and did not "clearly and unmistakably" delegate the "question of arbitrability" in disputes with Appellants.

Finally, Appellants' contention that Appellees do not identify an independent basis for invalidating the delegation clause simply because the same defects apply to the arbitration clause as a whole should be rejected. *See* Initial Br. at 25 n.17. *See*, *e.g.*, *MacDonald v. CashCall, Inc*., 883 F.3d 220, 227 (3d Cir. 2018) (delegation provision was independently unenforceable based upon same defects as the arbitration agreement as a whole).

II. THE COURT LACKS PENDENT APPELLATE JURISDICTION OVER THE TRANSFER ORDER.

Pendent appellate jurisdiction is limited to circumstances in which a nonappealable decision is "inextricably intertwined" with the appealable decision or when "review of the former decision [is] necessary to ensure meaningful review of the latter." *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379–80 (11th Cir. 2009) (citing *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995); *Summit Med. Assocs., P.C. v. Pryor,* 180 F.3d 1326, 1335 (11th Cir.1999)); *see also Harris v. Bd. of Educ. of the City of Atlanta*, 105 F.3d 591, 594 (11th Cir. 1997). The Supreme Court "has signaled that pendent appellate jurisdiction should be present only under rare circumstances." *King*, 562 F.3d at 1379 (citing *Johnson v. Jones,* 515 U.S. 304, 318, 115 S.Ct. 2151, 2159, 132 L.Ed.2d 238 (1995) (indicating pendent appellate jurisdiction is only appropriate "sometimes")); *Swint,* 514 U.S. at 49–50, 115 S.Ct. at 1211 (expressing concern that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay ... collateral orders into multi-issue interlocutory appeal tickets"). "As noted in *Swint,* a more expansive exercise of such jurisdiction would undermine the statutory scheme governing interlocutory appeals." *Id*. (citing *Swint,* 514 U.S. at 45–

50, 115 S.Ct. at 1209–11; 28 U.S.C. § 1292(b), (e); *Gilda Marx, Inc. v. Wildwood Exercise, Inc.,* 85 F.3d 675, 679 (D.C.Cir.1996)). The doctrine does not apply here.

Appellants argue that the Court should assert pendent appellate jurisdiction over the district court's transfer order because the question of whether the nonsignatories can enforce Herbalife's forum selection clause shares some factors with the Court's analysis concerning the applicability of estoppel to the issue of compelling arbitration. Initial Br. at 5-7. Such connection is insufficient to justify the Court's exercise of pendent jurisdiction.

The motion to transfer was briefed separately from the motion to compel arbitration and requested in the alternative. The question before the Court concerning arbitration does not require consideration of the court's transfer ruling. To affirm the district court's order denying arbitration the Court need only satisfy itself that estoppel does not apply because Appellees have not sought to enforce any terms in the Agreements, and the Agreements are neither relied upon nor necessary to Appellees' claims.

On the other hand, consideration of the transfer order requires the Court to review not just the applicability of estoppel to the forum selection clauses in the Distributor Agreements by the nonparty Appellants, but also the district court's assessment of numerous factors that inform the transfer analysis and have nothing to do with arbitrability. Initial Br. at 50-57 (citing multifactor test for transfer). The

district court ultimately concluded that the balance of factors weighed in favor of the Florida forum. Because Appellees did not agree to litigate their claims against Appellants in California, the case remains here.

Even if estoppel applied, the remaining arguments pertaining to arbitrability have no relation to the transfer analysis. See Argument §I.B. The arbitration and transfer issues are not inextricably intertwined, and it is unnecessary to review the venue issue to determine arbitrability. While the arbitration analysis could and should end at estoppel, the venue analysis would still require consideration of the various factors under 28 U.S.C. §1404. There is no basis for exercising pendent appellate jurisdiction in such circumstances. *See King*, 562 F.3d at 1380-81 (no pendent appellate jurisdiction where, although some factors in the *forum non conveniens* analysis applied equally to both issues, the analyses were conducted separately and it was unnecessary to determine the unappealable issue in order to resolve the appealable one); *see also Harris*, 105 F.3d at 595 (no pendent appellate jurisdiction where appealable issue may be resolved without reference to nonappealable one).

Appellants' cases are inapplicable. In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353 (11th Cir. 1997), the Court held it had jurisdiction to review both an order compelling discovery and the order imposing sanctions, issued in part for defendant's alleged violation of the interlocutory order compelling defendant.

Clearly, the sanctions order could not be reviewed absent consideration of the order that was violated. In *United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997), the Court exercised pendent appellate jurisdiction over an evidentiary ruling excluding evidence in connection with an order striking a paragraph from the indictment where both resulted from the same determination that videotape evidence could not be used to support the charge of mail fraud. The Court noted that "review of the evidentiary ruling necessarily implicates review of the order striking" the relevant paragraph from the indictment. *Id*. Here, there is no such interconnection between the transfer and arbitration rulings. As this Court noted in *Harris*, where the appealable issue may be resolved without reaching the merits of the nonappealable one, the questions are not sufficiently interwoven to fall within the Court's pendent appellate jurisdiction. *See Harris*, 105 F.3d at 595.

III. THE DISTRICT COURT CORRECTLY REFUSED TO TRANSFER THE CLAIMS AGAINST APPELLANTS.

Appellants once again attempt to enforce provisions in the Agreements as nonparties. Here, they seek the benefit of forum selection clauses contained in certain of the Appellees' Agreements. For the same reasons argued above with respect to the arbitration clause, the district court correctly refused to enforce the forum selection clauses through equitable estoppel because the Appellees' claims are unrelated to the Agreements containing those clauses. *See* Argument §I.A. Although, some courts have allowed nonsignatories who are third-party

beneficiaries, agents, or closely related to the signatory to enforce forum selection clauses, Appellants have not established, and do not argue that they have such a relationship with Herbalife. *See* SOC §II.A; *see also* App.v.11, Tab 98 at 9; *see generally* Initial Brief. Appellants' reliance on *Blixseth v. Disilvestri*, 2013 WL 12063940 (S.D. Fla. Jan. 31, 2013), is misplaced, as the plaintiffs' claims against nonsignatories in that case relied upon the terms of the contract. *See id*. at *16. Finally, the district court correctly concluded that, absent an applicable forum selection clause, the relevant factors weighed in favor of Plaintiffs/Appellees' choice of forum, as this lawsuit has substantial ties to Florida. SOC §I; App.v.11, Tab 98 at 7-9 (citing 28 U.S.C. § 1404(a)).

CONCLUSION

For the foregoing reasons, the district court's order denying Appellants' motion to compel arbitration should be affirmed. The Court should decline to exercise pendent appellate jurisdiction over the transfer order, consideration of which is neither necessary nor sufficiently related to the question of arbitrability to justify application of the doctrine.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,792 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-based typeface using Microsoft Word, 14-point Times New Roman.

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing this 11th day of February, 2019 to:

By: *s/ Etan Mark*
Etan Mark, Esq.

SERVICE LIST

Edward Salanga, Esq.
Michael S. Catlett, Esq.
Kyle T. Orne, Esq.
Kevin D. Quigley, Esq.
QUARLES & BRADY, LLP
Two North Central Avenue
Phoenix, AZ 85004
Attorneys for Appellants

Zachary S. Foster, Esq.
S. Douglas Knox, Esq.
QUARLES & BRADY, LLP
101 E. Kennedy Boulevard, Suite 3400
Tampa, Florida 33602
Attorneys for Appellants

Jason Jones, Esq.
JASON JONES ATTORNEY AT LAW
1147 Hunter Ave
Columbus, OH 43201
Co-Counsel for Appellees