No. 18-14048-JJ

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

PLAINTIFFS-APPELLEES

V.

MARK ADDY, JILLIAN ADDY, DENNIS DOWDELL, GARRAIN S. JONES, CODY MORROW, CHRISTOPHER REESE, GABRIEL SANDOVAL, EMMA SANDOVAL, JOHN TARTOL, LESLIE R. STANFORD, FERNANDO RANCEL, LORI BAKER, MANUEL COSTA, MARK DAVIS, JENNY DAVIS, DANIELLE EDWARDS, GRAEME EDWARDS, THOMAS P. GIOIOSA, SANDRA GIOIOSA, ALCIDES MEJIA, MIRIAM MEJIA, PAULINA RIVEROS, RON ROSENAU, CAROL ROSENAU, AMBER WICK, JASON WICK, JORGE DE LA CONCEPCION, DISNEY DE LA CONCEPCION, JENNIFER MICHELI, GUILLERMO RASCH, CLAUDIA RASCH, SAMUEL HENDRICKS, AMY HENDRICKS, BRADLEY HARRIS, PAYMI ROMERO, RYAN BAKER, KRISTOPHER BICKERSTAFF, MARK MATIKA, ENRIQUE CARILLO, DANIEL J. WALDRON, SUSAN PETERSON, MICHAEL KATZ, ARQUIMEDES VALENCIA, AND DEBI KATZ,

DEFENDANTS-APPELLANTS

Appeal from the United States District Court

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

Hon. Marcia G. Cooke, District Judge

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No: 18-14048-JJ

Rodgers, et al. v. Addy, et al.

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

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

38. Mejia, Alcides - Appellant

39. Mejia, Miriam - Appellant

40. Micheli, Jennifer - Appellant

41. Morrow, Cody - Appellant

42. O'Donnell, Lara - Appellees' Counsel

43. Orne, Kyle - Appellants' Counsel

44. Peterson, Susan - Appellant

45. Pyle, Cody - Appellee

46. Quarles & Brady LLP – Appellants' Counsel

47. Quigley, Kevin D. - Appellants' Counsel

48. Rancel, Fernando - Appellant

49. Rasch, Claudia - Appellant

50. Rasch, Guillermo - Appellant

51. Reese, Christopher - Appellant

52. Ribalta, Jennifer - Appellee

53. Riveros, Paulina - Appellant

54. Rodgers, Jeff - Appellee

55. Rodgers, Patricia - Appellee

56. Romero, Paymi - Appellant

57. Rosenau, Carol - Appellant

58. Rosenau, Ron - Appellant

59. Salanga, Edward - Appellants' Counsel

60. Sandoval, Emma - Appellant

61. Sandoval, Gabriel - Appellant

62. Stanford, Leslie R. - Appellant

63. Tartol, John - Appellant

64. Valdez, Felix - Appellee

65. Valdez, Izaar - Appellee

66. Valencia, Arquimedes - Appellant

67. Waldron, Daniel J. - Appellant

68. Wick, Amber - Appellant

69. Wick, Jason - Appellant

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument in this case. Plaintiffs seek to certify a nationwide class action composed of thousands of class members. Each of the parties is (or was) an independent distributor (each a "Distributor" and collectively, "Distributors") for the international nutrition company, Herbalife, which distributes its products through a direct sales model. [1] Herbalife's policies and procedures governing its Distributors, and even the agreements certain of the Plaintiffs signed with Herbalife to become Distributors, contain valid and binding arbitration provisions. Defendants (along with Herbalife) sought to enforce the arbitration provisions or, alternatively, to transfer venue of the entire case to the Central District of California.

The primary issues presented in this appeal are whether Plaintiffs must arbitrate their claims against Defendants or, alternatively, prosecute those claims in the Central District of California. To resolve those issues, the Court will need to analyze the interplay and validity of multiple contracts relating to the eight named Plaintiffs, consider whether the forty-four Defendants can enforce the arbitration provisions contained in Plaintiffs' contracts, and decide whether, in any event, the District Court erred in splintering this case into three different cases (the case now

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[1] Herbalife was previously a defendant in this action, but the District Court's ruling, which is the subject of this appeal, dismissed Herbalife as a party.

pending before this Court against Defendants, a case by certain of the named Plaintiffs against Herbalife to proceed in the Central District of California, and cases by certain of the named Plaintiffs against Herbalife to proceed in arbitration).

Without addressing Defendants' arguments, the District Court summarily rejected Defendants' motion to compel arbitration and motion to transfer venue and, instead, splintered this case into three parts. While recognizing the validity of Plaintiffs' agreements with Herbalife, the District Court did not address at all Defendants' arguments and, in the process of denying their motions, disregarded binding case law and the strong preference in favor of arbitration. This appeal is not frivolous and, because of the complexity of the issues involved, Appellants believe oral argument would significantly aid the decisional process. Accordingly, oral argument is appropriate pursuant to Fed. R. App. P. ("FRAP") 34 and 11th Cir. R. 34-3.

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INTRODUCTION

The eight named Plaintiffs are current and former Herbalife Distributors seeking to have the District Court certify a nationwide class of individuals who attended Herbalife events over the last nine years. Like all Herbalife Distributors, Plaintiffs are subject to a binding arbitration provision contained in Herbalife's Distributor Rules of Conduct (*i.e.*, Herbalife's policies and procedures, referred to herein as the "Rules"), which are incorporated by reference into the agreements Plaintiffs signed to become Distributors (referred to herein as "Distributor Agreements"). That arbitration provision clearly and unmistakably delegates to an arbitrator the issue of whether Plaintiffs' claims must be arbitrated. All eight Plaintiffs either (i) became an Herbalife Distributor at a time when the Rules already contained the arbitration provision or (ii) continued operating and earning commissions as a Distributor for years after Herbalife amended the Rules to add the arbitration provision. Thus, all eight Plaintiffs are subject to the arbitration provision contained in the Rules. Additionally, four of the Plaintiffs also signed Distributor Agreements containing an arbitration provision that is similar to the one in the Rules.

Despite their clear agreement to arbitrate on an individual basis, Plaintiffs filed their claims against Herbalife and Defendants, who are also Herbalife Distributors themselves, on a class-wide basis in federal court. In response,

Herbalife and Defendants filed a motion to compel arbitration and, in the alternative, a motion to transfer the entire case to the Central District of California.

Although all Plaintiffs were subject to an arbitration provision, and although all of Plaintiffs' claims against Defendants were jointly pled against Herbalife, the District Court issued a ruling that split the case into three different pieces. First, the District Court granted the motion to compel arbitration, but only as to those four Plaintiffs who signed Distributor Agreements containing an arbitration provision and only as to those Plaintiffs' claims against Herbalife. Inexplicably, the District Court gave no effect to the arbitration provision in the Rules, stating only that "[t]he 2016 Rules of Conduct are limited by the implied covenant of good faith and fair dealing and the Court declines to retroactively apply the arbitration provision of the 2016 Rules." [Doc. 106 at 1.][2] As a result, the District Court denied the motion to compel arbitration in all other respects, which left unresolved the following claims: (a) the claims of the four remaining Plaintiffs against Herbalife; and (b) the claims of all eight Plaintiffs against Defendants.

The Court then considered the motion to transfer. As to the claims of the four remaining Plaintiffs against Herbalife, the District Court granted the motion to transfer to the Central District of California, based solely on the forum selection

[2] Citation in this Opening Brief shall be to the trial docket number ("Doc.") and the page number, as applied by the Electronic Case Filing System.

clause in the Distributor Agreement between those Plaintiffs and Herbalife. As to the claims of all eight Plaintiffs against Defendants, the District Court denied the motion to transfer, reasoning only that "[t]he balance of the § 1404(a) factors weighs in Plaintiffs' favor and the Court declines to disregard Plaintiffs' choice of venue." In sum, four Plaintiffs will have their claims against Herbalife resolved in arbitration; four Plaintiffs will litigate their claims against Herbalife in the Central District of California; and all eight Plaintiffs will litigate their claims against Defendants (which were jointly pled against Herbalife) in the District Court.

The District Court erred in multiple respects. First, the District Court erred by not compelling into arbitration the threshold issue of whether Plaintiffs are required to arbitrate their claims, because each of the Plaintiffs clearly and unmistakably agreed to arbitrate issues of arbitrability. Second, even if the District Court was the correct decision maker on issues of arbitrability, it erred in refusing to compel arbitration of Plaintiffs' claims against Defendants pursuant to the arbitration provision contained in the Rules. Under California law, the Rules require arbitration of Plaintiffs' claims. The District Court's use of the implied covenant of good faith and fair dealing to render the arbitration provision in the Rules unenforceable misunderstood California law and discriminated against an agreement to arbitrate, in violation of the Federal Arbitration Act. And, third, none of the alternative grounds Plaintiffs asserted below to avoid arbitration are valid.

In the alternative, the District Court erred in denying the motion to transfer as to Plaintiffs' the claims against Defendants. If Plaintiffs are not required to arbitrate then, at a minimum, four of the Plaintiffs are equitably estopped from litigating their jointly pled claims against Herbalife and Defendants in any forum other than California. Moreover, all remaining Plaintiffs should be required to litigate their claims in the Central District of California pursuant to 28 U.S.C. § 1404(a) and the factors applied thereunder.

STATEMENT OF JURISDICTION

I. The Court Has Subject-Matter Jurisdiction Over This Case.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs allege claims against Defendants under 18 U.S.C. § 1962(c) (civil RICO) and 18 U.S.C. § 1962(d) (RICO conspiracy). [Doc. 1 at 74-78.]

II. The Court Has Appellate Jurisdiction Over the District Court's Order.

On December 14, 2017, Defendants and Herbalife filed a Joint Motion to Compel Arbitration (the "Motion to Compel"). [Doc. 62.] That same day, Defendants and Herbalife filed, in the alternative, a Joint Motion to Transfer Venue to the Central District of California (the "Motion to Transfer"). [Doc. 63.] On August 23, 2018, the District Court entered the Order Granting In Part Defendants' Motion to Compel Arbitration and Motions to Transfer Venue to the Central District of California (the "Order"), granting in part and denying in part the Motion to

Compel and the Motion to Transfer. [Doc. 106.] In the Order, the District Court denied the Motion to Compel and the Motion to Transfer in all respects as to Defendants. [*Id.*] On September 20, 2018, Defendants filed a timely Notice of Appeal of the Order under FRAP 3 and 4(a)(1)(A). [Doc. 113.]

A. Defendants Are Entitled to Immediately Appeal the District Court's Denial of the Motion to Compel Arbitration.

Under the Federal Arbitration Act (the "FAA"), Defendants are entitled to immediately appeal the District Court's denial of the Motion to Compel. 9 U.S.C. § 16(a) (providing the right to appeal the denial of a stay under section 3 of the FAA); *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 873 (11th Cir. 2005) ("Pursuant to 9 U.S.C. § 16(a) (2000), we have jurisdiction over this appeal."); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631-32 (2009) (holding that non-signatories who seek to compel arbitration based on equitable estoppel have the same right as signatories to immediately appeal a denial of such a motion).

B. The Court Should Exercise Pendent Appellate Jurisdiction Over the Denial of the Motion to Transfer.

This Court should exercise pendent appellate jurisdiction over an otherwise nonappealable order when it "is inextricably intertwined with an appealable decision or when review of the former decision is necessary to ensure meaningful review of the latter." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1365 (11th Cir. 1997) (citations omitted); *see also U.S. v. Lopez-Lukis*, 102 F.3d 1164, 1167, n.10 (11th

Cir. 1997) ("[P]endent jurisdiction and the doctrine of judicial economy permit us to exercise jurisdiction over related claims when other claims are properly reviewable.") (citations omitted). "[T]he critical inquiry is whether the appealable issue can be resolved without reaching the merits of the nonappealable issues." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1179 (11th Cir. 2011).

Here, the review of the Motion to Compel and the Motion to Transfer are inextricably intertwined. Indeed, the District Court held simultaneous oral argument on both motions, and its partial denial of the motions are contained in the same Order. [Doc. 101, 106.] Both motions raise issues about the interplay of the arbitration provision and the forum selection provisions contained in the Rules and Plaintiffs' Distributor Agreements. [*See generally* Doc. 62, 63.] And many of the arguments raised in those motions are nearly identical and involve the resolution of nearly identical issues. For example, in addressing the denial of the Motion to Compel, the Court will need to determine the extent to which Plaintiffs are equitably estopped from refusing to submit their claims against Defendants to arbitration pursuant to the Rules and Plaintiffs' Distributor Agreements. [Doc. 62 at 14-17.] That same issue is also raised in the Motion to Transfer. [Doc. 99 at 7.] Significantly, the legal standard for applying equitable estoppel in both instances is nearly identical. *Compare Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 218, 221

(2009) (applying a two-test equitable estoppel standard)[3] *with Liles v. Ginn-La West End, Ltd.*, 631 F.3d 1242, 1256 (11th Cir. 2001) (applying a nearly identical two-test equitable estoppel standard)[4]; *see also Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342, n.7 (11th Cir. 2012) (holding that the equitable estoppel analysis for "arbitration clauses" and "forum-selection clauses" "is the same") (emphasis added). Finally, both the Motion to Compel and the Motion to Transfer raise issues about the proper forum for Plaintiffs' claims, issues that should both be decided at the outset of this litigation.

Accordingly, the Motion to Compel cannot be resolved without reaching the merits of the Motion to Transfer, making it appropriate for this Court to exercise pendent appellate jurisdiction here.

STATEMENT OF THE ISSUES

1. Plaintiffs' agreements to arbitrate incorporate the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA") and expressly delegate to an arbitrator the power to decide all questions of

[3] State law applies to the issue of whether a non-signatory to an agreement containing an arbitration provision can compel a signatory to that agreement to arbitrate a dispute. *See Arthur Andersen*, 556 U.S. at 630-31.

[4] Application of a forum selection clause is governed by federal law. *P & S Bus. Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003); *Liles*, 631 F.3d at 1256 (applying the Eleventh Circuit standard of equitable estoppel to a forum selection clause).

arbitrability. Did the District Court err in refusing to have an arbitrator decide all issues of arbitrability?

2. In August 2013, more than four years before this lawsuit was filed, Herbalife amended its Rules, which are incorporated by reference into all of Plaintiffs' contracts, to add an arbitration provision. Did the District Court err in refusing to enforce that arbitration provision, in its original form or as later amended?

3. As a result of the District Court's decision, half of the Plaintiffs are now litigating against Herbalife, in California, the exact same claims that they are litigating against Defendants, in Florida. Did the District Court err in refusing to transfer this entire action to the Central District of California?

STATEMENT OF THE CASE

I. The Parties.

Herbalife operates a global nutrition company that sells nutritional products to consumers through a network of independent Distributors. [Doc. 62 at 3.] Plaintiffs are former and current Distributors and their spouses, and Defendants are all current Distributors. [*See* Doc. 1 at 37-68.]

II. Plaintiffs' Contractual Relationships with Herbalife.

A. The Distributor Agreements.

To enroll as a distributor, Plaintiffs (or their spouses) each executed a Distributor Agreement with Herbalife. [*See* Doc. 62-2 at 2-5, 720-771.][5] Patricia Rodgers enrolled on June 23, 2010; Jennifer Lavigne enrolled on December 2, 2014; Jennifer Ribalta enrolled February 14, 2011; Cody Pyle enrolled on July 7, 2014; Izaar Valdez enrolled on March 22, 2013;[6] and Felix Valdez enrolled on June 15, 2008. [*Id.*] All of them remain Distributors to this day, with the exception of Cody Pyle, whose distributorship was terminated on July 19, 2017, when he became an Herbalife Preferred Member,[7] and Izaar Valdez, whose distributorship was terminated on June 21, 2016, for nonpayment of the annual renewal fee. [Doc. 62-3 at 2-4; Doc. 84-2 at 2-3.]

Four of the Plaintiffs—Jennifer Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez—executed Distributor Agreements containing binding arbitration

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[5] Plaintiff Jeff Rodgers is the husband of Plaintiff Patricia Rodgers, and Plaintiff Michael Lavigne is the husband of Plaintiff Jennifer Lavigne. The Rules permit spouses to operate only a single distributorship. [*See* Doc. 62-2 at 44, 68, 320, 361, 599, 637.]

[6] Izaar Valdez previously was a Distributor from June 14, 2008 until June 15, 2011, when her distributorship was terminated for failure to pay the annual renewal fee. [Doc. 62-2 at 5.] That prior Distributor Agreement was superseded when she executed a new Distributor Agreement on March 22, 2013. [*Id.*]

[7] A Preferred Member is only entitled to purchase Herbalife products at a discount, not pursue the Herbalife business opportunity. [Doc. 84-2 at 2-3.]

provisions (the "Distributor Agreement Arbitration Provisions"). [*See* Doc. 62-2 at 4-5, 724-34, 740-55.] In the Distributor Agreement Arbitration Provisions, Jennifer Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez agreed to arbitrate all disputes or claims with or involving Herbalife. [*Id.* at 730-31, 746-47, 752, 754]

The other four Plaintiffs—Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta—executed Distributor Agreements containing a forum selection clause requiring "any claim" to be brought "in either the Superior Court or the United States District Court, both located in Los Angeles, California" (the "Forum Selection Clause"). [Doc. 63-2 at 1-2, 5-11, 42-51.]

All of the Plaintiffs' Distributor Agreements expressly incorporate by reference the Rules and the Sales and Marketing Plan (the "Marketing Plan") in their most current forms and as amended by Herbalife from time to time (collectively, the Distributor Agreements, the Rules, and the Marketing Plan are referred to as the "Contract"). [*See* Doc. 62-2 at 721 § 4, 727 § 3, 737 § 4, 743 § 3, 753 § 5, 755 § 5, 763 § 8, 768 § 8.]

B. Herbalife's Distributor Rules of Conduct.

Much like any company's policies and procedures, the Rules and the Marketing Plan provide the specific terms and conditions under which a Distributor must operate an Herbalife Distributorship, including, among other things, the manner and method by which Distributors are compensated. [*See* Doc. 62-2 at 2-3.]

By executing the Distributor Agreements, Plaintiffs agreed to be bound by those terms and conditions when operating their Distributorships. [*See id.* at 4-5.] Herbalife retained the right to amend the Rules, subject to some restrictions. [*See id.* at 721 § 4, 727 § 3, 737 § 4, 743 § 3, 753 § 5, 755 § 5, 763 § 8, 768 § 8.]

In August 2013, Herbalife amended the Rules to add an arbitration provision applicable to all Distributors (that arbitration provision is referred to herein as the "2013 Rules Version"); that amendment was made available to Distributors, through myherbalife.com, in October 2013.[8] [*See* Doc. 62-2 at 3.] The 2013 Rules Version broadly applies to "all disputes and claims" between Distributors and Herbalife, including but not limited to claims "which arise out of or relate in any way to any dispute between [Distributor] and another Herbalife [Distributor]." [*Id.*; *see also id.* at 244.]

When the 2013 Rules Version was added, Rule 8(C) of the Rules required every Distributor to "[s]tay informed of Herbalife's policies by . . . regularly visiting Herbalife's official website MyHerbalife.com." [Doc. 84-1 at 3, 69.] Also, the Rules provided that its arbitration provision was "incorporated into the [Distributor] Application and Agreement." [Doc. 62-2 at 244.] Plaintiffs Jeff and Patricia Rodgers, Jennifer Ribalta, Felix Valdez, and Izaar Valdez became Distributors prior

[8] Also at this time, an arbitration provision was added to the Distributor Agreement for new Distributors.

to the addition of the 2013 Rules Version, whereas Plaintiffs Jennifer and Michael Lavigne and Cody Pyle became Distributors after the 2013 Rules Version went into effect. [*Id.* at 4-5.]

The 2013 Rules Version was then amended twice prior to the filing of the Complaint, in May 2014 and again in November 2016. [*See id.* at 3-4, 388-90 (the "2014 Rules Version"), 679-80 (the "2016 Rules Version") (collectively, the 2013 Rules Version, the 2014 Rules Version, and the 2016 Rules Version are referred to herein as the "Rules Arbitration Provisions").][9] Importantly, the 2014 Rules Version and the 2016 Rules Version, broadly apply to "all disputes and claims" between Distributors and Herbalife, including, among others, "claims that arise out of or relate to any dispute between [Distributor] and another Herbalife [Distributor]."[10] [Doc. 62-2 at 388-89, 679-80.] In other words, the scope of the agreement to arbitrate remained unchanged from when it was first added to the Rules in 2013.

Both the 2014 and 2016 Rules Versions require arbitration hearings to take place in the Distributor's county of residence, unless the parties agree otherwise. [*Id.* at 389-90, 680.] The Rules are governed by California substantive law, the FAA,

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[9] Collectively, the Rules Arbitration Provisions and the Distributor Agreement Arbitration Provisions are referred to herein as the "Arbitration Provisions."

[10] Defendants contend that Plaintiffs Jennifer Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez are bound by the arbitration provisions in their Distributor Agreements to the extent they are not otherwise required to arbitrate pursuant Herbalife's current Rules.

and the AAA Rules. [*Id.* at 387-89, 679-80.] Further, both the 2014 and 2016 Rules Versions require Herbalife to pay all arbitration fees unless the claim is for more than $75,000 in damages or the claim is frivolous. [*Id.* at 389, 680.] And while the Rules generally grant Herbalife the sole and absolute discretion to amend the Rules, the right to amend the arbitration provision is expressly limited such that any amendments apply prospectively only—*i.e.*, they do not apply to claims that "have accrued or are otherwise known to Herbalife at the time." [*Id.* at 390, 680.]

Thus, from August 2013 to date, the Rules contained a broad, binding arbitration provision. [*Id.* at 3-4.] After the 2013 Rules Version was adopted, all Plaintiffs—whether they became Distributors before or after the arbitration provision was added to the Rules—continued to operate for years as Distributors by pursuing the business opportunity, purchasing discounted products, and receiving commissions. [*See* Doc. 62-3 at 2-3.] Further, Plaintiffs Jennifer Lavigne, Michael Lavigne, and Cody Pyle became Distributors after August 2013, and after the 2014 Rules Version went into effect (in May 2014). [Doc. 62-2 at 4-5.]

In fact, all Plaintiffs (besides Izaar Valdez) continued to earn commissions after the 2016 Rules Version went into effect: as of the date the Motion to Compel was filed, the Rodgers had last earned commissions on November 15, 2017 for $70.73; the Lavignes had last earned commissions on October 15, 2017 for $22.84; Jennifer Ribalta had last earned commissions on May 15, 2017 for $28.50; Cody

Pyle had last earned commissions on June 15, 2017 for $124.09; and Felix Valdez had last earned commissions on December 15, 2016 for $11.71. [*Id.*] All of them (against besides Izaar Valdez) also continued to purchase products with the discounts available to them as Distributors. [*Id.*; *see also* Doc. 62-2 at 15-16, 291-92, 562-64.]

III. Plaintiffs' Allegations in the Complaint.

Rather than submit their individual claims to arbitration, or at least file suit in the Central District of California, Plaintiffs filed a Class Action Complaint (the "Complaint") on September 18, 2017 in the Southern District of Florida. [Doc. 1] The Complaint seeks certification of a nationwide class of current and former Herbalife distributors and alleges two claims jointly against Defendants and Herbalife: a RICO claim (the "RICO Claim") and a RICO conspiracy claim (the "RICO Conspiracy Claim"). [Doc. 1 at 73-78.][11]

Both claims are premised on a theory that Herbalife and Defendants have engaged in a joint scheme and enterprise to induce putative class members to attend Herbalife events by misrepresenting attendance as being crucial to success as a Distributor. [*See id.* at 2-5] Specifically, in support of the RICO Claim and the

[11] The Complaint also alleges three claims against Herbalife only: a Florida Deceptive and Unfair Trade Practices Act claim, an unjust enrichment claim, and a negligent misrepresentation claim. [Doc. 1 at 78-82.]

RICO Conspiracy Claim, Plaintiffs alleged that Defendants and Herbalife engaged in a concerted scheme of joint misconduct: "Defendants jointly conduct, manage, and control the affairs of the Circle of Success enterprise"; "All Defendants jointly affect the strategic direction of the Circle of Success enterprise"; and "Defendants have collectively persuaded hundreds of thousands of victims to invest substantial sums into attending events". [*Id*. at 74-75.]

IV. The Motion to Compel Arbitration and the Alternative Motion to Transfer Venue.

On December 14, 2017, Defendants and Herbalife jointly filed the Motion to Compel, moving the District Court for an order compelling arbitration of all of Plaintiffs' claims and staying the litigation under Section 3 of the FAA. [Doc. 62.] In the Motion to Compel, Defendants sought to require Plaintiffs to submit all questions of arbitrability (*e.g.*, whether the agreement to arbitrate is enforceable and whether Plaintiffs' claims fall within its scope) to AAA arbitration. [*Id.* at 8-9.] Defendants alternatively argued that the District Court should compel Plaintiffs to arbitrate all of their claims. [*Id.* at 10-17.] That same day, Defendants and Herbalife, in the alternative to the Motion to Compel, jointly filed the Motion to Transfer, asking the District Court to transfer this action to the Central District of California. [Doc. 63.] They argued that if the Court refused to compel arbitration of Plaintiffs' claims, then Plaintiffs Patricia Rodgers, Jeff Rodgers, Izaar Valdez, and Jennifer Ribalta were required to comply with the Forum Selection Clause in their Distributor

Agreements and bring their claims in California, and that they were equitably estopped from refusing to do so as to Defendants. [*Id.* at 8-13; Doc. 99 at 7.] Defendants and Herbalife argued further that even without considering the Forum Selection Clause, transfer of the entire action was warranted under 28 U.S.C. § 1404(a). [Doc. 63 at 13-20.]

On August 23, 2018, the District Court entered the Order, granting in part and denying in part the Motion to Compel and the Motion to Transfer. [Doc. 106.] The District Court's entire ruling on the Motion to Compel consisted of the following single paragraph:

> The 2016 Rules of Conduct are limited by the implied covenant of good faith and fair dealing and the Court declines to retroactively apply the arbitration provision in the 2016 Rules. However, because certain Plaintiffs signed a Distributor Agreement with a valid arbitration clause, Defendant's Motion to Compel Arbitration is **GRANTED** as to claims against Herbalife Defendants made by Plaintiffs Jen Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez. The Motion to Compel Arbitration is **DENIED** in all other respects.

[*Id.* at 1.] The District Court did not address Defendants' argument that Plaintiffs are required to arbitrate issues of arbitrability. The District Court did not address the enforceability of the 2013 Rules Version or the 2014 Rules Version. [*See id.* at 1.] And the District Court did not address any of the arguments that were unique to Defendants. [*Id.*]

The District Court's entire ruling on the Motion to Transfer also consisted of a single paragraph:

> The balance of the § 1404(a) factors weighs in Plaintiffs' favor and the Court declines to disregard Plaintiffs' choice of venue. However, because certain Plaintiffs signed a Distributor Agreement with a valid forum selection clause, Defendants' Motion to Transfer Venue is **GRANTED** as to claims against Herbalife Defendants made by Plaintiffs Jen Ribalta, Patricia Rodgers, Jeff Rodgers and Izaar Valdez. The Motion to Transfer Venue is **DENIED** in all other respects.

[*Id.* at 2.] Here too, the District Court did not address any of the arguments unique to Defendants. [*Id.*] Nor did the District Court address the effect of its decision to transfer some of Plaintiffs' claims to the Central District of California on the balancing of the Section 1404 factors.

The District Court thus splintered the case into three parts: (1) Plaintiffs' claims against Defendants to proceed immediately in the District Court; (2) Plaintiffs Jennifer Ribalta, Patricia Rodgers, Jeff Rodgers, and Izaar Valdez's claims against Herbalife transferred to the Central District of California; and (3) Plaintiffs Jennifer Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez's claims against Herbalife to be arbitrated. [*Id.* at 1-2.]

V. Defendants Appeal the Order.

On September 20, 2018, Defendants filed a timely Notice of Appeal of the Order under FRAP 3 and 4(a)(1)(A), appealing the District Court's denial of the Motion to Compel and the Motion to Transfer as to Plaintiffs' claims against

Defendants. [Doc. 113.] On September 24, 2018, the District Court granted Defendants' motion to stay all proceedings in the District Court, pending resolution of this appeal. [Doc. 116.]

VI. Standard of Review.

This Court reviews *de novo* a district court's denial of a motion to compel arbitration. *Entrekin v. Internal Medicine Assoc. of Dothan, P.A.*, 689 F.3d 1248, 1251 (11th Cir. 2012).

This Court also reviews *de novo* the enforceability of a forum selection clause. *Rucker v. Oasis Legal Finance, LLC*, 632 F.3d 1231, 1235 (11th Cir. 2011). *De novo* review applies even to non-signatories to a forum selection clause. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998).

However, this Court reviews for an abuse of discretion a district court's ruling on a motion to transfer venue under 28 U.S.C. § 1404(a). *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 654 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

First, the District Court erred by not requiring an arbitrator to determine the validity, scope, and application of the Arbitration Provisions to Plaintiffs' claims. Each of the Arbitration Provisions incorporates the AAA Rules, or otherwise clearly and unmistakably delegates these issues of arbitrability to an arbitrator.

Second, the District Court erred by refusing to enforce the Rules Arbitration

Provisions. The District Court's reasoning in refusing to do so is based on a misunderstanding of California law and Defendants' arguments, as well as a misapplication of the facts. Each Plaintiff executed a Distributor Agreement incorporating by reference the Rules. The Rules Arbitration Provisions are, therefore, binding on each Plaintiff. Although some Plaintiffs signed up as Distributors before the 2013 Rules Version was adopted, their assent to the 2013 Rules Version is implied by their continued operation of their distributorships after the 2013 Rules Version was adopted. No grounds exist for refusing to compel arbitration under the Rules Arbitration Provisions. The Rules Arbitration Provisions are undeniably enforceable, and Plaintiffs' claims fall within their broad scope. In any event, Plaintiffs are barred from avoiding arbitration under the doctrine of equitable estoppel.

Third, to the extent that Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta are not required to arbitrate their claims, then Defendants should be permitted to enforce the Forum Selection Clause against them under the doctrine of equitable estoppel, resulting in transfer to the Central District of California. Further, to the extent the Court allows any portion of this action to avoid arbitration, then the entire case should be transferred to the Central District of California pursuant to 28 U.S.C. § 1404(a). The Section 1404 factors weigh heavily in favor of transfer, especially given the fact that half of the Plaintiffs are now

simultaneously litigating identical claims against Herbalife in California, and against Defendants in Florida.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Erred By Not Compelling Arbitration on the Threshold Issues of Arbitrability.

A. Plaintiffs Agreed to Arbitration.

Each of the Plaintiffs is bound by an arbitration provision delegating issues of arbitrability to an arbitrator. It is well-established that "[a]n agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference." *Boys Club of San Fernando Valley, Inc. v. Fid. & Deposit Co.*, 6 Cal. App. 4th 1266, 1271 (1992).[12] Moreover, consent to arbitration need not be express, it may be implied in fact. *See Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (US), LLC*, 282 P.3d 1217, 1224 (Cal. 2012) ("A signed agreement [to arbitrate] is not necessary . . . and a party's acceptance may be implied in fact . . . ."). Indeed, California courts have repeatedly recognized that continuing to work after a policy modification constitutes acceptance of the new term. *See, e.g.*, *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 422 (2000) (holding that an

[12] Under the FAA, state contract law determines whether there is a valid arbitration agreement. *See Arthur Andersen*, 556 U.S. at 630-31. The Rules state that they are governed by California substantive law. [*See* Doc. 62-2 at 77, 387, 679.] Plaintiffs have not disputed that California law applies here. [*See* Doc. 86 at 1, n.1.]

employee was bound by an arbitration agreement where her employer mailed copies of a memorandum and brochure concerning dispute resolution and the employee continued to work for the employer); *see also Asmus v. Pac. Bell*, 999 P.2d 71, 79 (Cal. 2000) ("Continuing to work after the policy termination and subsequent modification constituted acceptance of the new employment terms.").

Plaintiffs incorrectly argued below that they never assented to arbitration. [Doc. 86 at 16-18.] Each of them (or their spouses) executed Distributor Agreements with Herbalife, which expressly incorporated by reference the Rules, as amended by Herbalife from time to time. [*See* Doc. 62-2 at 721 § 4, 727 § 3, 737 § 4, 743 § 3, 753 § 5, 755 § 5, 763 § 8, 768 § 8.] In August 2013, Herbalife amended the Rules (and the Distributor Agreements for new Distributors) to add the 2013 Rules Version. [*See* Doc. 62-2 at 3.][13] When the 2013 Rules Version was added, all Distributors—including the five named Plaintiffs who were Distributors at the time—were subject to Rule 8(C), which required each Distributor to "Stay informed of Herbalife's policies by . . . regularly visiting Herbalife's official website MyHerbalife.com." [Doc. 84-1 at 3, 69.] From August 2013 through the filing of this lawsuit in September 2017, an agreement to arbitrate remained in effect and

[13] Again, Plaintiffs Jennifer Lavigne, Michael Lavigne, Felix Valdez, and Cody Pyle are all also governed by Distributor Agreements that contain arbitration provisions. [*See* Doc. 62-2 at 724-34, 740-55.]

party of the Rules, with only immaterial changes in 2014 and 2016. [Doc. 62-2 at 3-4.]

Further, each of the Plaintiffs either became Distributors after the 2013 Rules Version was adopted, or continued operating as Distributors long after that adoption, and thus, under the Rules, each of them agreed to arbitrate. [*Id.* at 4-5; Doc. 62-3 at 2-3.] Plaintiffs Jennifer Lavigne, Michael Lavigne, and Cody Pyle expressly agreed to the Rules Arbitration Provisions because the 2014 Rules Version was already in effect—and was expressly incorporated into the Distributor Agreements that they signed—at the time they became distributors in 2014. [Doc. 62-2 at 4-5, 730-31, 746-47]; *see also Boys Club of San Fernando Valley*, 6 Cal. App. 4th at 1271.[14] And Plaintiffs Patricia Rodgers, Jeff Rodgers, Izaar Valdez, Felix Valdez, and Jennifer Ribalta at least impliedly agreed to the 2013 Rules Version and subsequent amendments. *See Pinnacle*, 282 P.3d at 1224. They each purchased product and earned commissions as Distributors for years after the 2013 Rules Version was adopted. [Doc. 62-3 at 2-3.] Plaintiffs should not be permitted to reap rewards for years under their agreements with Herbalife, including its compensation plan, while later avoiding the obligations contained in those same agreements (including the

[14] While Felix Valdez joined prior to the adoption of the Rules Arbitration Provisions, his Distributor Agreement still contained an arbitration provision. [Doc. 62-2 at 752, 754.]

arbitration provision). *See Asmus*, 999 P.2d at 79.

Because all Plaintiffs, besides Izaar Valdez, continued to operate as Distributors after the 2016 Rules Version was adopted, the 2016 Rules Version is the version of the Rules Arbitration Provisions that applies to them.[15] Notably, however, the 2016 Rules Version is just the most recently updated version of an arbitration provision that has remained in effect—with the same broad scope—since August 2013.

B. Plaintiffs Clearly and Unmistakably Agreed that an Arbitrator Must Decide Their Challenges to Arbitration.

The District Court erred in not immediately compelling this case, and all issues Plaintiffs raise, to arbitration. Plaintiffs' threshold objection to arbitration—that they are not required to arbitrate their claims against Defendants—is a question of arbitrability. *See JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018) ("[Q]uestion[s] of arbitrability … are fundamental questions that will determine whether a claim will be brought before an arbitrator, and include questions about whether particular parties are bound by an arbitration clause and questions about whether a clause 'applies to a particular type of controversy.'") (citing *Howsam v.*

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[15] The 2014 Rules Version applies to Izaar Valdez, whose distributorship was terminated on June 21, 2016. Again, however, any differences between the 2013 Rules Version, the 2014 Rules Version, or the 2016 Rules Version are immaterial to the issues raised in this appeal.

Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)). A clear and unmistakable agreement that the arbitrator should decide the issue of arbitrability revokes the court's ability to determine that threshold question. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005).[16]

That clear and unmistakable agreement can be found in two places. First, the Rules Arbitration Provisions, as well as the arbitration provisions in the Lavigne's and Pyle's Distributor Agreements, expressly delegate issues of arbitrability to an arbitrator. [Doc. 62-2 at 245, 389, 680, 731, 747.]

Second, each of the Arbitration Provisions clearly incorporate the AAA Rules. [*Id.*; Doc. 62-2 at 752, 754.] The AAA Rules expressly empower the arbitrator to decide matters relating to the arbitrator's jurisdiction and provide that the arbitrator, not the Court, must decide issues of arbitrability. *See* AAA Rule 7 ("The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the

[16] An 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. While this Court has not yet addressed this specific issue, the Fifth Circuit recently held that a clear and unmistakable delegation of arbitrability to an arbitrator required arbitration of claims against non-parties who sought to enforce the arbitration agreement under the doctrine of equitable estoppel. *See Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017).

arbitrability of any claim or counterclaim."). For that reason, this Court has repeatedly held that simply incorporating the AAA Rules into an arbitration provision constitutes a clear and unmistakable agreement that an arbitrator must decide arbitrability challenges. *JPay*, 904 F.3d at 937. Thus, the District Court should have compelled Plaintiffs to arbitrate issues of arbitrability. *See Terminix Int'l Co., LP*, 432 F.3d at 1332-33; *JPay*, 904 F.3d at 937.

Each of the issues that Plaintiffs raised in response to the Motion to Compel are issues of arbitrability that they agreed—and are required—to arbitrate. *See JPay*, 904 F.3d at 937. Specifically, Plaintiffs challenge the enforceability of the Rules Arbitration Provisions, the scope of the Arbitration Provisions, and whether Defendants' can enforce the Arbitration Provisions under equitable estoppel, all of which are "questions about whether particular parties are bound by an arbitration clause and questions about whether a clause 'applies to a particular type of controversy.'" *Id.* at 930.[17]

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[17] Plaintiffs' also challenged the delegation clause on the grounds that it is "independently unconscionable." [Doc. 86 at 12-13.] Although some courts have recognized that "[e]ven if a delegation of arbitrability is clear and unmistakable it may be found unenforceable," that is only true if "the delegation *itself* is unconscionable." *See, e.g., Saravia v. Dynamex, Inc.*, 310 F.R.D. 412, 419 (N.D. Cal. 2015) (emphasis in original). In other words, the unconscionability defense would have to relate specifically to the delegation clause itself, separate and apart from the rest of an arbitration provision, for the defense even to be potentially viable. *Id.* Here, Plaintiffs did not identify any independent bases for invalidating the delegation clause itself as unconscionable.

II. The District Court Erred in Refusing to Compel Arbitration Pursuant to the Rules Arbitration Provisions.

As explained above, the Court need not reach any of the following arguments, because each relates to arbitrability and should be considered in AAA arbitration in the first instance. If the Court disagrees that each of these issues relates to arbitrability, the Court should still reverse the District Court's Order because each of the claims Plaintiffs have asserted fall within a valid and binding arbitration provision.

A. The District Court Misapplied California Law and Misunderstood the Facts in Finding that the Implied Covenant of Good Faith and Fair Dealing Precluded Arbitration of Plaintiffs' Claims.

The District Court's holding is flawed because it (1) misapplies California law regarding the implied covenant of good faith and fair dealing; (2) discriminates against the Rules Arbitration Provisions by treating that provision differently than other contractual provisions; and (3) ignores the 2013 Rules Version and the 2014 Rules Version, both of which were enacted years before this action.

1. The District Court Misapplied California Law on the Implied Covenant of Good Faith and Fair Dealing.

There is no general law prohibiting an arbitration provision from being applied retroactively, and certainly parties are free to agree to arbitrate a dispute that occurred in the past. *See Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 221 (Cal. 2013) ("The FAA requires courts to place arbitration agreements on equal

footing with other contracts."). Under California law, a party seeking to impose an arbitration provision is only prohibited from unilaterally amending an arbitration provision, and applying those amendments retroactively, *i.e.*, against claims that have accrued or are known to the amending party. *See Harris v. Tap Worldwide, LLC*, 248 Cal. App. 4th 373, 385 (2016). A unilateral right to amend is not problematic, so long as amendments do not apply to claims accrued or known at the time of amendment. *See Peleg v. Neiman Marcus Group, Inc.*, 204 Cal. App. 4th 1425, 1465 (2012). Where an agreement is silent as to the retroactive application of amendments, the implied covenant of good faith and fair dealing prevents amendments to arbitration provisions from applying to claims known or accrued at the time. *Id.*

In the Order, the District Court refused to enforce the 2016 Rules Version because it believed that "[t]he 2016 Rules of Conduct are limited by the implied covenant of good faith and fair dealing" and that Defendants were attempting to apply the 2016 Rules Version retroactively. [Doc. 106 at 1.] In so concluding, the District Court misapplied (and seemingly misunderstood) California case law on the implied covenant and the nature of Plaintiffs' claims vis-à-vis the 2016 Rules Version. Contrary to the District Court's conclusion, invocation of the implied covenant of good faith and fair dealing was inappropriate with respect to the 2016 and 2014 Rules Versions. *See Peleg*, 204 Cal. App. 4th at 1465. Because, both

Versions expressly provide that they do not apply "to claims that have accrued or are otherwise known to Herbalife at the time of the amendment." [Doc. 62-2 at 390, 680.] [18] Neither Version contains improper unilateral amendment language, and neither Version is silent on the retroactive application of amendments. The implied covenant, therefore, is not implicated and should not have played a role in the District Court's ruling. *See Peleg*, 204 Cal. App. 4th at 1465. Moreover, even if the implied covenant applied, it would only limit the application of amendments; it would not invalidate the Rules Arbitration Provisions completely.

In any event, Defendants never asked the District Court to retroactively apply the 2016 Rules Version, *i.e.* apply it against claims that had accrued or were known to Herbalife before the 2016 Rules Version was enacted. Under well-established California law, contractual amendments, including to arbitration provisions, can apply to events that occur prior to the amendment, so long as the claims based on those events do not accrue or are not known to the amending party (*i.e.* Herbalife) until after the amendment. *See id.*

Plaintiffs have never argued, alleged, or established that their claims

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[18] The implied covenant does likely apply to the 2013 Rules Version, but that version was superseded in 2014 and then again in 2016, and, in any event, the implied covenant imposes no greater restrictions than the self-limiting language contained in the 2014 and 2016 Version, limiting amendments only "so that changes do not apply to" accrued or known claims. *Peleg*, 204 Cal. App. 4th at 1465.

accrued,[19] or were known to Herbalife, prior to November 2016 (except for Izaar Valdez who is bound by the 2014 Rules Version because she was terminated prior to the 2016 Rules Version), which is when the 2016 Rules Version went into effect. When Defendants invoke the 2016 Rules Version (and the 2014 Rules Version as to Izaar Valdez) to compel arbitration of claims filed in September 2017, they are not asking the District Court (or this Court) to apply the 2016 Rules Version (or the 2014 Rules Version) retroactively, *i.e.*, to claims that had accrued or were known to Herbalife prior to the amendment. Thus, the District Court's ruling, which was based in large part on the belief that Defendants were seeking retroactive application of the 2016 Rules Version, was in error.

2. The District Court's Ruling Discriminates Against Arbitration.

The District Court also erred by applying the implied covenant of good faith and fair dealing in a way that discriminates against arbitration. Courts are required to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also* 9 U.S.C. § 2. Courts must not interpret arbitration provisions "so unreasonably as to suggest discrimination against arbitration in violation of the

[19] 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." *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 751 (11th Cir. 2000).

FAA." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 472-73 (2015). As a result, an arbitration provision can be validly added by amendment to an agreement to the same extent as any other term of an agreement can be added or changed. *See Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 831 (S.D. Miss. 2001) ("Bank One could validly amend its agreement to add an arbitration clause, just as it could have amended the agreement to add or change any other term on the agreement."); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 892 (Ill. App. 2003) (recognizing that "[a] number of other cases have upheld the validity of similar amendments adding arbitration clauses to existing contracts") (citing cases).

Despite the foregoing, the District Court's Order singles out amendments to the Rules Arbitration Provisions, in violation of the FAA. The District Court's application of the implied covenant suggests that dispute resolution clauses contained in the original agreement between contracting parties can never be amended. Here, the Distributor Agreements contain dispute resolution provisions—some requiring arbitration, others requiring filing in Los Angeles (none provided for a Florida forum). [Doc. 62-2 at 4-5, 724-34, 740-55; Doc. 63-2 at 1-2, 5-11, 42-51.] But Herbalife later amended those agreements—by amending the incorporated-by-reference Rules—to adopt the 2013 Rules Version, which required that all claims accruing after the amendment proceed only in arbitration. [Doc. 62-2 at 3.] Herbalife provided written notice of those amendments to all of its

Distributors. [*Id.*] Following those amendments, Plaintiffs continued to operate their Herbalife distributorships—in some cases, for years—marketing and selling Herbalife products, in return for compensation pursuant to the very contracts containing the requirement to arbitrate. [Doc. 62-3 at 2-3.]

As discussed above, California law generally allows parties to amend their contractual agreements. *See Peleg*, 204 Cal. App. 4th at 1465. California law also allows parties to agree in advance that unilateral amendments can be made. *Id.* The only limitation on such amendments, at least when they touch on dispute resolution, is that they not apply to claims already known or accrued. *Id.* So long as that limitation is not violated, a unilateral amendment is valid, particularly where, as here, it is supported by mutual consideration.

In denying the Motion to Compel, the District Court adopted a new application of the implied covenant, one that only applies to arbitration provisions later added by contractual amendment. The District Court did not hold that all of the Rules are unenforceable, only the one provision of the Rules dealing with arbitration of disputes. Further, Plaintiffs themselves are not seeking to invalidate all of the Rules, under which they operated their businesses and benefited through commissions—only the Rule on arbitration.

Accordingly, the District Court's holding runs afoul of the FAA and should be reversed. *See DIRECTV*, 136 S. Ct. at 472-73.

3. Even if Plaintiffs' Claims Accrued Prior to November 2016, the 2013 Rules Version or the 2014 Rules Version Require Arbitration.

The District Court, in denying the Motion to Compel on the mistaken belief that Defendants sought to retroactively apply the 2016 Rules Version, did not address application of the 2013 or 2014 Rules Versions to Plaintiffs' claims. Even if Plaintiffs were to establish (which they did not below) that their claims accrued before the 2016 Rules Version, and thus that Defendants were seeking to retroactively apply the 2016 Rules Version to those claims, Plaintiffs should still be required to arbitrate their claims under the 2013 Rules Version or the 2014 Rules Version.

The only way Plaintiffs could have escaped application of the Rules Arbitration Provisions entirely is to allege and establish that their claims accrued prior to 2013, when the 2013 Rules Version was adopted. Plaintiffs made no attempt below to do so, and for good reason. Only five named Plaintiffs (Jeff and Patricia Rodgers, Jennifer Ribalta, Felix Valdez, and Izaar Valdez) had signed up as Distributors by 2013; three named Plaintiffs were not yet Distributors. [Doc. 62-2 at 2-5.] Moreover, an argument that Plaintiffs' claims accrued prior to 2013 might save their claims from arbitration, but it would doom those claims for another reason; their claims would clearly be time-barred. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (holding that a four-year statute of

limitations applies to RICO claims). In any event, all Plaintiffs contend that they attended events that form the basis of their claims long after the 2014 Rules Version was in place. [Doc. 1 at 38-49.] Because Plaintiffs have no basis to argue that their claims accrued prior to 2013, they are, at the very least, bound by the arbitration provisions in the 2013 Rules Version and/or the 2014 Rules Version. The District Court erred in implicitly holding otherwise.

B. No Other Grounds For Refusing Arbitration Exist.

1. The District Court Erred To the Extent It Concluded that Plaintiffs' Claims Against Defendants Do Not Fall Within the Scope of the Arbitration Provisions.

There is a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As such, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25. "The presumption of arbitrability is particularly applicable where an arbitration clause is broadly worded." *Int'l Broth. Of Elec. Workers Sys. Council U-4 v. Florida Power & Light Co.*, 627 F. App'x 898, 901 (11th Cir. Oct. 30, 2015) (citation omitted). A clause that applies to "any" or "all" disputes is the paradigm of a broad arbitration clause. *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir. 2003).

The Rules Arbitration Provisions (which apply to all Plaintiffs) and the Distributor Agreement Arbitration Provisions (which apply to Plaintiffs Jennifer and

Michael Lavigne, Cody Pyle, and Felix Valdez in the event the Rules Arbitration Provisions do not apply) are extremely broad. They cover "all disputes and claims" between a Distributor and Herbalife, with few exceptions that have no application here. [*See* Doc. 62-2 at 244, 388-89, 679-80, 730-31, 746-47, 752, 754.] Further, those provisions expressly extend to disputes or claims with Herbalife arising out of or relating to a Distributor's disputes or relationship with another Distributor (like Defendants). [*Id.*][20] Moreover, the Rules Arbitration Provisions apply not just to Plaintiffs but to all Distributors, including Defendants.

Plaintiffs' claims against Defendants fall within the broad scope of those provisions. Indeed, Plaintiffs' claims against Defendants were pled jointly against Herbalife. [Doc. 1 at 74, 78.] Plaintiffs allege a single RICO claim (Count I) against Defendants and Herbalife and a single RICO Conspiracy claim (Count II) against Defendants and Herbalife. [*Id.*] Plaintiffs allege that Defendants and Herbalife engaged in concerted conduct—jointly conducting the affairs of a RICO enterprise and entering into a conspiracy to violate the RICO statute. [*Id.* at 74-78.]

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[20] The arbitration provision in Felix Valdez's Distributor Agreement extends to "any claim or dispute arising out of or related to my Distributorship, including, without limitation, my rights, obligations and relationships with Herbalife (including any of its corporate affiliates or any of their respective officers, directors or employees), and/or with other Distributors." [Doc. 62-2 at 752, 754.] Thus, this Court, at the very least, should reverse the District Court's denial of the Motion to Compel as to Felix Valdez and remand with instructions to the District Court to compel Valdez to arbitrate his claims against Defendants based on that arbitration provision.

The RICO Claim and the RICO Conspiracy Claim are undoubtedly claims by Distributors (Plaintiffs) against Herbalife, arising out of or relating to those Distributors' relationships with other Distributors (Defendants). As a result, the District Court already found that both claims fall within the scope of the Distributor Agreement Arbitration Provisions as to Herbalife. [Doc. 106 at 1.] Therefore, both claims necessarily fall within that same scope as to Defendants.

Nonetheless, the District Court artificially spliced Plaintiffs' single RICO Claim and single RICO Conspiracy Claim, analyzing them first as to Herbalife and then as to Defendants, as if they were separate claims. [*Id.* at 2.] They are not separate claims, however, and to treat them as such, particularly when Plaintiffs have not done so, was error. The fact that Defendants did not sign Plaintiffs' arbitration agreements with Herbalife—a practical impossibility given that there are hundreds of thousands of Distributors—does not change the fact that Count I and Count II of the Complaint definitively fall within the scope of the Arbitration Provisions. Thus, the result should be the same: Plaintiffs should have to arbitrate Counts I and II of the Complaint as to Defendants, just like with Herbalife. *See, e.g.*, *Griggs v. SGE Mgmt., LLC*, 2015 WL 11423656, at *5 (W.D. Tex. Oct. 15, 2015) (requiring RICO claims by former distributors of direct sales company against high-level distributors and company to be arbitrated even though the defendant distributors were not signatories to contract based on the scope of the arbitration provision), *report and*

recommendation approved by, 2015 WL 11438110 (W.D. Tex. Nov. 4, 2015). This is especially true where, as here, Defendants—who are distributors like Plaintiffs—are bound by the same Rules Arbitration Provisions.

Because Plaintiffs' claims against Defendants fall within the scope of their binding arbitration provisions, the District Court erred by refusing to compel arbitration of those claims.[21]

2. Plaintiffs Are Equitably Estopped from Avoiding Arbitration of their Claims Against Defendants.

Despite the general rule that arbitration is a creature of contract, it is well-established that "there are certain limited exceptions, such as equitable estoppel, that allow nonsignatories to a contract to compel arbitration." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (quotations omitted), *abrogated on other grounds by*, *Arthur Andersen*, 556 U.S. at 630-31.

Under established California law, a nonsignatory may compel arbitration when either (1) a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory; or (2) the signatory alleges "substantially interdependent and concerted misconduct by the nonsignatory and"

[21] If the Court finds that the Rules Arbitration Provisions are unenforceable, then this argument still applies to Plaintiffs Jennifer and Michael Lavigne, Cody Pyle, and Felix Valdez, as they are bound by the Distributor Agreement Arbitration Provisions.

another signatory and "the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement." *Goldman*, 173 Cal. App. 4th at 219, 222 (emphasis added).

Plaintiffs' claims against Defendants satisfy both tests. The District Court, however, failed to address either of these tests in its Order.

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

Claims rely on a contract if "'the claims the plaintiff asserts against the nonsignatory [are] dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause.'" *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 186 Cal. App. 4th 696, 715 (2010) (quoting *Goldman*, 173 Cal. App. 4th at 217-18). The fact that claims are "cast in tort rather than contract does not avoid the arbitration clause." *Molecular Analytical Sys.*, 186 Cal. App. 4th at 716. Instead, the Court must focus on "the nature of the claims asserted by the plaintiff against the nonsignatory defendant" to determine whether they "rely upon, make reference to, or are intertwined with claims under the subject contract." *Id.* at 715.

Here, both the RICO Claim and the RICO Conspiracy Claim against Defendants necessarily rely on and are intertwined with the Contract. Both claims are based on the allegation that Defendants and Herbalife misrepresented the importance of event attendance for success in the Herbalife business opportunity.

[*See* Doc. 1 at 74, 78.] But Plaintiffs and Defendants only attended Herbalife events and made statements about event attendance as Distributors pursuant to their Distributor Agreements. [*See id.* at 77.] And whether such statements are false requires an in-depth analysis of the Contract, including, among other things, the compensation plan within the Marketing Plan, and the terms and conditions of a distributorship, which are determined by the Rules. Indeed, whether or not event attendance really is the key to success in the business opportunity depends upon how the business opportunity works (which is governed by the Rules) and how compensation is paid (which is governed by the Marketing Plan).

Further, the Complaint is full of allegations that rely directly on the terms of the Contract, especially Plaintiffs' class allegations regarding the existence of common issues of fact, many of which directly reference provisions of the Contract. [*See, e.g.*, *id.* at 70-71.] Liability against Defendants thus relies on and is intertwined with the Contract.

Accordingly, Plaintiffs are equitably estopped from arguing that the Rules Arbitration Provisions do not apply to their claims against Defendants for this reason alone. Alternatively, Plaintiffs Cody Pyle, Felix Valdez, and Jennifer and Michael Lavigne, are equitably estopped from avoiding arbitration under the Distributor Agreement Arbitration Provisions.

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

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

The essence of the Complaint is interdependent misconduct between Defendants and Herbalife, and the Complaint is replete with such allegations. Plaintiffs allege that Defendants and Herbalife jointly committed the same RICO and RICO Conspiracy violations: "Defendants jointly conduct, manage, and control the affairs of the Circle of Success enterprise"; "All Defendants jointly affect the strategic direction of the Circle of Success enterprise"; "Defendants have collectively persuaded hundreds of thousands of victims to invest substantial sums into attending events". [*See* Doc. 1 at 74-75.] In fact, courts have specifically held that RICO claims against a non-signatory and a signatory raise allegations of substantially interdependent and concerted misconduct sufficient for equitable estoppel to apply. *See, e.g.*, *Moore v. Chavez*, 2009 WL 10672578, at *5 (C.D. Cal. May 4, 2009). That result intuitively makes sense, because operating a RICO enterprise or conspiring to commit RICO violations could hardly be more

interdependent.

The only remaining issue is whether Plaintiffs' allegations of misconduct are connected to the Contract. *See Jacobson*, 2015 WL 8293164, at *6. For the same reasons that Plaintiffs' claims rely on the Contract (*see supra* § II.B.2.a), this element is certainly met. The necessary predicate for all of Plaintiffs' claims of concerted misconduct between the Defendants and Herbalife is that all of them misrepresented the importance of event attendance for success in the Herbalife business opportunity. The existence of that predicate element can only be determined by the Rules and the Marketing Plan. Further, Defendants' and Herbalife's relationship is governed by those same Rules and Marketing Plan. And Plaintiffs' class-wide allegations can only be resolved by reference to the Contract. [*See, e.g.*, Doc. 1 at 70-71.]

Plaintiffs allege interdependent misconduct between Defendants and Herbalife, and those allegations are certainly connected to the Contract. Accordingly, Plaintiffs are equitably estopped from arguing that the Rules Arbitration Provisions do not apply to their claims against Defendants. Alternatively, Plaintiffs Cody Pyle, Felix Valdez, and Jennifer and Michael Lavigne, are equitably estopped from avoiding arbitration under the Distributor Agreement Arbitration Provisions.

3. The Rules Arbitration Provisions Are Not Illusory.

Under California law, an arbitration provision is illusory and therefore

unenforceable only where one party has the unfettered right to unilaterally amend the provision and apply those amendments retroactively. *Harris*, 248 Cal. App. 4th 385. However, it is equally well-established under California law that a unilateral right to amend will not render an arbitration provision illusory when the right to amend is "subject to limitations, such as fairness and reasonable notice." *Id.* at 388. That means that "[a]n arbitration agreement that expressly exempts all claims, accrued or known, from contract changes is valid and enforceable." *Peleg*, 204 Cal. App. 4th at 1465 (emphasis added).

Plaintiffs argued below that Herbalife's "ability to amend these agreements at any time, without notice, renders them illusory." [Doc. 86 at 5-8.] But, both the 2014 Rules Version and the 2016 Rules Version expressly contain the language regarding amendments that California law requires. The 2014 Rules Version (relevant only to Izaar Valdez and not addressed by the District Court) and the 2016 Rules Version (relevant to all other Plaintiffs) provide that amendments do not apply "to claims that have accrued or are otherwise known to Herbalife at the time of the amendment." [Doc. 62-2 at 390, 680.] Under California law, therefore, the Rules Arbitration Provisions are not illusory. *See Peleg*, 204 Cal. App. 4th at 1465.

4. The Rules Arbitration Provisions Are Not Unconscionable.

Under California law, Plaintiffs must show both procedural and substantive unconscionability to establish that an arbitration provision is unconscionable. *See*

Pinnacle, 282 P.3d at 1232. "[P]rocedural unconscionability requires oppression or surprise" and substantive unconscionability requires terms "so one-sided as to shock the conscience." *Id.*

There has been no oppression or surprise here, where Distributors are (and always have been) required to follow the Rules in order to earn commissions and purchase discounted products from Herbalife. That is especially true where years have passed between the adoption of the arbitration provisions at issue and the claims being made. As to substantive unconscionability, Plaintiffs' only cited authority in briefing below to support its argument that an unfettered right to amend renders an arbitration provision unconscionable, *Ridgeway v. Nabors Completion & Prod. Servs. Co.*, was expressly reversed by the Ninth Circuit, which correctly noted that even a seemingly unfettered right to modify (which Herbalife does not have) is not unconscionable, by virtue of the implied covenant of good faith and fair dealing. 725 F. App'x 472, 474 (9th Cir. Feb. 13, 2018). Plaintiffs made no other arguments regarding substantive unconscionability, and, for this reason alone, Plaintiffs have not established that the Rules Arbitration Provisions are unconscionable.

With no way to establish traditional unconscionability, Plaintiffs resorted to arguing that the Rules Arbitration Provisions are unconscionable as to Plaintiffs who signed up before the Distributor Agreement contained an arbitration provision—

because they purportedly never assented to it or signed it.[22] [Doc. 86 at 16-18.] But that argument does not hold water. *See supra* § I.A. Regardless of whether notice of the 2013 Rules Version was provided one month or three months after adoption, notice is not required for an amendment to be enforceable, and all Plaintiffs continued operating as Distributors for years after the 2013 Rules Version was adopted. [Doc. 62-3 at 2-3]; *see also Peleg*, 204 Cal. App. 4th at 1465. Plaintiffs' consent to arbitrate claims covered by the Arbitration Provisions is thus implied in fact. *See Craig*, 84 Cal. App. 4th at 420; *Asmus*, 999 P.2d at 79; *Harris*, 248 Cal. App. 4th at 384.

Ignoring the fact that they impliedly accepted arbitration, which alone is enough, Plaintiffs' unconscionability arguments focused solely on the claim that they never expressly agreed to nor signed an arbitration provision. But even if true, that does not invalidate the Rules Arbitration Provisions under California law, even without considering Plaintiffs' implied-in-fact acceptance. Plaintiffs' executed Distributor Agreements all expressly incorporated the Rules (in their most up-to-date form) by reference. [Doc. 62-2 at 721 § 4, 727 § 3, 737 § 4, 743 § 3, 753 § 5, 755 § 5, 763 § 8, 768 § 8.] Those Distributor Agreements—even the ones that do

[22] Plaintiffs' unconscionability arguments—even if they had merit—cannot possibly apply to the four Plaintiffs (Cody Pyle, Felix Valdez, and Jennifer and Michael Lavigne) who signed up when an arbitration provision was in effect and contained in their Distributor Agreements.

not contain an arbitration provision—expressly address the method and forum for dispute resolution. [Doc. 62-2 at 4-5, 724-34, 740-55; Doc. 63-2 at 1-2, 5-11, 42-51.] Dispute resolution was, thus, "one of those things concerning which the parties intended to contract." *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 801-03 (1998). As such, in addition to their implied-in-fact acceptance discussed above (which is enough on its own), Plaintiffs are also considered to have expressly consented to the Rules Arbitration Provisions. *See id.*

5. The Terms of Use on Herbalife's Website Did Not Supersede the Rules Arbitration Provisions.

Plaintiffs argued awkwardly below that the terms of use contained on Herbalife's website (the "Terms of Use") supersede all other policies and agreements between the parties, thus invalidating the Rules Arbitration Provisions. [Doc. 86 at 9-11.] Plaintiffs themselves readily admitted, however, that the Terms of Use do not "apply to this dispute"—and for good reason. [*Id.* at 10, n.17.] If the Terms of Use really do apply, Plaintiffs would have been required to bring their claims in California, and their claims would be barred by a 90-day limitations period. [Doc. 86-8 at 12.] Further, the Terms of Use have a narrow application "set[ting] forth the legal terms and conditions governing [the] use of [Herbalife's] website" and the purchase of products and services through the website, which apply even to non-Distributors. [*Id.* at 1-3.] In contrast, the Rules broadly govern how a Distributorship must be operated, and how Distributors get paid. And Plaintiffs'

claims here relate to their operations and compensation as Distributors, not the purchase of products or services through Herbalife's website.

Undeterred, Plaintiffs pointed to the integration clause in the Terms of Use and argued that they "expressly supersede all prior agreements between the parties." [Doc. 86 at 10.] But even that clause recognizes that there are "Other Policies" incorporated by reference, and the integration clause expressly applies only to the "subject matter" of the Terms of Use—*i.e.* the use of the website. [Doc. 86-8 at 1.] Accepting Plaintiffs' contrary interpretation of the Terms of Use would abrogate the Rules (and all other agreements and policies), including Plaintiffs' (and Defendants') rights to purchase discounted products and earn commissions, despite the thousands of dollars in products ordered and commissions earned by Plaintiffs. [Doc. 62-3 at 3-4; Doc. 84-2 at 2-3.] Undoubtedly, such preemption was not the parties' intent.

6. Defendants Are Not Barred From Compelling Arbitration Based on Herbalife's Statements in *Bostick*.

On April 8, 2013, the *Bostick* nationwide class action was brought against Herbalife in the Central District of California by certain Distributors, alleging various claims arising out of alleged misrepresentations tied to the Herbalife business opportunity. [Doc. 67-1.] At that time, Herbalife had not yet adopted an arbitration provision in the Rules or its Distributor Agreements. [Doc. 62-2 at 3.] In 2015, the Central District of California approved a settlement in *Bostick*, which

applied to all Distributors from April 1, 2009 to December 2, 2014, and their "known or unknown" claims as of September 18, 2017. [Doc. 61-2 at 3-4; Doc. 61-3 at 2; Doc. 61-4 at 1]; FRAP 4(a)(1)(A).

Plaintiffs attempted to save their claims from arbitration by misconstruing Herbalife's position in *Bostick*, but that position does not invalidate the Rules Arbitration Provisions either. The *Bostick* class action was filed several months before the arbitration provision was added to Distributor Agreements or the Rules. [Doc. 62 at 4.] The *Bostick* settlement thus excluded from its scope those Distributors who had signed a Distributor Agreement containing an arbitration provision after the initiation of the *Bostick* action. [Doc. 61-3 at 3.]

The objectors to the *Bostick* settlement were concerned that Herbalife might seek to retroactively enforce the new arbitration provision in the Distributor Agreements against Distributors who had joined Herbalife and asserted claims prior to its adoption (and thus had no such arbitration provision in their Distributor Agreements). [Doc. 86-2 at 5; Doc. 86-9 at 9.] Consistent with California law, Herbalife responded that it did not seek to enforce the arbitration provision in the Distributor Agreements retroactively against Distributors whose claims in *Bostick* had already accrued, were known to Herbalife, and had been asserted in the pending litigation before the arbitration provision went into effect. Plaintiffs in this case have mischaracterized this uncontroversial position, in an attempt to apply judicial

estoppel against Herbalife and Defendants and avoid arbitration.

Meritless as it is, this judicial estoppel argument could only possibly apply to Herbalife, which is not a party to this appeal, not Defendants. *See Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1335 (11th Cir. 2005) ("[Judicial estoppel] may be applied to prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.") Defendants took no position in the *Bostick* action, and, thus, are not barred from taking any position here.

Regardless, the elements of judicial estoppel are not met here, even as to Herbalife. Defendants' position that the Arbitration Provision in the Rules binds Plaintiffs is not inconsistent at all with any position Herbalife took in *Bostick*. [Doc. 86 at 15.] Although Herbalife admitted in *Bostick* that its new arbitration provision would not apply to claims known, accrued, and pending, here Defendants are merely attempting to enforce arbitration provisions in effect well before Plaintiffs' claims were known, accrued, or pending.[23]

III. The District Court Inexplicably and Improperly Separated Plaintiffs' Claims Into Three Forums.

In the alternative to arbitration, Defendants moved the District Court to

[23] In any case, judicial estoppel would not apply to Plaintiffs Cody Pyle, Felix Valdez, and Jennifer and Michael Lavigne, who are separately bound to arbitrate by virtue of the Distributor Agreements they signed.

transfer Plaintiffs' claims against them to the Central District of California. [Doc. 63.] As to Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta, Defendants argued that they are equitably estopped from refusing transfer to the Central District of California because each of their agreements with Herbalife contains a forum selection clause and their claims against Defendants satisfy this Court's equitable estoppel standard. As to all Plaintiffs, Defendants argued that the federal venue transfer statute, 28 U.S.C. § 1404(a), requires transfer of the entire case to the Central District of California.

Not only did the District Court deny Defendants' transfer request, it split this litigation into three pieces. In doing so, the District Court concluded that "certain Plaintiffs signed a Distributor Agreement with a valid forum selection clause," but did not explain why it rejected Defendants' equitable estoppel arguments based on that same clause. [Doc. 106 at 2.] That ruling was in error. As to discretionary transfer, the District Court stated that "[t]he balance of the § 1404(a) factors weighs in Plaintiffs' favor and the Court declines to disregard Plaintiffs' choice of venue." [*Id.*] That ruling was as an abuse of discretion.

A. Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Roders and Jennifer Ribalta Must Litigate Their Claims Against Defendants Along With Their Claims Against Herbalife—in California—Pursuant to the Doctrine of Equitable Estoppel.

To the extent that Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta are not required to arbitrate their claims, then they are equitably

estopped from avoiding application of the Forum Selection Clause as to their claims against Defendants. Similar to arbitration, equitable estoppel allows a nonsignatory to enforce a forum selection clause in certain circumstances. *See Liles*, 631 F.3d at 1256.

This Court applies a two-test standard (nearly identical to the California standard discussed above), enforcing a forum selection clause under equitable estoppel when either: (1) the signatory relies on the terms of a written agreement containing a forum selection clause in asserting its claims against the nonsignatory; or (2) the signatory alleges substantially interdependent and concerted misconduct by both the nonsignatory and a signatory. *Id*. The second test is satisfied where the claims against a nonsignatory "are based on the same facts and are inherently inseparable from the claims against the signatories," without any showing that those facts are tied to the underlying agreement (unlike the California standard discussed above). *See Blixseth v. Disilvestri*, 2013 WL 12063940, at *15-16 (S.D. Fla. Jan. 31, 2013).

For the same reasons the two California tests are satisfied to equitably estop Plaintiffs from avoiding arbitration, both Eleventh Circuit tests are satisfied to equitably estop Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta from refusing to transfer their claims against Defendants to California. *See supra* § II.B.2. In fact, equitable estoppel is even more unavoidable here, because

under the second test (interdependent misconduct), it matters not whether Plaintiffs' claims have any connection to the Contract. *Blixseth*, 2013 WL 12063940, at *15-16. As such, it cannot be legitimately disputed that the second test is satisfied here. *See supra* § II.B.2.b.

Accordingly, the District Court erred in refusing to transfer Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta's claims against Defendants to the Central District of California.

B. Alternatively, the District Court Abused its Discretion By Refusing to Transfer Plaintiffs' Claims Against Defendants Under 28 U.S.C. § 1404(a).

Alternatively, if the Court allows any claims to escape arbitration, then the District Court abused its discretion by refusing to transfer this action under 28 U.S.C. § 1404(a). That error is only more glaring given that the District Court transferred Plaintiffs Izaar Valdez, Patricia Rodgers, Jeff Rodgers, and Jennifer Ribalta's claims against Herbalife (but not Defendants) to the Central District of California.

1. Legal Standard Under 28 U.S.C. § 1404(a).

Under 28 U.S.C. § 1404(a), a district court may transfer "any civil action" to another district where the action could have been brought "[f]or the convenience of parties and witnesses, [and] in the interest of justice." To determine the propriety of transfer, courts first determine "whether the action could have been brought in the venue in which transfer is sought" and then "assess whether convenience and the

interest of justice require transfer to the requested forum." *Osgood v. Discount Auto Parts, LLC*, 981 F. Supp. 2d 1259, 1263 (S.D. Fla. 2013). In deciding the second step, courts consider the following factors:

> (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.

Manuel v. Convergys Corp., 430 F.3d 1132, 1135, n.1 (11th Cir. 2005).

2. This Action Could Have Been Brought in the Central District of California.

This action could have been brought in the Central District of California, because venue is proper in that district and Defendants are subject to personal jurisdiction there. 28 U.S.C. § 1391(b)(2) (venue is proper in a judicial district where "a substantial part of the events or omissions giving rise to the claim occurred"); 18 U.S.C. § 1965(d) (providing for nationwide service of process for RICO claims); *Repub. of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997) ("When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction.").

3. Convenience and the Interest of Justice Require Transfer to the Central District of California.

Trial efficiency and the interests of justice, on their own, mandate a transfer.

Further, out of the eight remaining Section 1404(a) factors, six weigh heavily in favor of transfer. The District Court abused its discretion by ruling otherwise and refusing to transfer this entire action to the Central District of California.

a. Trial Efficiency and the Interests of Justice Alone Justify a Transfer.

The District Court could (and should) have granted the Motion to Transfer by applying this factor alone. *See Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986) ("The 'interest of justice' is a separate component of a § 1404(a) transfer analysis, and may be determinative in a particular case . . . ."). The District Court found that half of Plaintiffs are bound by valid forum selection clauses, requiring their claims to be brought in the Central District of California. [Doc. 106 at 2.] And yet, the District Court did not transfer the entire action; it transferred only the claims of Plaintiffs against Herbalife. [*Id.*] That ruling undermines trial efficiency and the interests of justice.

Courts across the country have repeatedly held that when some of the plaintiffs' claims are covered by a binding forum selection clause, the interests of justice require a transfer of the entire action. *See, e.g.*, *McNair v. Monsanto Co.*, 279 F. Supp. 2d 1290, 1313 (M.D. Ga. 2003) ("[B]y virtue of choosing to bring this lawsuit together, the Plaintiffs without a contractual obligation to litigate this case in Missouri have in essence made a choice to subject themselves to suit in a venue other than their choice."); *Nemo Assoc., Inc. v. Homeowners Mktg. Servs. Int'l, Inc.*,

942 F. Supp. 1025, 1029 (E.D. Pa. 1996) ("Assuming arguendo that the Kenwoods are not personally bound by the forum selection clause, the balancing criteria of § 1404(a) lead me to conclude that the totality of the circumstances militate in favor of transferring the entire case to Florida."). And that makes sense, because Section 1404(a) provides for the transfer of "any civil action," not individual claims, as the District Court did here. *See* 28 U.S.C. § 1404(a) (emphasis added).

Further, the result of the District Court's ruling is that there is now an identical case pending in the Central District of California, Case No. 2:18-cv-07480-JAK-MRW, which results in the possibility of inconsistent results, amongst many other issues. That fact militates heavily in favor of the transfer of the rest of this action as well. *See Great Lakes Transp. Holding LLC v. Yellow Cab Serv. Corp. of Florida, Inc.*, 2012 WL 12930665, at *8 (S.D. Fla. Feb. 6, 2012) ("The interest of justice weighs heavily in favor of transfer when related actions are pending in the transferee forum.") (citation omitted).

Moreover, Herbalife previously settled claims against a class of Distributors (the *Bostick* Settlement), which occurred in the Central District of California. [Doc. 61-2; Doc. 61-3.] The Central District of California retained continuing jurisdiction to enforce and interpret that settlement. [Doc. 61-5 at 29.] Defendants have argued in this case that some of Plaintiffs' claims are barred by the *Bostick* Settlement, which must be decided by the Central District of California. [Doc. 68 at 1-2, n.2;

Doc. 70 at 5-9.] That fact weighs heavily in favor of (if not mandates) a transfer as well. *See, e.g., Koehler v. Green*, 358 F. Supp. 2d 346, 347 (S.D.N.Y. 2005) ("Given that court's familiarity with and continuing jurisdiction over the matters that form the basis of the instant complaint, the Court finds that transfer of the case to the Eastern District of Missouri pursuant to 28 U.S.C. § 1404(a) is warranted."). As such, efficiency and the interests of justice alone justify a transfer here.

b. The Convenience of Witnesses Weighs in Favor of Transfer.

Weighing heavily in favor of transfer is the fact that nearly the exact same witnesses will already need to be called in the Central District of California, as a result of the District Court's ruling transferring half of Plaintiffs' claims there. It is undisputable that it would be more convenient for all necessary witnesses to be called only a single time in California, rather than once in Florida and once in California.

Furthermore, witnesses in this matter are located across the country. Out of the eight named Plaintiffs themselves, half reside in other states: Oklahoma, New Jersey, and Ohio. [Doc. 63-2 at 13, 25, 42.] Further, Herbalife is headquartered in Los Angeles, California, and its employees who may testify in this action reside there as well. [Doc. 63-2 at 3.] With respect to Defendants, 20 reside in Florida, 9 reside in California, and the remaining 15 reside across the country or overseas. [Doc. 1 at 50-68.] And those Defendants who reside in Florida do not object to

litigating in California. Because of Herbalife's definitive ties to California, non-party witnesses are also more likely to be in California than Florida. Thus, transfer of the entire matter to California would be much more convenient for witnesses.

c. The Evidence and the Locus of Operative Facts Are In California.

All of Herbalife's marketing and promotional activities originate from its headquarters in Los Angeles, California, and the Complaint is based on alleged misrepresentations relating to those activities. [Doc. 63-2 at 2; Doc. 1 at 12, 19-20.] Thus, the bulk of the sources of proof in this action, including records pertaining to (i) the Herbalife events alleged in the Complaint, (ii) Herbalife's marketing and advertising activities, and (iii) Plaintiffs' and Defendants' distributorships are in the possession of Herbalife in Los Angeles, California. [*Id.*] Certainly such evidence is not more likely to be found in Florida, especially given the fact that Plaintiffs purportedly represent a nationwide class of Herbalife Distributors.

d. The Convenience of the Parties Weighs in Favor of Transfer.

Of the 52 named parties, only four are (1) Florida residents who (2) do not consent to a transfer of this action: Plaintiffs Patricia Rodgers, Jeff Rodgers, Felix Valdez, and Jennifer Ribalta. However, three of those four Plaintiffs expressly consented to venue in California, and as a result, those three Plaintiffs are currently litigating their claims against Herbalife in the Central District of California. That

leaves one out of the 52 parties who is a Florida resident contesting transfer. Further, because half of Plaintiffs' claims against Herbalife are now pending in California, many, if not all, of the parties here will now be called as witnesses in California anyway. Thus, transferring the rest of this matter to California as well would certainly be more convenient for the parties.

e. The Central District of California is in a Better Position to Compel the Attendance of Witnesses.

There are unlikely to be any unwilling witnesses in Florida whose testimony must be compelled, as the parties themselves will be the primary witnesses here. Further, because of Herbalife's ties to California, non-party witnesses are most likely to be within the Central District of California's subpoena power, not within that of the District Court.

f. The Relative Means of the Parties is a Neutral Factor.

The relative means of the parties in terms of ability to travel is neutral here, as Plaintiffs and Defendants are all individuals, their means are likely similar. Moreover, because half of Plaintiffs are already litigating this case in the Central District of California, transferring this case would help conserve these individuals' resources.

g. Familiarity with the Law Weighs in Favor of Transfer.

Because the Distributor Agreements entered into by all Plaintiffs contain a broad California choice-of-law clause, California law will govern this dispute in all

areas where federal law does not, a fact that Plaintiffs have never disputed.

h. Plaintiffs' Choice of Forum Deserves Little Weight.

Here, half of Plaintiffs reside outside of Florida, and thus, their choice of forum "deserves less weight." [Doc. 63-2 at 13, 25, 42.]; *Elite Advantage, LLC v. Trivest Fund, IV, L.P.*, 2015 WL 4982997, at *10 (S.D. Fla. Aug. 21, 2015); *see also Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) ("When the plaintiff's choice is not its home forum . . . the presumption in plaintiff's favor 'applies with less force,' for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'") (citations omitted). Moreover, Plaintiffs purport to represent a nationwide class of individuals, which means their choice should be given even "less deference." *Elite Advantage*, 2015 WL 4982997, at *10. Accordingly, the District Court's decision to entitle Plaintiffs' choice of forum to nearly dispositive weight, was an abuse of discretion.

Based on the totality of the factors under Section 1404(a), the District Court abused its discretion by refusing to transfer Plaintiffs' claims against Defendant to California.

CONCLUSION

Defendants respectfully request as follows:

(1) that the Court reverse the District Court's denial of the Motion to Compel and remand the case with instructions to the District Court to enter an ordering

compelling all Plaintiffs to arbitrate their claims against Defendants;

(2) in the alternative, that the Court reverse in part the District Court's denials of the Motion to Compel and the Motion to Transfer, and remand the case with instructions to the District Court to enter an order (a) compelling Plaintiffs Jennifer Lavigne, Michael Lavigne, Cody Pyle, and Felix Valdez to arbitrate their claims against Defendants and (b) transferring the claims of Plaintiffs Patricia Rodgers, Jeff Rodgers, Izaar Valdez, and Jennifer Ribalta against Defendants to the Central District of California;

(3) in the alternative, that the Court reverse the District Court's denial of the Motion to Transfer and remand the case with instructions to the District Court to enter an order transferring this entire action to the Central District of California.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appearance was served electronically using the CM/ECF system, on November 14, 2018, on all electronic filing to all counsel or parties of record on the service list.

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