20-1228 (L)

20-1278 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE, ET AL.,

Plaintiffs-Appellees,

v.

THE TRUMP CORPORATION, ET AL.,

Defendants-Appellants,

ACN OPPORTUNITY, LLC,

Non-Party-Appellant.

On Appeal from the United States District Court for the Southern District of New York, No. 1:18-cv-9936 (Schofield, J.)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Defendants carried out a fraudulent scheme that harmed Plaintiffs. While accepting huge, secret payments from a multi-level marketing company called ACN, Defendants publicly insisted that they were independent of the company—and used that carefully cultivated fictitious independence, along with their wealth and celebrity and a barrage of false statements, to induce Plaintiffs and many others to invest in ACN's "business opportunity." Although ACN benefitted too, Defendants instigated, constructed, and perpetrated the fraudulent scheme, drawing on a playbook that they also deployed elsewhere. Ultimately, it was Defendants' scheme that persuaded Plaintiffs to invest and, as a result, Plaintiffs suffered significant losses as Defendants walked away with millions. Plaintiffs therefore filed this lawsuit to obtain redress from Defendants.

Following procedural gamesmanship that lasted until the district court denied Defendants' motion to dismiss in part, Defendants filed a motion to compel arbitration. Defendants are not actually parties to any arbitration agreement with Plaintiffs. Nevertheless, Defendants sought to invoke the agreement between Plaintiffs and ACN, which Defendants never signed, which makes no mention of Defendants, and which is not the basis for any of Plaintiffs' claims. Defendants sought to justify this maneuver by asserting that Plaintiffs—in signing contracts with ACN—must have understood that they were also entering into agreements with

Defendants. But as the district court properly recognized, Defendants' argument "turns the Amended Complaint on its head." A531. Specifically, the Amended Complaint alleges that Defendants deliberately hid from Plaintiffs and the public the true nature of their relationship with ACN. This deceit, moreover, was hardly a stray detail: It is central to the fraudulent scheme alleged in the Amended Complaint, which depended on creating the false impression that Defendants were in fact independent of ACN.

Given this course of conduct—which involved actively sowing falsehoods and confusion about their ties to ACN—Defendants have no basis now to assert that their relationship with ACN was so clear that agreements with ACN were self-evidently also contracts with Defendants. For that reason, among several others, Defendants cannot rely on equitable estoppel to compel arbitration. In any event, as the district court held, Defendants' improper procedural tactics intended to achieve delay and other strategic advantage in the district court resulted in waiver of their claimed entitlement to arbitrate. Finally, there is no force to Defendants' newly minted contention that these questions must themselves be decided by an arbitrator. Defendants unequivocally waived that argument below by asking the district court to decide the very issue that they now claim it cannot decide. And even if Defendants' "arbitrability" contentions were to be considered on the merits, they would fall short for two reasons: *First*, this is a question of contract formation

reserved by law for judicial determination; and *second*, there is no clear agreement between Plaintiffs and Defendants to let an arbitrator decide these issues.

That leaves ACN—which, unlike Defendants, *does* have a contract with Plaintiffs, but is *not* a party to this case. This point bears repetition since ACN keeps implying otherwise: Plaintiffs have alleged *no* claims against ACN; ACN faces *no* risk of liability or damages; and ACN has *disclaimed* any obligation to indemnify Defendants—who, it seems, made a strategic decision *not* to implead ACN into the case. In light of ACN's apparent belief that it is somehow a de facto "defendant in all-but-name" (whatever that means), ACN Br. at 20, ACN could have filed a motion to intervene to protect any interests that it actually believes are threatened by Plaintiffs' lawsuit—yet it chose not to do so. Now, ACN seeks to have it both ways: it wants none of the risks or responsibilities of being a party, with all the procedural prerogatives afforded only to parties.

It cannot do that. For good reason, no court has ever held that a non-party subpoena recipient can hijack a federal proceeding and dispossess an Article III judge of jurisdiction over the case or controversy before her. Nor has any court ever held that, in so doing, a non-party could force a plaintiff to arbitrate claims against a defendant with whom it does not have an arbitration agreement. Neither the Federal Arbitration Act (FAA), nor the Federal Rules of Civil Procedure, nor principles of equity afford any basis for ACN's unprecedented claim that it can unilaterally deem

itself a party to this case (without actually being a party), respond to a document subpoena by moving to compel arbitration (without any jurisdictional or procedural basis), and compel Plaintiffs to arbitrate their claims against Defendants (with whom Plaintiffs have no agreement to arbitrate anything). If accepted, ACN's position would threaten the orderly administration of the federal courts and make a mockery of the bedrock principle that arbitration is a matter of consent. It is unsurprising that the district court rejected these unwarranted assertions out of hand.

At bottom, these appeals require nothing more than a return to first principles of contract law and federal procedure. A party cannot enforce an agreement that they did not sign, that does not mention them, and as to which they are not an intended third-party beneficiary—particularly when they have knowingly misled a signatory to the contract by concealing secret connections to another signatory. A party waives their ability to pursue arbitration when they deliberately resort to procedural gamesmanship aimed at first using the federal courts to obtain a strategic advantage before seeking arbitration. A party cannot argue on appeal that the district court lacked authority to decide a question when they took the opposite position below and were dissatisfied with the result. And a non-party cannot decide against moving to intervene, but then ignore the ground rules of litigation and the FAA by seeking to a compel the actual parties into arbitration. None of these principles should be controversial. The decision below should be affirmed.

STATEMENT OF THE ISSUES

The questions presented by Defendants' appeal are as follows:

1. Whether the district court correctly applied the doctrine of equitable estoppel in concluding that Plaintiffs' contract with ACN does not require them to arbitrate disputes with Defendants.

2. Whether the district court correctly concluded that Defendants waived any such asserted right to compel Plaintiffs into arbitration.

3. Whether the district court correctly adjudicated these questions itself after Defendants expressly invited it to do so.

The questions presented by ACN's appeal are as follows:

1. Whether the district court had jurisdiction over ACN's motion to compel Plaintiffs' claims against Defendants into arbitration.

2. Whether ACN may invoke its arbitration agreement with Plaintiffs to obtain an order compelling Plaintiff to arbitrate their claims against Defendants, with whom they never agreed to arbitrate anything.

3. Whether it was procedurally proper for ACN—as non-party that decided against seeking intervention in this litigation—to file a motion to compel arbitration of Plaintiffs' claims against Defendants.

4. Whether ACN may invoke generalized notions of equity to compel arbitration of Plaintiffs' claims against Defendants.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d) because the proposed class here has at least 100 members, there is minimal diversity between the parties, and the aggregate amount in controversy exceeds $5 million. It lacked

jurisdiction over ACN's non-party cross motion to compel arbitration for the reasons given herein. *See infra*, 62-67. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(B) because the district court denied petitions from Defendants and ACN (on April 8 and 9, 2020, respectively) to order arbitration. A35. Defendants timely filed a notice of appeal on April 13, 2020, and ACN timely filed a notice of appeal on April 16, 2020. A36-37.

STATEMENT OF THE CASE

I. FACTS

In the early 2000s, the "Trump" brand got a badly needed reboot when Defendant Donald J. Trump hosted *The Apprentice* and *The Celebrity Apprentice*. A230-35. These primetime "reality" television shows "portrayed Trump to an audience of millions around the country as a credible and authoritative voice in the world of business." A232-33. As a result, many ordinary Americans came to associate the name "Trump" with business savvy and entrepreneurial success. A232, 235. Trump himself personified this brand, and he and the other Defendants collectively operated and controlled it. A213-14.

The essential theory of this case is that Defendants cashed in on that brand by assuring ordinary working-class Americans that near-worthless investments were really the secret to financial success. Between 2005 and 2015, Defendants came up with a scheme to sell full-throated praise from Donald Trump to doubtful business

ventures in exchange for huge sums of money. A223, 343-365. These financial arrangements were kept secret from the public and from intended audiences: When touting a business, Donald Trump would not disclose any payment for his endorsement and would falsely assert that his seals of approval were heartfelt, carefully vetted, and not for sale. A215, 217-19, 271-79. Selling Trump endorsements this way—privately bought and paid for, publicly appearing to be genuine—made them extra-powerful and convincing. A217. In other words, when Trump said "Trust me," people listened. *Id.*

Plaintiffs in this case are four individuals of limited financial means who fell victim to Defendants' deception. A213. They are a hospice worker, a self-employed formerly homeless man, a food delivery driver, and a mother of three who works at a national retail store. A287, 296, 300, 305. Each was persuaded to sign up for a business opportunity with Non-Party Appellant ACN after hearing Donald Trump sing its praises. Specifically, Trump encouraged them to become Independent Business Owners ("IBOs") associated with ACN. A213, 243. IBOs marketed ACN-distributed videophones and other products and services through a multi-level marketing model. A243-45.

Statistically speaking, multi-level marketing arrangements are not a winner's game—nearly all who try them lose money. A 265. And some prospective IBOs were skeptical upon first hearing ACN's own sales pitch. *See, e.g.*, A287-88.

Enter Defendants. In exchange for millions of dollars in secret payments from ACN, they held Donald Trump out as a genuinely independent evaluator of the ACN IBO opportunity, since Trump reassured prospective IBOs in the strongest possible terms that it was a sure winner. A213. Defendants conveyed this message in numerous forums, including in recruiting videos, in print materials, online, on stage at more than a dozen large events, and in two episodes of *The Celebrity Apprentice*, where contestants seeking a job at the Trump Organization promoted ACN and Defendants Ivanka Trump and Donald Trump Jr. also appeared in support of the company. A245-55.

Defendants' consistent message to potential IBOs had three key components: (1) that IBOs would have a reasonable probability of commercial success if they bought into ACN;[1] (2) that Donald Trump was independently endorsing and promoting ACN because he believed that it offered a reasonable probability of commercial success (rather than because Defendants were being paid);[2] and (3) that

[1] For example, "You have a great opportunity before you at ACN *without any of the risks most entrepreneurs have to take*." A259 (emphasis added). "The absolute truth is that this [videophone] technology will be present in every home within the next several years." A266.

[2] For example, Interviewer: "[W]hy do you keep coming back? What is it about ACN? Certainly not for any money." Trump: "No." Interviewer: "It's for the love of the organization. Tell us why you love ACN?" Trump: "[T]he reason I'm doing it is because I really have . . . just a special relationship with the founders, they are good people, they are hard workers, they love what they are doing, they love the people

Trump's endorsement was predicated on Defendants' due diligence, inside information, and/or personal experience with ACN and the IBO investment.[3] A258, 324.

As the Amended Complaint explains in detail, Defendants' message, which induced Plaintiffs and thousands of others like them into ACN, was knowingly and materially false in all respects. A215-16, 258-81. The ACN business opportunity did not offer a realistic possibility of commercial success, A260-62, 265, 266-69, 271; Defendants had done little to no diligence relating to the particular statements they were making, A281; and Defendants were really endorsing the ACN business opportunity because they were being paid millions of dollars to do so—a fact they consistently misrepresented and obscured, A271-77.

Misleading the target audience about Defendants' ties with ACN was crucial to this scheme. A215, 258. To foster the illusion of independent judgment, Trump professed deep personal affinity for ACN and its founders, while at the same time omitting any mention of the lavish payments he received from ACN so that his audience would not realize that his praise had been purchased. A272-75. He told

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in the room. . . . [T]hey are really good people with great ideas and they want to help other people." A274, 275.

[3] For example, "When evaluating a business opportunity, people need to look for strong leadership, a solid track record, success stories, a strong product people really need and want and a clear plan for the future. ACN has all of these things." A304, 307.

audiences, for example, that he had chosen to "give" an endorsement to ACN because he "really believe[d]" in it. A272. He told audiences "I've always had a good feeling about ACN; I just feel good about it." A276. He told audiences "I do this . . . because I love it because I think this is a great company." A276. And he told audiences "[t]he reason I'm doing it is because I really have . . . just a special relationship with the founders, they are good people." A275. Not once did he mention being paid millions. A276-77.

Even when asked point blank, Trump made false and misleading statements about the nature of his relationship to ACN. In one interview, for example, he disclaimed any financial motive, saying that he promoted ACN out of respect for its co-founders and "would not be doing it 'for the money.'" A276. And at a 2013 event, Trump again told an interviewer that he was not endorsing ACN "for any money." A274. Consistent with these statements, "every Plaintiff recalls watching videos featuring Trump and being left with the same understanding—that Trump's endorsement was not in exchange for any compensation from ACN." A276.

Each Plaintiff had initially approached the ACN recruitment process with skepticism, and for each of them, Defendants' fraudulent statements were the "turning point." A287-90, 296-97, 300-02, 306-08. After they signed up, and as they struggled to recoup their initial investments, each Plaintiff was further persuaded by Defendants' endorsement to invest even more. A290-93, 298-99, 303-04, 308-10.

Looking back, each Plaintiff recalls specific statements from Defendants that convinced them to invest. A289, 293-94, 297-98, 304, 307. Each Plaintiff also recalls being impressed by ACN's association with Defendants' brand, including through ACN's appearances on *The Celebrity Apprentice*. A288-89, 296, 301, 306, 307, 309. None of them would have signed up but for Defendants' knowingly fraudulent promotion. A290, 296, 301-02, 307-08.

ACN has represented—and it is assumed for purposes of these appeals—that Plaintiffs each entered into a contract with ACN upon paying the IBO enrollment fee. A425. Defendants are not parties to those contracts, which do not mention Defendants at all. To the contrary, the contracts make clear that the signatory's "IBO relationship is with ACN Opportunity, LLC, and *not* with any ACN Provider"—a defined term that includes service providers and other third parties with whom ACN transacts business. A436 ¶ 3 (emphasis added); *see also* A439 ¶ 3; A442 ¶ 3. The arbitration clauses contained in the IBO agreements similarly reflect that Plaintiffs are entering into an agreement exclusively with ACN and not with anyone else:

> In the event of a dispute *between me and ACN* as to our respective rights, duties and obligations arising out of or relating to this Agreement, it is agreed that such disputes shall be exclusively resolved through binding arbitration before the American Arbitration Association pursuant to the Commercial Rules of Arbitration.

A436 ¶ 16; A439 ¶ 16 (emphasis added); *see also* A442 ¶ 17.[4]

Plaintiffs were IBOs for varying amounts of time, during which Defendants' false and fraudulent statements induced each of them to spend (and lose) money. *See* A287-310. In the end, each came to realize that Trump's message was a lie and decided to cut their losses. A219, 295, 299, 305, 310. None of them succeeded in earning back the money Defendants caused them to "invest." A295, 299, 305, 310.

II. PROCEDURAL HISTORY

A. Defendants decide not to file a motion to compel arbitration, but change their mind and file after denial of their motion to dismiss

In October 2018, Plaintiffs commenced this putative class action against Defendants. A43-206, 209-398. Their federal claims, now dismissed, alleged a pattern of mail and wire fraud. A372-80, 399. Their state law claims, which remain live, allege common-law fraud, negligent misrepresentation, and violations of state

[4] ACN tweaked the IBO agreements' arbitration provision in 2016. *Compare* A436 (2013 version), *and* A439 (2014 version), *with* A442 (2016 version). The new language further underscored that the provision applied only between ACN and the IBO: "*ACN and I* agree that . . . the Dispute Resolution Provisions in the ACN Policies and Procedures shall control. The Dispute Resolution Provisions require . . . that *ACN and I* will resolve all disputes through binding arbitration before the American Arbitration Association pursuant to the Commercial Rules of Arbitration. Both *ACN and I* agree that all disputes will be resolved on an individual basis . . . ." A442 ¶ 17 (emphases added).

consumer-protection statutes prohibiting unfair and deceptive advertising practices arising from Defendants' statements about ACN. A380-396.[5]

Early on, Defendants acknowledged that they were aware of the arbitration provision in ACN's IBO agreements. In fact, they mentioned that provision in the their very first line of argument before the district court. *See* SA58 (citing D. Ct. ECF No. 46 at 1). But they repeatedly disregarded and declined any intention to invoke it. *See* SA58-59 (collecting examples in the record); SA4 (listing anticipated motions, not including any motion to compel arbitration). The parties thus prepared for third-party discovery to be conducted by both sides, and the district court permitted service of document-preservation subpoenas, including eight such subpoenas served on Plaintiffs' friends and family members in January 2019. SA59.

Around the same time, Defendants moved to dismiss the original Complaint. A16. Plaintiffs amended and, in February 2019, Defendants again moved to dismiss, asking the district court to decide and terminate the case. A17-18.

Several months later, in July 2019, Defendants filed a letter informing the district court—for the first time, eight months into the litigation and contrary to their prior representations and course of conduct—that they "ha[d] determined . . . Plaintiffs' claims are arbitrable" and intended to file a motion to compel arbitration,

[5] The district court found good cause for Plaintiffs to proceed under pseudonyms for an initial pre-trial period. A207.

but only if the case survived dismissal. SA14. In other words, Defendants admitted that they were waiting until the district court decided the pending motion to dismiss *before* filing their anticipated motion to compel. SA14. Five days later, on July 24, 2019, the district court granted Defendants' motion to dismiss as to the federal claims but denied their motion as to Plaintiffs' state law claims. A399-424.

Because that result was not fully to their liking, Defendants followed through on their motion to compel arbitration, citing the arbitration clause in ACN's IBO agreements—which Defendants did not sign, and which do not mention Defendants. A21. By then it was September 2019, nearly a year into the litigation, and Plaintiffs had expended significant energy and resources in federal court.

Defendants argued that they were entitled to arbitrate the merits of Plaintiffs' claims against them under the doctrine of equitable estoppel, and that any such entitlement to arbitrate was not waived. *See* SA24-48, SA79-93. Significantly, Defendants did not argue that an arbitrator should resolve either of those issues in the first instance. In fact, their motion rested on the contrary premise that these questions were for the district court to decide. The relief they sought below was "an order compelling Plaintiffs to arbitrate the state law claims that survived Defendants' motion to dismiss." SA29.

While Defendants' motion to compel arbitration remained pending, the district court allowed discovery to proceed. *See* A425-26. Both Plaintiffs and

Defendants issued document subpoenas to various non-parties, including ACN. *See* SA161, 166.

On April 8, 2020, the district court denied Defendants' motion to compel arbitration on two independent grounds. A522-37. First, with respect to the issue of equitable estoppel, it concluded that Defendants had failed to adequately "explain how Plaintiffs agreed to arbitrate with them even though Defendants were not parties to the respective Agreements between Plaintiffs and ACN." A527, 532. In resolving this issue, the district court construed and applied Second Circuit precedent, but noted an unbriefed argument that under Supreme Court precedent, North Carolina law should have governed. A527-28 n.4. Second, in the alternative, the district court concluded that Defendants had waived any right to compel arbitration by tactically withholding their motion to compel arbitration as they litigated aggressively for months. A534-36.

B. ACN moves to compel arbitration in response to a subpoena

Meanwhile, the non-party subpoena that Plaintiffs served on ACN under Federal Rule of Civil Procedure 45 sought a discrete set of documents in ACN's unique possession. SA161. Plaintiffs made multiple good-faith proposals to narrow the scope of ACN's production, but ACN categorically refused to engage in any discussion about the scope of production. SA100-101.

In January 2020, Plaintiffs were forced to move to compel ACN to produce responsive documents under Rule 45(d). A 443-44. ACN responded with a brief "in Opposition to Plaintiff's Motion to Compel Compliance with Subpoena and in Support of Cross-Motion to Compel Arbitration." SA108. This filing sought arbitration of ACN's "discovery dispute" with Plaintiffs, as well as "all other disputes arising out of or in connection with their IBO Agreements." SA120-21.

In this period, ACN also sent arbitration demands to Plaintiffs. A490-91. The AAA declined those demands as procedurally deficient because ACN did not provide signed IBO agreements for Plaintiffs. A493.

On April 9, 2020, ruling from the bench, the district court granted in part Plaintiffs' motion to compel subpoena compliance and denied ACN's cross-motion to compel arbitration. A556-58, 563-66; *see also* A538-539 (written order). In denying the cross-motion, the district court noted "ambiguity" as to whether ACN sought to compel arbitration of the entire case or only of ACN's subpoena obligations. A553. As to the former, the district court held ACN lacked "standing to do that." A558. As to the latter, it concluded that (1) a non-party discovery dispute between ACN and Plaintiffs' did not implicate the arbitration agreement; and (2) there was no "jurisdiction to compel arbitration" given the improper posture in which ACN's motion arose. A556-57.

C. Defendants and ACN both appeal and seek a stay

In April 2020, Defendants and ACN each appealed the district court's orders denying their motions to compel arbitration, A541, 543, and sought to stay all proceedings pending appeal, A36-37. The district court denied a stay. A596. After carefully weighing the pertinent factors, it concluded that neither Defendants nor ACN were likely to succeed on appeal. A608. The district court again stressed that ACN had offered no sound basis to "compel Plaintiffs to arbitrate Plaintiffs' claims against Defendants—or even a discrete discovery dispute—in a litigation to which ACN is not a party." A602-03.

Defendants and ACN then filed stay motions in this Court, and Defendants requested an administrative stay during the pendency of their stay motion. ECF Nos. 58, 59, 84. While Plaintiffs opposed the stay motions, to facilitate their expeditious disposition, Plaintiffs did not oppose an administrative stay. ECF No. 72. This Court entered an administrative stay on May 29, 2020, ECF No. 78, prompting the district court to halt all proceedings, SA.174.

After Defendants missed the deadline to file their opening merits brief, Plaintiffs filed a motion to establish an expedited briefing schedule, lift the administrative stay, and deny Defendants' stay motion. ECF No. 132. The Court granted Plaintiffs' motion for an expedited briefing schedule and granted a "stay until the appeal is heard (or submitted in the event oral argument is not requested)."

ECF No. 139. Plaintiffs then sought clarification whether the expedited briefing schedule applied to ACN, which by then also had missed its deadline to file. ECF No. 142. The Court issued an order clarifying that its prior order applied to ACN, including the previously ordered "stay pending disposition of the appeal." ECF No. 145.[6]

STANDARD OF REVIEW

This Court reviews *de novo* a district court's legal conclusion that a movant is not entitled to compel arbitration. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 72-73 (2d Cir. 2017). The district court's waiver decision is also reviewed *de novo*, with the underlying factual findings reviewed for clear error. *La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010).

Neither Defendants nor ACN have submitted any evidence other than the contracts Plaintiffs are assumed to have signed. *See* A425. The factual universe is therefore limited to those contracts and the allegations of the Amended Complaint, which the Court must accept as true. *See Guyden v. Aetna, Inc.*, 544 F.3d 376, 379

[6] Defendants and ACN ask this Court to extend the existing stay until issuance of the mandate. That request should be denied. For the reasons set forth in Plaintiffs' stay briefing, as well as those in the district court's well-reasoned opinion, Defendants and ACN have failed to justify the extraordinary remedy of a stay pending appeal.

n.1 (2d Cir. 2008); *Meyer*, 868 F.3d at 74. The Court must draw all reasonable inferences in favor of the non-movants—here, Plaintiffs—in assessing those facts. *Meyer*, 868 F.3d at 74.

SUMMARY OF THE ARGUMENT

I. The district court properly denied Defendants' motion to compel arbitration. There are four independent grounds on which this Court should affirm that decision.

First, in *Arthur Andersen LLP v. Carlisle*, the Supreme Court held that state contract law—not federal common law—determines whether a non-signatory can compel arbitration under a theory of equitable estoppel. 556 U.S. 624, 630-31 (2009). Under North Carolina law, which governs here, Plaintiffs can be forced to arbitrate against a non-signatory only if their claims specifically seek to enforce the contract at issue. *See Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635, 638-40 (N.C. Ct. App. 2018). In this case, Plaintiffs' claims against Defendants are based on state statutory and common law obligations, not Plaintiffs' contracts with ACN. Because Plaintiffs do not seek to impose liability on Defendants based on their contracts with ACN, or to somehow enforce their contracts with ACN against Defendants, North Carolina precludes Defendants' reliance on the doctrine of equitable estoppel. Although North Carolina law was not briefed below, Plaintiffs squarely argued that equitable estoppel does not apply here and may seek affirmance of that conclusion based on any contention or ground supported by the record.

In the alternative, if this Court applies its own articulation of the equitable estoppel standard (which generally predates *Arthur Andersen*), there are two separate grounds on which to affirm the decision below. The first is that Defendants have not alleged a sufficient relationship among the parties to put Plaintiffs on notice that, by agreeing to arbitrate with ACN, they would also consent to arbitrate with Defendants. To the contrary, as alleged in the Amended Complaint, Defendants deliberately (and successfully) concealed and misrepresented their relationship with ACN. Regardless Defendants have failed to show that Plaintiffs' claims are sufficiently intertwined with ACN's contracts to support application of equitable estoppel: Plaintiffs' claims do not arise under or challenge the terms of their contract with ACN and so Plaintiffs cannot be held to that contract here.

In addition, as the district court correctly held, Defendants have waived any asserted right to compel arbitration. Defendants strategically availed themselves of a federal forum for many months, taking full advantage of that forum to issue third-party subpoenas and to seek (and obtain) partial dismissal of some of the claims against them. Defendants were up front about this—they then bluntly announced that they would move to compel arbitration only if they were dissatisfied with the district court's disposition of their motion to dismiss. Federal courts do not allow parties to engage in such procedural gamesmanship, resorting to supposed arbitration rights only if district judges do not give them everything they want.

Finally, Defendants argue for the first time on appeal that only an arbitrator can decide their motion to compel arbitration. But this contention is diametrically opposed to Defendants' position in the district court and was thus knowingly, irrevocably waived: Defendants cannot invite the district court to decide issues, only to argue on appeal that the district court had no authority to make those decisions if they are displeased with the outcome. In any event, Defendants' new position also fails on the merits for two independent reasons. First, whether equitable estoppel compels Plaintiffs to arbitrate with Defendants is a question of contract formation that cannot be delegated to an arbitrator. And second, even if that were not the case, any such asserted delegation to an arbitrator would require clear and unmistakable evidence that Plaintiffs consented to arbitrate threshold questions with Defendants. Since no evidence supports that conclusion—either in the contracts themselves or in the Amended Complaint—it would offend bedrock principles of consent to require Plaintiffs to arbitrate anything (even arbitrability) with Defendants.

II. The district court also correctly rejected ACN's separate request to compel arbitration, which ACN advanced in a brief responding to a motion to compel compliance with a non-party subpoena for documents. Indeed, ACN identifies no court—anywhere—that has compelled arbitration of an entire dispute between parties to federal court litigation at the behest of a non-party to that litigation.

ACN's efforts to justify the unprecedented order it seeks come up short in several respects. *First*, ACN has failed to establish that the district court had jurisdiction over its petition to compel arbitration. The FAA requires an independent jurisdictional basis for such motions, determined by looking to the actual underlying controversy between the parties. That requirement is not satisfied here because the only actual case or controversy is between Plaintiffs and Defendants; simply put, this litigation does not present a case or controversy between Plaintiffs and ACN. *Second*, even if the district court had jurisdiction over ACN's petition, it correctly denied ACN's motion because arbitration is a matter of consent. ACN cannot rely on its agreement with Plaintiffs to force them against their will to arbitrate claims against Defendants (with whom they never consented to arbitrate anything). *Third*, ACN's motion was procedurally improper because ACN is not a party to the case and had no procedural authorization as a third-party subpoena recipient to file a motion to compel arbitration. *Finally*, ACN's equitable estoppel arguments—advanced for the first time on appeal—are both forfeited and meritless. Equitable estoppel is a doctrine applicable only to non-signatories, not non-parties, and it is bounded by well-established rules. ACN offers no basis for reimagining it as a free-floating warrant to compel arbitration based on some kind of global assessment of what seems fair, particularly given that ACN itself seeks to invoke equities that rest upon a substantial mischaracterization of this case (and its own strategic choices).

ARGUMENT

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

A. Defendants cannot invoke ACN's arbitration agreements through equitable estoppel

Defendants were not signatories to—or even mentioned in—the contracts containing the arbitration clause they seek to invoke. And they have abandoned their contention, rejected below, that they can invoke those contracts as agents of ACN (perhaps because discovery confirmed that Defendants expressly disavowed any agency relationship with ACN). *See* A532-33; D. Ct. ECF No. 249 at 2. As a result, Defendants now rely exclusively on the doctrine of equitable estoppel.

Equitable estoppel may apply where a defendant seeks to compel plaintiffs to arbitrate based on a contract between the plaintiffs and a third party. It operates, however, only in limited circumstances that "demonstrate that the plaintiffs intended to arbitrate [the] dispute" with the defendants when they entered into their arbitration agreement with the third party. *Ross v. Am. Express Co.*, 547 F.3d 137, 146 (2d Cir. 2008).

Here, the district court applied a federal common law standard of equitable estoppel—as articulated in Second Circuit precedent—in holding that Defendants were not entitled to compel arbitration based on Plaintiffs' contract with ACN. In so doing, however, the district court itself noted an unbriefed argument that North

Carolina state law instead should govern. *See* A527-532 & n.4. In fact, the district court's observation was correct—North Carolina law *does* provide the applicable standard under binding Supreme Court precedent. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009). And the district court's decision should be affirmed because Plaintiffs prevail under North Carolina law. In the alternative, it should be affirmed because Plaintiffs would also prevail under the federal common law standard in any event.

1. Defendants are not entitled to equitable estoppel under state law

a. North Carolina allows equitable estoppel only when a suit seeks to enforce a contractual duty

In the district court, the question whether Defendants may rely on equitable estoppel to compel arbitration was briefed and decided as a question of federal common law. *See* A527-532 & n.4. As the district court correctly recognized, however, the Supreme Court held in *Arthur Andersen LLP v. Carlisle* that equitable estoppel analysis is governed not by federal common law, but by state law. *See* A527 n.4 (citing 556 U.S. at 630-31). Even though the district court identified a binding Supreme Court precedent that forecloses their arguments, Defendants have adhered to their original account of the applicable legal standard, which fails to take *Arthur Andersen* into account. This Court should not follow Defendants' lead. It should instead apply state law, as required by Supreme Court precedent.

The "relevant state contract law" for purposes of equitable estoppel is the state law that governs the contract containing the arbitration clause. *Arthur Andersen*, 556 U.S. at 632. Because the ACN contracts include a North Carolina choice-of-law provision, North Carolina law clearly applies. *See* A436 ¶ 18; A439 ¶ 18; A442 ¶ 17; *see also Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996). And in North Carolina, equitable estoppel is appropriate only if the plaintiff "has asserted claims in the underlying suit that, either literally or obliquely, assert a breach of duty created by the contract containing the arbitration clause." *Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635, 638 (N.C. Ct. App. 2018); *accord Carter v. TD Ameritrade Holding Corp.*, 721 S.E.2d 256, 263 (N.C. Ct. App. 2012). In other words, it is not enough in North Carolina for a defendant to show that the contract "provides part of the factual foundation" for the complaint. *Smith Jamison Constr.*, 811 S.E.2d at 639. Unless a plaintiff is "attempting to assert claims against [a nonsignatory defendant] that are premised upon any contractual and fiduciary duties created by the contract containing the arbitration clause," equitable estoppel does not apply. *Id.* at 640.

This straightforward principle resolves this case. Plaintiffs assert no claims against Defendants sounding in breach of contract or premised on breach of a duty created by their contract with ACN. Rather, Plaintiffs' claims "are dependent upon legal duties imposed by [state] statutory or common law rather than contract law." *Smith Jamison Constr.*, 811 S.E.2d at 640. Under North Carolina law, that simple

fact is determinative. The district court's denial of Defendants' motion to compel arbitration should therefore be affirmed on this ground.

b. Plaintiffs' state law authority is properly before this Court.

While Defendants may object to any consideration of North Carolina law because Plaintiffs "did not advance this argument in the [d]istrict [c]ourt," Plaintiffs may still "assert[] it as a basis on which to affirm that court's judgment." *Schweiker v. Hogan*, 457 U.S. 569, 585 (1982). That is so because Plaintiffs are appellees seeking affirmance of the decision below, and the "general rule [is] that the appellee may seek to sustain a judgment on any grounds with support in the record." *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994); *see also United States v. Morgan*, 380 F.3d 698, 701 n.2 (2d Cir. 2004) ("[W]e are entitled to affirm the judgment of the district court on any ground with support in the record, even one raised for the first time on appeal."). Moreover, this argument is no great departure from the dispute below, since it merely identifies the controlling law after the district court noted the issue on its own initiative.

To be sure, Defendants and ACN also advance arguments on appeal that were not made below, and we identify doctrines of waiver and forfeiture that preclude those arguments. *See infra*, 46-48, 75. But as appellants seeking to overturn the district court's judgments, Defendants are differently situated with respect to the law of waiver and forfeiture. *Compare* 16AA Wright & Miller, Fed. Prac. & Proc. Juris.

§ 3974.1 (4th ed. 2020) ("Unless an appellant's argument was made in the district court, it likely will not be considered for the first time on appeal.") *with id.* § 3974.2 ("The appellee is also free to present arguments in support of the judgment below by any reasoning from facts disclosed in the record, even though that reasoning was rejected by the court below or was not even advanced below by the appellee."). That is particularly true here because Defendants affirmatively waived the new argument they now seek to raise on appeal—and because they now seek to raise entirely new bases for compelling arbitration on appeal, as compared to identifying new contentions in support of bases advanced below. *See infra*, 46-48.

2. Defendants are not entitled to equitable estoppel under this Court's precedents in any event

In the alternative, the district court's decision should be affirmed under Second Circuit cases governing equitable estoppel. Under this Court's federal common law standard, Defendants must show: (1) that there was a sufficiently close relationship between them and ACN that Plaintiffs would have expected Defendants to be able to arbitrate in ACN's stead; and (2) that the claims against Defendants are *intertwined* with the underlying contract. *See Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127 (2d Cir. 2010); Defts' Br. at 17 (agreeing both are required). These two requirements give force to "the black letter rule that the obligation to arbitrate depends on consent." *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2d Cir. 2008).

a. Defendants lacked a sufficient relationship with ACN

Equitable estoppel cannot apply unless the "relationship among the parties . . . justifies a conclusion that" the party resisting arbitration assumed "an obligation to arbitrate" with the non-signatory seeking to compel arbitration. *Sokol Holdings*, 542 F.3d at 359. The district court concluded that this requirement was not satisfied here because Defendants "did not reveal themselves as financially and professionally tied [to ACN], much less associated in a way that would cause Plaintiffs reasonably to predict that their contractual obligations to ACN would create the same obligations with Defendants." A531.

As an initial matter, the district court accurately identified the crucial facts alleged in the Amended Complaint that make it clear why Defendants fail this test: Defendants intentionally obscured their contractual and financial ties to ACN. *See supra*, 9-10; A271-79. Indeed, the success of Defendants' moneymaking scheme depended on making sure their audience did *not* understand that they had business relationships with ACN. Defendants' deception on this point is one of the central pillars of the Amended Complaint. A215, 258, 324-25. As the district court explained, Defendants' argument relies on the factual premise "that Plaintiffs knew that ACN and Defendants were aligned," but "the Amended Complaint alleges the opposite." A531. In that crucial respect, Defendants' position on equitable estoppel "turns the Amended Complaint on its head." A531.

The district court was right. The touchstone of the test is how Plaintiffs would have understood the relationship between the signatory to the arbitration agreement (ACN) and the non-signatories seeking to enforce it (Defendants). *See Ross*, 547 F.3d at 145-46 (test focuses on the "knowledge and consent" of the party resisting arbitration and what was "reasonably seen" and "predictabl[e]" to them). In other words, Defendants must show that their relationship to ACN *as it was presented to Plaintiffs* was sufficient to put Plaintiffs on notice that a deal with ACN was functionally a deal with them. Defendants concede this point. *See* Defts' Br. at 18 (acknowledging that the test considers "the information available to [the] plaintiff").

Defendants cannot prevail under this standard because Defendants repeatedly misled Plaintiffs in this respect. There is no allegation in the Amended Complaint that could possibly support an inference that Plaintiffs viewed ACN and Defendants as interchangeable: they signed a contract with ACN, the terms of which specified that it was only with ACN, and they had absolutely no reason to believe it was somehow also with Defendants, who held themselves out as financially independent of ACN.

Precedent confirms the point. When this Court has found a relationship supporting equitable estoppel, "the *plaintiffs themselves* treated the signatory and non-signatory corporate affiliates as at least somewhat interchangeable with respect to the plaintiffs' rights and responsibilities under the relevant contract." *Medidata*

Sols., Inc. v. Veeva Sys., Inc., 748 F. App'x 363, 366-67 (2d Cir. 2018) (emphasis in original). Accordingly, nearly all of this Court's cases have "involv[ed] affiliated corporate entities" or non-signatories who were "explicitly named . . . as having certain tasks to perform under the contract." *Ross*, 547 F.3d at 145. There is nothing like that here. There is no corporate or common-ownership relationship between any of the Defendants and ACN, and Defendants do not contest the district court's conclusion that they were never agents acting under ACN's control and direction. *See* A533. And Defendants misrepresented even the arm's-length dealings they did have with ACN.

These facts are decisive. This Court has refused to compel arbitration where the relationship at issue would have been unknown to plaintiffs when they entered the contract. In *Sokol Holdings*, for example, this Court refused to compel arbitration when plaintiffs entered into an agreement (with an arbitration clause) to buy a business owner's shares, then later sued a non-signatory that allegedly interfered with the sale to take the shares itself. 542 F.3d at 357. Although the signatory seller and the non-signatory purchaser entered into a "close corporate and operational relationship" while interfering with the deal, the plaintiffs in *Sokol Holdings* did not know about that relationship when they signed the agreement. *Id.* at 362. Similarly, in *Ross*, plaintiffs signed credit card agreements (including arbitration clauses) with various issuing banks, then later sued American Express, alleging that Amex had

conspired with the banks and other credit card companies to set artificially high fees. 547 F.3d at 139-41. This Court again refused to compel arbitration, explaining that Amex's "only relation with respect to the cardholder agreements was as a third party allegedly attempting to subvert the integrity of the cardholder agreements." *Id.* at 146.[7]

Defendants' arguments to the contrary lack merit. First, Defendants rely on *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115. But that case only underscores equitable estoppel's central focus on foreseeability to the plaintiff. In *Ragone*, the employment contract at issue did not explicitly mention the non-signatory. 595 F.3d at 127. But the plaintiff "knew from the date of her employment"—that is, when the contract was signed—that the non-signatory would function as her "co-employer" with the company that hired her. *Id.* at 127-28. She also knew that the non-signatory's personnel would supervise her "in the ordinary course of her daily duties" under the contract. *Id.* Thus, there was a clear understanding that the non-signatory would be effectively "interchangeable" with

[7] The equitable roots of the doctrine underscore why Defendants' deception is inconsistent with estoppel here. It is a foundational principle of equity jurisprudence that parties should not reap the benefits of their own malfeasance. "[T]he equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." *PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) (quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 247 (1848)); *accord Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 241 (1933) ("He who comes into equity must come with clean hands.").

the employer during the performance of her contract. *See Medidata Sols.*, 748 F. App'x at 366-67. In this way, *Ragone* is "consistent with the black letter rule that the obligation to arbitrate depends on consent," and "simply extend[ed] its contours somewhat by establishing that the consent need not always be expressed in a formal contract." *See Sokol Holdings*, 542 F.3d at 361-62.[8]

Second, Defendants argue that Plaintiffs somehow should have understood that Defendants were speaking "on behalf of ACN" because many of their statements reached Plaintiffs through "ACN-branded events, DVDs, and magazines." Defts' Br. 22-23. But the fact that ACN decided to include some of Defendants' endorsements in its materials hardly put Plaintiffs on notice that Defendants and ACN were, behind the scenes, so closely related that they were interchangeable counterparties to Plaintiffs' contract with ACN. This is especially true given that Defendants themselves went to great lengths to repeatedly insist upon their own independence from ACN, and given that the language of the contract between Plaintiffs and ACN

[8] The district court cases that Defendants cite are similarly distinguishable. *See Bankers Conseco Life Ins. Co. v. Feuer*, No. 16 Civ. 7646, 2018 WL 1353279, at *7 (S.D.N.Y. Mar. 15, 2018) (non-signatories were four agents of the signatory company and another company they simultaneously represented); *Cooper v. Ruane Cunniff & Goldfarb Inc.*, No. 16 Civ. 1900, 2017 WL 3524682, at *7 (S.D.N.Y. Aug. 15, 2017) (non-signatory and signatory were "co-fiduciaries" of the ERISA plan at issue); *Fensterstock v. Educ. Fin. Partners*, No. 08 Civ. 3622, 2012 WL 3930647, at *5 (S.D.N.Y. Aug. 30, 2012) (non-signatory "served as [the signatory's] agent for the purposes of servicing [the plaintiff's] loan," and plaintiff "worked with" the non-signatory throughout his loan repayment).

expressly limited the agreement to just the contracting parties. A436 ¶¶ 3, 16; A439 ¶¶ 3, 16; A442 ¶¶ 3, 17. At the very least, Defendants' argument requires a giant inferential leap in Defendants' favor from the facts alleged in the Amended Complaint. And at this stage of the proceedings, the Court must resolve all reasonable inferences in favor of the non-movant. *See, e.g.*, *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017); *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003).

Finally, even taking the facts exactly as Defendants characterize them (prior to the completion of discovery and without a single document from ACN), Defendants' argument still fails as a matter of law. Defendants have conceded the lack of any agency relationship with ACN by not challenging the district court's decision against them on that point. *See* A532-33. So even on their own account of the facts, any statements they made "on behalf of" ACN would have been made in a transactional, arm's-length capacity: as a provider of discrete services to ACN, not as an agent or corporate affiliate of ACN. *See, e.g.*, A272 ("[H]e was paid lavishly for each appearance—at times millions of dollars for delivering a single speech."). This Court has never found a sufficient relationship for equitable estoppel purposes where the signatory and non-signatory had engaged only in an arm's-length transaction. *See Ross*, 547 F.3d at 144-46 (surveying the cases); *Medidata Sols.*, 748 F. App'x at 366-67 (focusing on whether the signatory and non-signatory were "at

least somewhat interchangeable with respect to the plaintiffs' rights and responsibilities under the relevant contract").[9]

b. The claims against Defendants are not intertwined with ACN's contract

Defendants' motion to compel arbitration also lacks merit because Plaintiffs' claims are not intertwined with the agreements containing the arbitration clause. While the district court concluded otherwise, it gave the issue only brief consideration in light of its separate conclusion that the necessary relationship for equitable estoppel was lacking. A528. And, in fact, the lack of intertwinedness provides an additional basis on which the district court can be affirmed. While Defendants' fraud may have induced plaintiffs to enter into a relationship with ACN, the illegality of Defendants' conduct did not in any way arise from the particular contract ACN had its IBOs sign—which simply set forth obligations that IBOs and ACN owed to one another, and did not assign any duties to third parties. *See* A436 ¶¶ 3, 13; A439 ¶¶ 3, 13; A442 ¶¶ 3, 13. Nor was Defendants' illegal conduct geared

[9] In *Ragone*, the fact that the signatory was, formally, "a client" of the non-signatory defendant was insufficient to establish the requisite relationship. 595 F.3d at 118. *Ragone* emphasized the additional, dispositive fact (absent here) that the plaintiff "kn[ew] that she would extensively treat with [the defendant's] personnel" when she signed her employment contract. *Id.* at 128. *Ragone* is the high-water mark of this Court's equitable estoppel precedents, and even on Defendants' own version of the facts it does not warrant the application of equitable estoppel here.

toward determining any of the terms of that agreement. Yet those are the only circumstances in which the Court has found intertwinedness.

Any intertwinedness found in this Court's prior cases has fallen into two categories. First, there are cases where the contract itself gave rise to the challenged conduct. Most such cases concerned claims that either required proving a breach of the relevant agreement, *see, e.g.*, *Sokol Holdings*, 542 F.3d at 359; *AstraOil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276, 281 (2d Cir. 2003), or otherwise involved "construing . . . provisions of" the contract, *Choctaw Generation Ltd. P'ship v. Am. Home Assur. Co.*, 271 F.3d 403, 406-07 (2d Cir. 2001). *Ragone*, in turn, found that workplace harassment claims were intertwined with a contract that "required [the plaintiff] to follow the instructions and directives" of the alleged harassers. 595 F.3d at 127. Those claims, too, arose out of the terms of the contract—the challenged behavior was "factually intertwined" with duties imposed by the agreement. *Id.* at 128.

A second line of cases involved suits in which the defendant was accused of tampering with the contract by causing illegal terms to be included in it. The claims found to be intertwined were price-fixing schemes that injected artificially inflated price terms *into* the contracts containing arbitration clauses. *See Ross*, 547 F.3d at 139, 146; *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 173, 176, 178 (2d Cir. 2004). In these cases, even if the alleged illegal conduct could be understood to have

preceded the formation the contract, it was nevertheless fundamentally "bound up with" and "linked textually to" the contract itself. *JLM Indus.*, 387 F.3d at 178 (quoting *Choctaw*, 271 F.3d at 407).

This case is not analogous. The duty Defendants breached in making fraudulent statements to Plaintiffs is imposed by common law and statutes, and it exists to protect the public at large from dishonest operators. Nothing about that illegality depends on construing any terms of any contract. And Plaintiffs do not allege that Defendants' fraud aimed to dictate or corrupt any terms of the IBO agreements. To the contrary, Plaintiffs have alleged that Defendants did not closely scrutinize ACN's business model. So long as they made their millions in a side deal with ACN, they did not care what transpired between ACN and Plaintiffs.

To be sure, Plaintiffs allege that Defendants' fraudulent statements induced them to go into business with ACN. *See* Defts' Br. at 18; *see also* ACN Br. at 29, 52-53. But this Court has never held that intertwinedness exists simply because the alleged illegal conduct affected the existence or non-existence of the agreement, even if the actual terms of the agreement are not implicated. Nor would it make any sense to extend the doctrine to cover these facts. As many courts have recognized, such claims are not intertwined with a contract in any way that would support estoppel. *See supra*, 24-26; *see also White v. Sunoco, Inc.*, 870 F.3d 257, 265 (3d Cir. 2017) (Florida and South Dakota law) (equitable estoppel did not apply where

the plaintiff's claims "do not rely on any terms in the [contract containing the arbitration clause]"); *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1132 (9th Cir. 2013) (California law) (equitable estoppel did not apply to fraudulent inducement claims because to hold otherwise would "erroneously equate[] . . . the existence of [a contract] with interrelatedness between [p]laintiffs' claims and the obligations" it imposes).

Defendants separately argue that the claims are intertwined because—in their understanding—the relief Plaintiffs seek is "recovery of funds they invested with ACN" and to "set aside their contract[]" with ACN. Defts' Br. at 18, 20; *accord* ACN Br. at 27-28, 52. That is simply incorrect. In terms of ACN, what is done is done. Plaintiffs seek no damages from them, and do not seek to undo their contract. It is true that some component of Plaintiffs' damages claims against Defendants could be *measured* by looking to the amount they were induced to pay ACN. But any recovery will come from Defendants and have nothing to do with unwinding any contract. The case Defendants hypothesize to support their position is not one that is before this Court.

3. Defendants' reliance on **Grigson** *is misplaced*

Unable to satisfy either the governing test (North Carolina) or the test applied below (federal common law), Defendants argue that the "ultimate question" is really "whether it is fair to extend" Plaintiffs' arbitration agreement with ACN. Defts' Br.

at 23 ("The linchpin for equitable estoppel is equity—fairness."). Yet abstract notions of fairness are no substitute for an actual legal standard, nor can they justify Defendants' attempt to circumvent "the basic principle that one does not give up one's right to court adjudication except by consent." *Sokol Holdings*, 542 F.3d at 361; *see also Holland v. Florida*, 560 U.S. 631, 649 (2010) ("[C]ourts of 'equity must be governed by rules and precedents no less than the courts of law.'"). And it would not be "fair" to extend ACN's contractual rights to Defendants, who prevented Plaintiffs from knowingly consenting to any such arrangement by deliberately concealing their extensive, profitable ties to ACN as part of a fraudulent scheme.

It is telling that in making this argument, Defendants rely so heavily on the Fifth Circuit's decision in *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000). *See* Defts' Br. 23-25. *Grigson*'s reasoning was squarely at odds with this Court's consent-focused approach to equitable estoppel, as the dissent in *Grigson* pointed out. *See* 210 F.3d at 537 (Dennis, J., dissenting) (arguing that the majority should have followed Second Circuit authority, which would have compelled a different result); *Sokol Holdings*, 542 F.3d at 361 (endorsing the reasoning of the *Grigson* dissent).[10] And the facts in *Grigson* differed markedly from

[10] In particular, this Court's precedents would not permit equitable estoppel on the sole basis that a non-signatory and a signatory engaged in "interdependent and concerted misconduct." *Compare Grigson*, 210 F.3d at 527 (stating that equitable

the facts here. In *Grigson*, the claims against the non-signatory defendant relied extensively on alleged violations of the contract with the signatory, violations that the non-signatories supposedly induced. 210 F.3d at 528-30. Here, Plaintiffs do not contend that ACN breached the IBO agreement, nor do they allege that Defendants violated any duties imposed by that agreement (or encouraged ACN to do so). That difference alone is dispositive. *See supra*, 24-26.

Moreover, *Grigson* is unpersuasive on its own terms—particularly because it pre-dated the Supreme Court's guidance in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). *Stolt-Nielsen* held that the "contractual nature of arbitration" includes allowing parties to "specify *with whom* they choose to arbitrate their disputes" and that lower courts "must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.* at 683-84. *Stolt-Nielsen* thus vindicated the logic of the *Grigson* dissent and this Court's own precedents.

Finally, Defendants rely on dicta in *Grigson* describing that litigation as an "attempt to bypass" an arbitration clause. Defts' Br. at 23-24 (quoting *Grigson*, 210 F3d at 530). But the facts *Grigson* described are not present here. In *Grigson*, the

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estoppel was permissible based solely on that basis), *and* Defts' Br at 26 n.2 (relying on this aspect of *Grigson*), *with Moss v. BMO Harris Bank, N.A.*, 24 F. Supp. 3d 281, 288 n.8 (E.D.N.Y. 2014) (Bianco, J.) (noting that this Court's consent-focused estoppel precedents are in tension with a "substantially interdependent and concerted misconduct" standard).

plaintiff sued the signatory for breach of contract in state court; voluntarily dismissed when the signatory moved to compel arbitration; and then filed a nearly identical lawsuit against non-signatories in federal court, alleging that the non-signatories had "caused" the same breaches of contract that were at issue in the abandoned state-court litigation. *Id.* at 530. Nothing even remotely similar occurred here. Plaintiffs do not contend that ACN violated the IBO agreement and do not seek any relief from ACN, nor have they ever done so previously. This lawsuit seeks to hold Defendants accountable for their own fraudulent conduct. As the district court emphasized: "[P]laintiffs are entitled to sue whomever they want; and they are not compelled to sue parties who . . . they don't want to sue." A555.

B. Defendants waived any right to compel arbitration

Separate from its equitable estoppel ruling, the district court concluded that Defendants waived any right to compel arbitration. This finding should also be affirmed.

After Plaintiffs filed suit, and despite full awareness of the arbitration clause on which they now seek to rely, Defendants chose to aggressively litigate to see what benefits they could obtain from the Article III forum. They twice moved to dismiss under the Federal Rules of Civil Procedure. A16, 18. The second time, they succeeded in obtaining full dismissal of Plaintiffs' federal claims on the merits. A399-424. And while in federal court, Defendants actively litigated procedural

issues—and availed themselves of intrusive discovery procedures that would have been unavailable in arbitration, serving numerous non-party subpoenas on plaintiffs' friends and family. SA59, 166. Only after the district court partly denied their motion to dismiss did Defendants seek an order requiring arbitration. Indeed, Defendants informed the district court while it was considering their motion to dismiss that they would move to compel arbitration only if it did not dismiss the case.

As the district court properly held, this gamesmanship resulted in waiver of any asserted right to compel arbitration. Courts assess waiver by weighing the resulting prejudice to the non-moving party against the moving party's justification (or lack thereof) for its delay. *See Kramer v. Hammond*, 943 F.2d 176, 179-80 (2d Cir. 1991). Three factors guide the analysis: "(1) the time elapsed from when litigation was commenced until the request for arbitration; (2) the amount of litigation to date, including motion practice and discovery; and (3) proof of prejudice." *La. Stadium & Exposition Dist.* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 626 F.3d 156, 159 (2d Cir. 2010). Those factors counsel in favor of affirmance here.

To start, significant time elapsed before Defendants filed their motion. Defendants did not request arbitration until July 2019—over eight months after this case began. *See Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 26 (2d Cir. 1995) (finding waiver after a delay of seven months); *PPG Indus.,*

Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 108 (2d Cir. 1997) (five months). They waited that long despite having mentioned the arbitration clause in their very first sentence of argument in the district court. *See* SA58. And by then, a considerable amount of litigation had occurred, much of it at Defendants' behest. The parties had fully briefed, and the district court had resolved, Plaintiffs' motion to proceed pseudonymously, Defendants' motion to stay discovery, and Defendants' (second) Rule 12(b)(6) motion, which sought dismissal of the very claims Defendants now contend should always have been in arbitration. *See La. Stadium*, 626 F.3d at 159 (finding waiver after eleven months of litigation, including briefing of three non-dispositive motions and partial briefing of a Rule 12(c) motion). All this occurred while Defendants were "fully aware of [their] alleged right to compel arbitration." *See Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993)

This delay, moreover, was unabashedly tactical. Defendants first asked the district court to dismiss Plaintiffs' claims. They then waited just long enough for the district court to rule on that request—and to dismiss Plaintiffs' federal claims—before immediately insisting that the district court had no role to play and the whole case had to be sent to arbitration. Defendants were notably candid about this tactic in their letter informing Plaintiffs that they planned an about-face: There, Defendants said they would move to compel arbitration "in the event the Court denies the pending motion to dismiss." SA16 (emphasis added). As the district court explained,

once Defendants "extracted what they [could] from the judicial proceedings, they [sought] to move to a different forum." A536.

This "heads-I-win, tails-we-arbitrate" position is precisely the kind of prejudicial tactic that justifies denying a motion to compel arbitration. "[A] litigant is not entitled to use arbitration as a means of aborting a suit that did not proceed as planned in the District Court." *La. Stadium*, 626 F.3d at 161; *see Hammond*, 943 F.2d at 179; *PPG Indus.*, 128 F.3d at 107. Here, the district court—which was already well acquainted with the parties—explained that Defendants' use of this gambit weighed heavily in its calculus. Had defendants not remained silent about their supposed right to arbitrate "over many months of litigation," the district court "would have directed Defendants to file the motion to compel arbitration first and decided the appropriate forum before making any decision on the merits." A536.

Yet there is more. Plaintiffs suffered further prejudice because Defendants used their sojourn in the Article III system to deploy invasive discovery on Plaintiffs' friends and family that would have been unavailable in arbitration. *See Cotton*, 4 F.3d at 179 (noting that "[s]ufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in discovery procedures not available in arbitration"). And that is to say nothing of the additional delay and expense that Plaintiffs incurred from briefing procedural issues and the motion to dismiss, and in amending their complaint. *See Hammond*, 943 F.2d at 179 (prejudice "can be found

when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense").

In assessing this record, the Court may consider Defendants' lack of any sound justification for their delay. Defendants now claim they needed "guidance from the court about how to proceed" in light of Plaintiffs' pseudonymity. *See* Defts' Br. 31. But they waited eight months to seek that guidance, *see* SA14, even as they told the district court they did *not* intend to move to compel arbitration, *see* SA58-59. And they did not mention any such need for guidance below when asked to identify what prejudice they would suffer from allowing Plaintiffs to proceed under pseudonyms. *See* D. Ct. ECF No. 46 at 18-20. Their new explanation is obviously pretextual: only have-it-both-ways tactics can explain the delay here. *See Leadertex, Inc.*, 67 F.3d at 26 (affirming finding of waiver where movant's "proffered excuse for the delay . . . is somewhat disingenuous," such that the court was "firmly persuaded that [the movant's] actions were inconsistent with its right to compel arbitration"); *La. Stadium*, 626 F.3d at 160-61 (rejecting movant's argument against waiver as "unsympathetic" after assessing in detail its proffered excuses for delay and rejecting each of them as insufficient).

Finally, it matters that Defendants are asserting an entitlement to invoke an arbitration clause to which they were not a party. The fact that Defendants delayed in seeking an equitable remedy—and did so without any valid justification, but with

prejudice to Plaintiffs and disrespect to the Article III forum—weighs in favor of affirmance. *See, e.g.*, *Parker v. Dacres*, 130 U.S. 43, 50 (1889) (noting "the principle upon which courts of equity uniformly proceed, independently of any statute of limitations, of refusing relief to those who unreasonably delay to invoke their aid").

In response to all this, Defendants cite cases from this Court and others, none of which involved a non-signatory, where claims of waiver were rejected on materially different facts than those presented here. *See* Defts' Br. at 28-29. But "[t]he waiver determination necessarily depends upon the facts of the particular case and is not susceptible to bright line rules." *Cotton*, 4 F.3d at 179; *accord Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002). Defendants' arguments are plainly unresponsive to the record of prejudicial, tactical delay here. *See Thyssen*, 310 F.3d at 105 ("The key to a waiver analysis is prejudice.").

C. The district court was correct to resolve these issues itself

For the reasons given above, the district court properly denied Defendants' motion to compel arbitration. On appeal, Defendants try a new argument: that an arbitrator—not the district court—should have decided whether they may compel arbitration of Plaintiffs' claims through equitable estoppel in the first instance. This position, however, is both waived and meritless.

1. Defendants waived their new arbitrability position by arguing the opposite to the district court

Defendants argue for the first time on appeal that they were entitled to have an arbitrator, not the district court, decide whether Plaintiffs' claims against them should be arbitrated. This is a 180-degree turnaround from the position Defendants took below. It was Defendants themselves who asked the district court to determine whether the remaining state-law claims against them must be arbitrated. The first sentence of their brief below asked for "an order compelling Plaintiffs to arbitrate the state law claims that survived Defendants' motion to dismiss." SA29. And their briefing concluded by asking the district court "to order Plaintiffs to arbitrate their state law claims with Defendants." SA92-93; *see also, e.g.*, SA36. As the record demonstrates, Defendants began challenging the district court's authority to decide these issues only after the district court decided the issues against them.

In briefing their motion for a stay of the proceedings below, Defendants asserted that they made this arbitrability argument in the district court, which somehow overlooked it. *See* ECF No. 120 at 2 (citing SA37). That is incorrect. To be sure, the lone page of briefing that Defendants cited to support this claim mentioned the presence of a delegation provision. But Defendants did not argue that the delegation provision applied to any of the issues before the court, nor did they advance any argument resembling the one they have raised on appeal. *See* SA37. If anything, their discussion of the delegation provision below confirms their

awareness that a delegation argument was potentially available to them—and highlights their choice to instead ask the district court to decide these questions instead.

Because Defendants made a strategic choice not to invoke the delegation provision in the district court, their new arbitrability position is not available to them on appeal. This Court "will infer a waiver . . . where the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *Mooney v. City of New York*, 219 F.3d 123, 131 (2d Cir. 2000). The effect of such knowing and intentional waivers "is that there was no error" in the district court. *Am. Home Assurance Co. v. A.P. MollerMaersk A/S*, 609 F. App'x 662, 664 (2d Cir. 2015). Applied here, these precedents demonstrate that Defendants irrevocably waived their arbitrability arguments by asking the district court to decide the very issues that they now say must be decided solely by an arbitrator. *See Stern v. Marshall*, 564 U.S. 462, 482 (2011) ("Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad."); *Royce v. Michael R. Needle P.C.*, 950 F.3d 939, 950 (7th Cir. 2020) (by asking the district court to resolve a potentially arbitrable issue, appellant effected a "waiver of the right to arbitrate" that "slams the door shut on any assertion that he can invoke it" for the first time on appeal).

Even if Defendants' failure to make this argument below could be understood as an inadvertent forfeiture rather than a knowing and intentional waiver, the result would be the same. *See Adams v. Suozzi*, 433 F.3d 220, 222 n.1 (2d Cir. 2005) (declining to consider an argument not raised below in support of a motion to compel arbitration); *see also Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017). Defendants lack any credible justification for their failure to make these arguments to the district court, which is reason enough to hold a party to a forfeiture. *See Patterson v. Balsamico*, 440 F.3d 104, 112-13 (2d Cir. 2006); *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005). That remains true in the arbitration context. *See Adams*, 433 F.3d at 222 n.1. Defendants therefore cannot pursue their arbitrability theory for the very first time on appeal.

2. Defendants' new arbitrability position is meritless

Regardless, Defendants' arbitrability arguments lack merit. Defendants assert that the issues implicated by their motion to compel arbitration are "gateway questions" concerning the broader dispute's "arbitrability," and that they are entitled to have any such questions that arise between them and Plaintiffs referred to an arbitrator. In making this argument, Defendants rely on a delegation provision in the contract between Plaintiffs and ACN. But this argument rests on two errors: first, the issue here goes to contract formation and cannot be delegated; and second,

Defendants come nowhere close to showing that Plaintiffs consented to arbitrate arbitrability with them. Each error independently forecloses Defendants' position.

a. Equitable estoppel is a non-delegable question of contract formation

First and foremost, Defendants' argument fails because the equitable estoppel inquiry necessarily involves a question of contract formation. And "parties may not delegate to the arbitrator the fundamental question of whether they formed the agreement to arbitrate in the first place." *Doctor's Assocs. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) (discussing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-301 (2010)).

Equitable estoppel is the only ground on which Defendants purport to have any agreement with Plaintiffs. And this Court's cases confirm that whether equitable estoppel applies is a question of contract formation. That is true in a decidedly literal sense. After all, a finding of equitable estoppel is premised on the conclusion that "an agreement implied in fact" exists between the parties, *Sokol Holdings*, 542 F.3d at 361 (quoting *Grigson*, 210 F.3d at 533 (Dennis, J., dissenting)), while the absence of equitable estoppel means that "the requisite contractual basis for arbitration does not exist," *Ross*, 547 F.3d at 143.

Because equitable estoppel goes to the threshold question whether a contract has been formed between two parties, it cannot be delegated to an arbitrator to decide. *Doctor's Assocs.*, 934 F.3d at 251; *Meena Enters. v. Mail Boxes Etc.*, No. 12

Civ. 1360, 2012 WL 4863695, at *3 n.4 (D. Md. Oct. 11, 2012) ("[T]hreshold issues of contract formation—including equitable estoppel—are properly subject to judicial determination."). As the Eleventh Circuit recently asked in an opinion by Judge O'Scannlain, "[H]ow does one go about delegating the question of equitable estoppel? By definition, there is no contract, which is, after all, why one of the parties is demanding equitable estoppel." *Lavigne v. Herbalife, Ltd.*, 967 F.3d 1110, 1120 n.7 (11th Cir. 2020).

In fact, *Lavigne* asked that question in a case just like this. There, the plaintiffs were independent business owners ("distributors") who—like Plaintiffs here—lost money after participating in a multi-level marketing arrangement ("direct sales network") offered by a company called Herbalife. *Id.* at 1113-14. Those plaintiffs sued third parties who—just like Defendants here—allegedly had made "misleading and fraudulent income claims" to induce them to pay money to Herbalife. *Id.* at 1115. The defendants tried to invoke Herbalife's arbitration provision, which incorporated the same AAA rules at issue here, even though they—just like Defendants here—were not signatories. *Id.* at 1115-16. The Eleventh Circuit refused to compel arbitration. *Id.* at 1117-20. It explained that the FAA "requires a court to send threshold questions of arbitrability to an arbitrator only when the parties have agreed to do so," and absent a written contract between the plaintiffs and the non-signatory defendants, the plaintiffs "ha[d] not agreed to anything with" defendants. *Id.* at 1118.

Defendants resist that interpretation, arguing that the Second Circuit has treated "the question whether nonsignatories . . . may enforce an arbitration agreement" as a "question of arbitrability" that can be delegated to an arbitrator. Defts' Br. at 14. To support this claim, Defendants cite *Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208-11 (2d Cir. 2005).[11] But *Contec* held only that the question of whether already-established contractual rights had been "validly assigned" from a signatory to its corporate successor was a matter of "*continued* 'existence, scope, or validity'" that could be delegated to an arbitrator. 398 F.3d at 210 (emphasis added). As other courts have correctly observed, *Contec* did not address whether a claim of equitable estoppel *not* based on an assignment of already-established contractual rights is a question of arbitrability similarly delegable to an arbitrator. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 986 (C.D. Cal. 2012) ("*Contec* does not support the broad proposition that in the face of a delegation provision, the Court should defer to the arbitrator entirely and make no inquiry into

[11] Defendants also cite *Thai-Lao Lignite (Thailand) Co. Ltd. v. Government of Laos*, 492 F. App'x 150 (2d Cir. 2012), as a case where a "third-party enforcement issue" was arbitrated. Defts' Br. at 14-15. But there, the question was whether an arbitrator had properly exercised jurisdiction over a non-signatory "third-party beneficiar[y]," where the third party had arbitrated alongside the signatory and its "presence in the arbitration was not shown to disadvantage the [party opposing arbitration] in any way." 492 F. App'x at 151-52.

whether a non-signatory may pursuant to equitable estoppel enforce an agreement to arbitrate against a signatory.").[12]

b. Even if equitable estoppel is delegable, Plaintiffs did not consent to arbitrate arbitrability with Defendants

i. Defendants have not shown a clear and unmistakable agreement with Plaintiffs to arbitrate threshold questions

Alternatively, even if equitable estoppel could be delegated under certain circumstances, Defendants have not shown that those circumstances exist here. In seeking to make that showing, Defendants rest on a single premise: that the law sets a "lower bar[]" to establish an agreement to arbitrate gateway questions of arbitrability than it does to establish an agreement to arbitrate. Defts' Br. at 15; *see also id.* (arguing a nonsignatory can arbitrate arbitrability even if it has "a markedly weaker relationship than necessary . . . to actually force arbitration of the underlying dispute"). But this premise gets things exactly backwards. It is hornbook law under the FAA that establishing an agreement to arbitrate arbitrability under the FAA requires *more* exacting proof—not *less* proof—than other types of arbitration agreements.

[12] If anything, *Contec* actually underscores the point that contract formation is an essential prerequisite before any issues can be delegated to an arbitrator. As discussed at greater length below, before considering whether the assignment issue was delegable, *Contec* conducted a separate analysis to ensure there was sufficient agreement between the parties. *See* 398 F.3d at 209.

"Under the FAA, threshold questions of arbitrability presumptively should be resolved by the court and not referred to the arbitrator." *Doctor's Assocs.*, 934 F.3d at 250. Contrary to Defendants' position, there is a robust presumption against arbitrating arbitrability, which can be overcome only where "the parties 'clearly and unmistakably' agree to arbitrate threshold questions." *Id.* at 251; *accord Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' . . . ." *First Options*, 514 U.S. at 944-45. Ambiguous or equivocal consent to arbitrate the first question (who decides) is never sufficient under the FAA to delegate issues of arbitrability.

For essentially the same reasons that Defendants have failed to show that Plaintiffs agreed to arbitrate the merits of this case with them, *see supra*, 23-40, Defendants have also failed to show a clear and unmistakable agreement by Plaintiffs to arbitrate gateway issues of arbitrability.

In their attempt to overcome these principles, Defendants rely on the terms of Plaintiffs' contracts with ACN. *See* Defts' Br. at 14. Principally, they rely on a provision in the arbitration clause that incorporates by reference the AAA's

Commercial Rules of Arbitration, which provide that an arbitrator has "the power to rule on his or her own jurisdiction." *Id.* at 13 (quoting AAA Rule 7(a)). Defendants contend this operates as a "delegation provision," *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010), and cite it as proof of a clear and unambiguous agreement by Plaintiffs to arbitrate arbitrability with them.

This argument does not succeed. The delegation provision appears in a bilateral contract between Plaintiffs and ACN. It addresses who should resolve disputes that arise between the signatories to the contract (namely, Plaintiffs and ACN). This provision, without more, cannot possibly be taken as proof that Plaintiffs (or any other signatory) intended to arbitrate arbitrability with strangers to the contract—much less that any such intent was clear and unmistakable. *See Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11, 12-13 (2d Cir. 2012); *Lavigne*, 967 F.3d at 1118; *Kramer*, 705 F.3d at 1127. Indeed, the agreement between Plaintiffs and ACN expressly states, "In the event of a dispute *between me and ACN* . . . it is agreed that such disputes shall be exclusively resolved through binding arbitration [under the AAA rules]." A435 ¶ 16 (emphasis added); A439 ¶ 16; *see also* A442 ¶ 17. Given this limitation, it makes no sense to read the delegation provision as clear and unmistakable proof that Plaintiffs—in signing the contract—agreed to arbitrate arbitrability (or anything else) with Defendants.

This Court has already refused to enforce a delegation clause on a similar basis in *Republic of Iraq*. There, two parties agreed that disputes related to their contract must be "referred by either Party" for arbitration under arbitral rules that included language delegating questions of arbitrability to the arbitrator. 472 F. App'x at 12-13. A non-party to the contract sought to invoke the arbitration clause, including its delegation provision. *Id.* at 12. This Court held that the non-signatory could not do so, since there was no "clear and unmistakable evidence that the particular question of arbitrability at issue here—whether [the non-party] may invoke the arbitration clause as a third-party beneficiary of the contract—should be decided by arbitrators." *Id.* at 13. The Court explained: "Where, as here, the arbitration clause does not clearly vest any right to invoke arbitration in a non-party . . . , *a fortiori*, it does not afford [the non-party] the right to have arbitrators rather than a court determine the arbitrability of its dispute." *Id.*

The Ninth Circuit reached the same conclusion in a case materially indistinguishable from this one. In *Kramer*, the defendant—a non-signatory to an arbitration agreement between plaintiff car buyers and third-party car dealerships—sought to compel arbitration of the question whether it was entitled to equitable estoppel. 705 F.3d at 1125-26. Much like here, the arbitration clause by its terms applied only to claims between the signatories. *Id.* at 1127. The Ninth Circuit therefore declined to send the equitable estoppel issue to an arbitrator, even though

the plaintiffs' contract elsewhere included a delegation provision, because "Plaintiffs only agreed to arbitrate arbitrability—or any other dispute—with the [other signatories]." *Id.* at 1128. As the Ninth Circuit explained, "[i]n the absence of a disagreement between Plaintiffs and the [other signatories], the agreement to arbitrate arbitrability does not apply." *Id.*

ii. Contec does not support Defendants' position

Defendants again rely heavily on *Contec Corp. v. Remote Solution*. This time, they cite it for the supposed proposition that the Second Circuit applies a "markedly weaker" standard than the standard equitable estoppel test to determine when a non-signatory may enforce a delegation clause. Defts' Br. at 15. Here, too, Defendants misread *Contec*, which simply illustrates the principle set forth above: enforcement of a delegation clause by a non-signatory requires clear and unmistakable evidence of consent to arbitrate with the non-signatory, and that evidence must be more than the mere existence of a delegation provision agreed to by the signatories. In other words, not only does *Contec* require there to be evidence of an agreement to arbitrate *with the non-signatory*, but it confirms that any attempt to invoke a delegation provision requires that agreement to be clear and unmistakable.[13]

[13] *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), on which Defendants also rely, further underscores the point. Applying *Contec*, this Court in *Republic of Ecuador* compelled arbitration of arbitrability issues only after

The facts of *Contec* bear this out. In that case, Contec L.P. had entered into an arbitration agreement with Remote Solution. This agreement included a delegation provision. Contec L.P. subsequently went through changes in corporate form, while retaining the same owner, address, and name ("Contec"). In one of its successor forms, Contec then sought to enforce Contect L.P.'s arbitration agreement with Remote Solution—and, in so doing, described the question whether the assignment of rights was valid as a question of arbitrability for the arbitrator to decide.

This Court agreed that this question was appropriately one for the arbitrator to decide. But at the same time, the Court emphasized "that just because a signatory has agreed to arbitrate issues of arbitrability with another party does not mean that it must arbitrate with any non-signatory." *Contec,* 398 F.3d at 209. The Court then explained that more is needed to satisfy the "threshold determination" required by *First Options*, 514 U.S. at 944-45—in other words, to provide "'clea[r] and unmistakabl[e]' evidence" of an agreement between the parties. *Id.* at 944 (alterations in original). *Contec* suggested that the "factors laid out in" this Court's equitable estoppel cases could provide a "useful benchmark" for how a non-signatory might make that showing. 398 F.3d at 209.

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confirming that *both* parties had manifested "clear and unmistakable" consent to arbitrate questions of arbitrability with one another. *Id.* at 394-95.

In its analysis, however, *Contec* relied on facts going well beyond those necessary to establish equitable estoppel. In particular, it considered three factors, which combined to "demonstrate that a sufficient relationship existed" under *First Options*. *Id.* Although one factor was Remote Solution's status as a signatory, that was not enough. *Id.* The Court also relied on (1) the "undisputed relationship between each corporate form of Contec and Remote Solution,"; and (2) the fact that the parties "apparently continued to conduct themselves as subject to the [agreement] regardless of change in corporate form." *Id.* In other words, it was essential to the Court's decision that both Remote Solution and the non-signatory successor form of Contec manifested—through their conduct—clear consent to be bound by the delegation provision.[14] *Cf. First Options*, 514 U.S. at 946 (also looking to the conduct of the parties to assess whether they "clearly agreed" to arbitrate arbitrability).

The facts here are nothing like those in *Contec*. Defendants have no relationship with Plaintiffs, apart from having defrauded them. Plaintiffs have never conducted themselves as though Defendants are part of their agreement with ACN.

[14] *Contec* separately held that the dispute over whether Contec could "validly assign[]" its rights to the successor corporation was a question of the original contract's "continued 'existence, scope or validity'" and therefore could be decided by the arbitrator under the AAA rules. *Contec*, 398 F.3d at 210. That holding is not relevant here, because Defendants have not argued that ACN assigned its arbitral rights to them. *But see* Defts' Br. at 14 (relying on this discussion).

They have never treated Defendants and ACN as interchangeable—or as agents or assigns or successors or anything like that. And Defendants themselves did not act that way until eight months into this litigation, when they strategically claimed to be part of the agreement despite knowing of its existence from the very outset and never previously making that claim. More fundamentally, however, for all the reasons given above, Defendants cannot establish the kind of relationship that would trigger equitable estoppel (which is the bare minimum under *Contec*). The circumstances here thus do not support a conclusion—let alone a clear and unmistakable conclusion—that Plaintiffs implicitly agreed to arbitrate anything with Defendants when they signed a contract with ACN, much less critical threshold questions of arbitrability.

II. THE DISTRICT COURT CORRECTLY DENIED ACN'S CROSS-MOTION TO COMPEL ARBITRATION

ACN's cross-motion to compel arbitration sought two extraordinary types of relief. First, ACN argued that Plaintiffs should be compelled "to submit [their] discovery dispute [with ACN] to arbitration." SA120-21. Second, ACN urged the district court to compel arbitration of the *entire lawsuit* between Plaintiffs and Defendants. *See id.* The district court correctly rejected both requests.

On appeal, ACN appears to have abandoned the first argument and doubled down on its contention that the whole case should be diverted to arbitration, either to arbitrate the merits or to arbitrate whether it is subject to arbitration. *See* ACN Br.

24-26.[15] But ACN's position rests on a deeply flawed premise: namely, that a non-party subpoena recipient can file a motion to compel arbitration of any federal case involving anyone with whom it has ever signed an arbitration agreement—even if the non-party has not been sued in the action; even if the non-party faces no risk of liability, damages, or indemnification; even if the non-party has declined to seek intervention in the case despite every chance to do so; and even if the actual parties to the litigation have never agreed with anyone to arbitrate claims against each other.

That cannot be. ACN does not identify—and we have not discovered—any court holding that a non-party can force a pending federal case into arbitration without joining the fray itself. For good reason. That theory would invite disruption in the federal courts and undermine the judicial process. In practice, it would empower any non-party to commandeer a federal lawsuit, at any stage of the litigation, simply by invoking the existence of an arbitration agreement with at least one of the parties. It would enable that non-party to enjoy the benefits of being a party to the case without shouldering any of the attendant responsibilities. And it would open the floodgates to countless motions to compel arbitration filed by non-

[15] To the extent ACN continues to pursue its narrower request to compel arbitration of its discovery dispute, that argument lacks merit for the many reasons articulated by the district court and in Plaintiffs' opposition to ACN's stay request. *See* SPA-31-34; ECF No. 114 at 11-13.

parties with only a tangential role in an action—or perhaps even in response to a run-of-the-mill subpoena.

Consider, for instance, a case where a plaintiff sues a defendant and, during discovery, someone subpoenas a non-party bank for financial records. Nearly everyone has an arbitration agreement with their bank (and many such agreements include delegation provisions). Under ACN's mistaken view, the FAA might well empower the non-party bank in every such case to file a motion to compel arbitration of the entire lawsuit. Even recognizing and fully honoring the FAA's statutory policy favoring arbitration, that cannot be—and it is not—the law.

ACN's cross-motion thus fails for several independent reasons. First, the district court lacked subject-matter jurisdiction over ACN's cross-motion to compel because there is no case or controversy between Plaintiffs and ACN. Second, ACN seeks relief—an order requiring Plaintiffs to arbitrate claims against Defendants, even though Plaintiffs have no such agreement with Defendants—inconsistent with bedrock principles of consent. Finally, ACN's motion to compel is procedurally defective: as a non-party, ACN had no procedural basis to submit this filing.

In the end, neither law nor equity endows ACN with the prerogative to weaponize its arbitration agreement to hijack a federal case in which is not a party, sideline the presiding Article III judge, and force the case into arbitration against the

parties' will. The district court was right to reject ACN's unprecedented bid to compel arbitration of this case, and this Court should affirm that decision.

A. The district court lacked subject-matter jurisdiction over ACN's motion to compel arbitration

The district court declined to "compel arbitration of the entire dispute," holding that ACN had no "standing" to seek that relief. A558. This conclusion was sound, since ACN's attempt to force Plaintiffs into arbitration fails for the most basic reason imaginable: there is no "actual case or controversy" between Plaintiffs and ACN. *See O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). And that threshold constitutional requirement is a prerequisite for the relief ACN seeks. Without an actual controversy, the district court did not have subject-matter jurisdiction over ACN's motion to compel arbitration. *See SM Kids, LLC v. Google, LLC*, 963 F.3d 206, 211 (2d Cir. 2020) (Article III "limits the subject-matter jurisdiction of the federal courts to 'Cases' and 'Controversies'"). This Court can affirm the denial of ACN's motion on that ground alone. *See Vaden v. Discover Bank*, 556 U.S. 49, 72 (2009) (reversing an order compelling arbitration because district court lacked subject-matter jurisdiction over the underlying controversy at issue).

The starting point for this analysis is Section 4 of the FAA, which provides that a party may petition for an order compelling arbitration in "any United States district court which, save for the [arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the

controversy between the parties." Section 4 thus imposes a jurisdictional limit on judicial consideration of petitions to compel arbitration. Notably, this requirement cannot be satisfied by reference to Section 4 itself, which does not vest federal courts with any additional subject matter jurisdiction. *See Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008). And the Supreme Court has clarified that a dispute between parties "over the arbitrability of their claims," *Vaden*, 556 U.S. at 63, does not satisfy the jurisdictional requirements of Section 4, *id.* at 62. Instead, a district court has subject-matter jurisdiction to compel arbitration under the FAA only if—assuming no arbitration agreement existed—"the entire, actual 'controversy between the parties,' as they have framed it, could be litigated in federal court." *Id.* at 66 (quoting 9 U.S.C. § 4). The "parties," for the purpose of Section 4, are the signatories to the arbitration agreement, not the parties to the litigation. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 445 (2d Cir. 1995).

Applied here, these rules required the district court to "look through" the dispute about arbitrability and ask whether it had subject-matter jurisdiction over an actual case or controversy between Plaintiffs and ACN. *See Vaden*, 556 U.S. at 66.[16]

[16] This Court modifies the "look through" approach in one small way unrelated to the actual-controversy requirement. When evaluating whether complete diversity is satisfied, the district court assessing its jurisdiction over an FAA petition looks only to the citizenship of the parties to the petition to compel, not all the way through to the parties to the underlying litigation. *See Hermès of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017).

As the district court correctly perceived, it lacked such jurisdiction. Plaintiffs have sued Defendants, not ACN. ACN did not intervene, has not been impleaded, is not actually a party to the proceedings, and faces no risk of liability, damages, or indemnification. In other words, there is no "case or controversy" between Plaintiffs and ACN here, and so the district court does not possess subject matter jurisdiction over any dispute between them. *See Spokeo, Inc. v. Robins*, 136 S. Ct 1540, 1547 (2016) (emphasizing the basic "constitutional limitation of federal-court jurisdiction to actual cases and controversies."); *Paul Revere Variable Annuity Ins. Co. v. Kirschhofer*, 226 F.3d 15, 26 (1st Cir. 2000) (holding that there was no subject-matter jurisdiction over a motion to compel arbitration by a party that had been dismissed with prejudice, because "[a] mere interest in a situation—no matter how deeply felt, or how important the issue—will not substitute for actual injury").[17]

[17] As the district court correctly held, there is plainly no independent jurisdictional basis to compel arbitration of a discovery dispute involving Plaintiffs and ACN. A557. The district court's power to adjudicate those disputes derives from its subject-matter jurisdiction over the underlying action between Plaintiffs and Defendants—not ACN. *See United States v. Morton Salt Co.*, 338 U.S. 632, 641-642 (1950) (noting that the judicial subpoena power derives from and is coextensive with the court's power to adjudicate cases and controversies); *Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dep't of Treasury*, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (noting that discovery devices "are not free-standing," but rather exist "to facilitate the resolution of actions cognizable in federal court").

ACN cannot fix this clear jurisdictional defect by theorizing that Plaintiffs' lawsuit against Defendants is "litigation by proxy" against ACN.[18] The Supreme Court's decision in *Vaden* expressly forbids such efforts to recast litigation in service of manufacturing federal subject-matter jurisdiction. Specifically, *Vaden* recognized that when "actual litigation has defined the parties' controversy," 556 U.S. at 68, the district court is bound by the case "as [the parties] have framed it." *Id.* at 66. The district court cannot "hypothesize[] discrete controversies of its own design" in order to invent subject-matter jurisdiction. *Id.* at 67. Nor can the district court allow the party seeking to compel arbitration to "recharacterize an existing controversy" or "manufacture a new controversy" in "an effort to obtain a federal court's aid in compelling arbitration." *Id.* at 68.

Put simply: Section 4 of the FAA "does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy." *Id.* Here, the "actual litigation" is between Plaintiffs and Defendants; ACN is merely a non-party subpoena recipient facing no risk of liability or damages. There is no "case or

[18] Indeed, ACN's arguments about the scope of the "dispute" it seeks to arbitrate have grown ever larger as this case has progressed. *Compare* A556-58 (the district court, ruling primarily on the "issue of whether the discovery dispute should be arbitrated," and in the alternative rejecting the argument "to the extent that ACN is asking me to compel arbitration of the entire dispute"), *with* ACN Br. at 18 (defining "[t]his dispute" as "framed by Plaintiffs' Complaint, ACN's arbitration demand, or even the district court's narrow 'discovery dispute'").

controversy" at all between Plaintiffs and ACN, perhaps apart from the dispute over whether to arbitrate (which does not count in assessing jurisdiction under Section 4).

The Fourth Circuit's decision in *Community State Bank v. Knox* is instructive. *See* 523 F. App'x 925 (4th Cir. 2013). *Knox* found subject-matter jurisdiction lacking in a case, like this one, involving an attempt to compel arbitration by an entity that was not a party to the underlying litigation. *See id.* There, individual plaintiffs sued payday loan servicers on various state law theories, but did not sue the bank that issued the loans (in fact, the plaintiffs specifically disclaimed any future action against the bank). *Id.* at 927. The bank later filed a petition to compel arbitration in district court under Section 4 of the FAA. *Id.* The Fourth Circuit held that there was no "independent jurisdictional basis" to support that petition because the bank "ha[d] no stake" in the case against the individual plaintiffs. *Id.* at 930. The court further concluded that "[t]he underlying controversy between the parties is concretely defined" by the existing litigation, *id.*, and that this litigation "comprise[d] the actual controversy between the parties," *id.* at 931. In addition, the claims in the existing litigation "were not brought against [the bank], are distinct from any claims that could be made against [the bank], and do not implicate any interest [of the bank] that could be compelled to arbitration by federal court." *Id.* at 932. The Fourth Circuit "fail[ed] to see any other underlying dispute" between the bank and the plaintiffs that could support a motion to compel arbitration, and rejected the bank's "invitation

to invent one or allow a purely hypothetical future claim" to provide a basis for jurisdiction. *Id.* at 930.[19] Concluding that "there *is* no controversy" between the bank and the plaintiffs, *id.* at 931, the Fourth Circuit "decline[d] to reach beyond the existing litigation in search of a basis for federal jurisdiction," *id.* at 932.[20]

This Court should do the same. After "looking through" to the underlying dispute, the result is clear—there is no controversy between Plaintiffs and ACN. The district court's rejection of ACN's motion to compel arbitration should be affirmed.

B. The FAA does not allow ACN to compel arbitration of claims brought against Defendants

Under the FAA, arbitration "is a matter of consent, not coercion." *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004) (quoting *Volt Info. Scis. v. Bd.*

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[19] The court noted in passing that the bank had not asked the plaintiffs to arbitrate any claim before filing its petition. *See Knox*, 523 F. App'x at 931 & n.5. But the Fourth Circuit did not rely on that fact and instead based its rejection of the petition on its conclusion that "[t]o the extent the Petition describes the real controversy that [the bank] seek[s] to have arbitrated, that controversy is embodied" in the existing litigation in which the bank was not involved. *Id.* at 932. The same is true here: The dispute ACN wants diverted to arbitration is *this* litigation between Plaintiffs and Defendants. And in this litigation, there is no case or controversy between Plaintiffs and ACN.

[20] In *Community State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011), the Eleventh Circuit indicated that a potential federal claim could provide subject-matter jurisdiction over a petition to compel arbitration. *Id.* at 1260. The Fourth Circuit's decision not to follow *Strong* into the realm of "pure speculation" is well founded, and this Court should not follow it either. *See Knox*, 525 F. App'x at 931. *Knox* is truer to *Vaden*, which makes clear that "Section 4 does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy." *Vaden*, 556 U.S. at 68.

of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)). For that reason, "'a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.'" *Id.* (quoting *Vera v. Saks & Co.*, 335 F.3d 109, 116 (2d Cir. 2003)). This fundamental precept of arbitration law offers yet another reason for affirming the decision below.

Plaintiffs signed arbitration provisions *with ACN* (not Defendants) and agreed to arbitrate a confined set of claims: those "dispute[s] between me and ACN." A436 ¶ 16; A439 ¶ 16; *see also* A442 ¶ 17 ("between ACN and me"). Here, Plaintiffs have no dispute with ACN, which is not a party and which faces no claims. The only claims alleged in the Amended Complaint are against Defendants. Because Plaintiffs have not manifested their consent to arbitrate any claims against Defendants, Plaintiffs have no obligation to arbitrate with them.

In an attempt to evade that straightforward result, ACN accuses Plaintiffs of "evasive pleading and litigation by proxy," insisting that Plaintiffs' case and claims against Defendants are really claims against ACN. ACN Br. 19, 20 (calling itself a "defendant in all-but-name"). That is a ridiculous argument. There is no such thing as a "defendant in all-but-name." ACN's tactical attempt to rewrite the Amended Complaint to trigger the arbitration agreement—albeit without incurring any risk that it will face damages or liability—is therefore unavailing. *Cf. Romana v.*

Kazacos, 609 F.3d 512, 518 (2d Cir. 2010) (holding that the "plaintiff is the master of his complaint" when it comes to matters of federal jurisdiction).

In any event, even if this Court treated Plaintiffs' claims against Defendants as *de facto* claims against ACN, or concluded that this issue is itself delegated to an arbitrator, that would not entitle ACN to the sweeping relief it seeks: namely, an order submitting this entire case to arbitration. The principle of consent is always the touchstone of arbitration analysis. ACN's agreement with Plaintiffs at most requires that any dispute between Plaintiffs and ACN (such as the dispute against it that ACN professedly perceives) proceed in arbitration. But to the extent Plaintiffs' claims run against Defendants, who possess no arbitral rights against Plaintiffs, they must remain in federal court, since this Court is bound to respect the absence of consent to arbitrate no less than its presence. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (noting that "unusual facts" require "reemphasiz[ing]" that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*" (emphasis in original)); *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements *into which parties had entered* . . . even if the result is 'piecemeal' litigation"); *Sokol Holdings, Inc., v. BMB Munai, Inc*., 542 F.3d 354, 363 (2d Cir.

2008) (engaging in claim-by-claim analysis and finding "one of Sokol's claims . . . to be arbitrable, while the others are not").

Simply stated, neither the arbitration agreement nor its delegation provision affords any basis for ACN to obtain an order requiring Plaintiffs to arbitrate claims against Defendants, with whom they have no contractual agreement to arbitrate. ACN's contrary arguments only confirms ACN's willingness to cast aside principles of consent, and the normal rules of litigation and arbitration, in this proceeding.

C. ACN's cross-motion to compel arbitration was procedurally improper

ACN's efforts to force this case into arbitration fail for another independent reason: the manner in which ACN presented its arbitration demand below was procedurally improper. *See* A558. As a matter of settled federal practice, ACN's non-party "Memorandum of Law in Opposition to Plaintiff's Motion to Compel Compliance with Subpoena and in Support of Cross-Motion to Compel Arbitration" was not a filing the Federal Rules of Civil Procedure permit. SA108-55.

When someone who has not been sued believes that they require judicial assistance to initiate arbitration, they have two basic options. *See Matter of Arbitration Between Chung & President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir. 1991)

First, they can initiate a standalone proceeding in federal court and petition for an order compelling arbitration, provided that they satisfy the requirements of

the FAA. *See Vaden*, 556 U.S. at 54-55; *see also, e.g.*, *ISC Holding AG v. Nobel Biocare Fin. AG*, 688 F.3d 98, 114-15 (2d Cir. 2012) (noting that 9 U.S.C. § 4 allows a party to "initiate[] a Title 9 proceeding" in federal court under certain circumstances); *Matter of Arbitration Between Chung & President Enters. Corp.*, 943 F.2d 225, 228 (2d Cir. 1991) ("A petition to stay or to compel arbitration can arise in one of two ways: it may be 'embedded' in pending litigation or it may be initiated by an independent proceeding."). It is clear why ACN did not choose that course here: Had ACN filed a separate proceeding seeking an order compelling arbitration of Plaintiffs' case against Defendants—to which ACN is not a party and which the actual parties have been litigating for over a year—it would have faced grave obstacles (including an inability to satisfy Section 4's jurisdictional requirements, for the reasons described above, *see supra*, 62-67).

ACN's other option, if it genuinely believed its interests were implicated by this existing litigation, was to file a motion for leave to intervene (and to then file a motion to compel arbitration). *See* Fed. R. Civ. P. 24. But that route would have required ACN to take risks, including "the risk that its position [would] not prevail and that an order adverse to its interests [would] be entered." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985).

Instead of filing a standalone action, or filing a motion to intervene, ACN decided to remain a non-party, free of all the risks and responsibilities that parties

must assume. But having made that strategic choice, ACN had no procedural standing to file *any* motion in this proceeding, much less a dispositive motion targeted at diverting *all* of the claims in this case into private arbitration. *See Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (discussing the need for intervention before a non-party may "insinuate itself into a private civil lawsuit between others"); *see also, e.g.*, *Hispanic Soc. of New York City Police Dep't Inc. v. New York City Police Dep't*, 806 F.2d 1147, 1154 (2d Cir. 1986) ("Because the requirements for intervention as a party have been ignored, the people pursuing this appeal have no more standing than individuals selected at random from a telephone book."); *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.*, 116 F.2d 845, 848 (2d Cir. 1941) (Hand, J.) ("If the companies had wished to enjoy the privileges following upon the status of a party, they should have become parties if they could. If they could not, a fortiori they should not have privileges of a party.").[21]

The fact that ACN received a non-party subpoena under Rule 45 does not change this bedrock limitation on its procedural prerogatives. Rule 45 does not throw open the courthouse door to whatever motions a non-party subpoena recipient

[21] *See also Katel Liab. Co. v. AT&T Corp.*, 607 F.3d 60, 63 (2d Cir. 2010) (noting that a non-party "intervened" before it "moved to compel arbitration"); *Process & Indus. Developments Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 585 (D.C. Cir. 2020) (noting that Federal Rule of Civil Procedure 7(b) "permits any *party* to file a written motion state the relief sought and the grounds for seeking it" (emphasis added)).

wishes to file. Instead, it provides a non-party subpoena recipient with a defined menu of options for responding: (1) compliance with the subpoena (*id.* 45(e)); (2) objecting to the subpoena (*id.* 45(d)(2)(B)); (3) moving to quash or modify the subpoena under specific enumerated circumstances (*id.* 45(d)(3)); (4) moving for a protective order (*id.* 45(e)(2)); or (5) in certain circumstances not relevant here, transferring a subpoena-related motion to a different court ((*id.* 45(f)). Needless to say, cross-moving to compel the entire case into arbitration is not one of those options. *See* 9A Wright & Miller, Fed. Prac. & Proc. Civ. § 2459 (3d ed. 2020) (discussing a court's "options" without identifying consideration of compelling arbitration).

The FAA does not alter that understanding. To the contrary, it requires that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." 9 U.S.C. § 6.[22] Section 4 of the FAA does not "expressly provide[]" for non-parties to file petitions to compel arbitration in circumstances otherwise precluded by the Federal Rules of Civil Procedure. Indeed, the "only" language in Section 4 that "express[ly]" overrides the Federal Rules of Civil

[22] Conversely, the Federal Rules of Civil Procedure "govern proceedings under" the FAA "to the extent applicable . . . except as [the FAA] provide[s] other procedures." Fed. R. Civ. P. 81(a)(6)(B).

Procedure is language not implicated here: Section 4's separate guarantee of a summary jury trial "'[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform'" is disputed. *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 364-65 (2d Cir. 1965) (quoting 9 U.S.C. § 4).[23]

There was thus no basis in the FAA, or Rule 45, or any other rule, for ACN to file a cross-motion to compel arbitration in response to a non-party subpoena. As a non-party that decided against intervening in this litigation to protect the rights it claims are threatened, ACN must be held to its choice. Like any other non-party, ACN had no prerogative to move to compel this litigation into arbitration and so the decision below denying its defective cross-motion should be affirmed.

D. ACN's "equitable estoppel" theory is forfeited and meritless

In a final effort to drum up a justification for the unprecedented relief it seeks, ACN now contends that the doctrine of equitable estoppel (or, at least, a theory loosely inspired by it) can be applied to *its own* demand to arbitrate. ACN Br. 50-58. This position, advanced for the first time on appeal, is forfeited and meritless.

[23] Moreover, in interpreting Section 3 of the FAA, the Supreme Court has recognized the importance of distinguishing between the procedural prerogatives afforded to parties and non-parties to litigation. *See Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 630 n.4 (2009) ("[W]e would not be disposed to believe that the statute allows a party to the contract who is not a party to the litigation to apply for a stay of the proceeding.").

1. ACN's "equitable estoppel" theory is forfeited

As an initial matter, ACN's new equity-based arguments are forfeited and should be disregarded on that basis alone. ACN did not mention any basis for compelling arbitration remotely like this in its briefs below, which mentioned neither equity nor estoppel. *See* SA 108-55. Nor did ACN invoke any such theory after the district court denied ACN's motion and the parties briefed ACN's request for a stay of that decision. *See* D. Ct. ECF No. 244. As a consequence, the district court had no occasion to pass upon it. This is a classic forfeiture, particularly because the see-what-sticks creativity of ACN's latest legal innovation would require the Court to take up a "complex and novel" argument without the benefit of ventilation below. *See Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 95-96 (2d Cir. 2000).

2. ACN's "equitable estoppel" theory is meritless

If this Court does take up ACN's "equitable estoppel" arguments, it should reject them, first and foremost because they are wholly inapposite to the issue at hand. As discussed above, the law of equitable estoppel exists to answer a particular question: when a non-signatory wants to invoke an arbitration agreement, how can it establish that a signatory to the contract "consented to extend its agreement"? *See Sokol Holdings, Inc.*, 542 F.3d at 361. That is not what ACN—as a signatory to the contract, but a non-party to the litigation—seeks to do. *See* ACN Br. at 55 ("ACN . . . does not seek to extend the scope of the arbitration provisions even an inch."). And

so the doctrine of "equitable estoppel" is necessarily unavailable to ACN. On their face, ACN's arguments are a category error: they take a doctrine built to address a specific issue involving non-signatories and seek to repurpose it for non-parties, when doing so undermines the entire premise and rationale of the doctrine.[24]

Stripped of its ill-fitting doctrinal garb, ACN's "equitable estoppel" argument is no more than a request for this Court to make freewheeling equitable judgments on issues where settled law defeats ACN's positions. ACN is up front about this: its entire argument proceeds from the premise that the Court can and should rely on "inherent equitable authority" to compel arbitration. ACN Br. at 50. In other words, ACN contends that the district court should have compelled arbitration even if the FAA does not, by its terms, authorize the irregular order that it seeks.

That is not the law. "[B]efore invoking the [delegation] principle," ACN must persuade the Court that the matter it seeks to arbitrate "'is within the coverage of'" the FAA. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (quoting *Prima*

[24] This category error leads ACN to rely heavily on *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524 (5th Cir. 2000). *See* ACN Br. 56-57. That case did not involve a non-party subpoena recipient seeking to enforce an arbitration agreement against a signatory party. Rather, as an equitable estoppel case, it involved one party to a case seeking to enforce an arbitration agreement it had not signed against another party who had. Plaintiffs have already explained why that case is unpersuasive in response to Defendants (who at least present a potentially relevant fact pattern). *See supra*, 37-40. For ACN's purposes, *Grigson* is even farther afield.

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967)). Its inability to meet that standard precludes any prerogative to compel this case into arbitration.

Moreover, the equitable considerations that ACN advances do not justify the extraordinary remedy it seeks. ACN claims to be a "defendant in all-but-name" in these proceedings—"in every meaningful respect a party." ACN Br. at 20, 53. On that basis, it urges the Court to compel arbitration. But its premise is simply wrong. ACN is *not* a defendant here, and it is reaping the benefits of that status. It has not been sued. No claims have been brought against it. None of Plaintiffs' claims asserts that ACN breached any provision of the IBO agreements or failed to fulfill any binding commitment it made to them.[25] ACN faces no liability, and in fact it "expressly denies liability for indemnification, contribution, or otherwise based on any judgment below." ECF No. 84 (ACN Motion for Stay) at 3 n.1. While ACN faces the prospect of discovery, it is in that respect indistinguishable from countless non-parties who routinely fulfill such obligations. Indeed, the district court is in the process of entertaining and carefully mediating ACN's concerns about the scope of its obligations, and it is well-equipped to do so. *See* A539. What ACN actually requests—in the name of "equity"—is to be treated as though it were a defendant

[25] The "inequities" ACN says that it faces here are therefore very different from the equities in *Grigson*, where the claims against the non-signatories turned on whether the signatory had complied with various contractual provisions. *Compare* 210 F.3d at 529-30.

without any of the risks or duties that accrue to actual party defendants. There is nothing equitable about that position and no court has ever upheld it.

ACN separately suggests that Plaintiffs have "blocked" ACN from arbitrating by "refusing to disclose their true identities." ACN Br. 57. But it was ACN who refused to sign the straightforward protective order that governs discovery in this case. *See* A427-33. In fact, ACN and Plaintiffs were making progress toward a mutually agreeable resolution of ACN's objections when Defendants and ACN took these appeals. *See* D. Ct. ECF No. 256. If the proceedings below had not been stayed (in part at ACN's request), ACN might already have the information about Plaintiffs that it seeks. Asking this Court to invent and wield "inherent equitable authority" in such an unparalleled manner requires vastly more justification than that.

The remainder of ACN's equitable estoppel briefing is essentially an *amicus* brief in support of Defendants' arguments on the relevant points. For the reasons explained above, Defendants are not entitled to equitable estoppel. *See supra*, 23-40. And because Plaintiffs did not consent to arbitrate delegation issues or anything else with Defendants, Plaintiffs' claims belong in federal court.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's orders denying Defendants' and ACN's motions to compel arbitration, lift the stay pending appeal, and remand this case for further proceedings.

August 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32.1(a)(4), as modified by this Court's August 24, 2020 Order granting Plaintiffs "permission to file an oversized brief not to exceed 20,000 words." ECF No. 166. This brief contains 19,455 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in size 14 Times New Roman font.

Dated: August 31, 2020

/s/ Roberta A. Kaplan

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated: August 31, 2020

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