20-1228(L), 20-1278(con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, LUKE LOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RICHARD ROE, MARY MOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

TRUMP CORPORATION, DONALD J. TRUMP, DONALD J. TRUMP, JR., ERIC TRUMP, IVANKA TRUMP,

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-09936 (Schofield, J.)

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Appellant The Trump Corporation, a nongovernmental corporate party, certify the following: The Trump Corporation is wholly owned by the Donald J. Trump Revocable Trust dated April 7, 2014. There is no publicly held corporation that owns 10% or more of The Trump Corporation's stock.

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Plaintiffs' opposition telegraphs weakness. Rather than address Appellants' arguments, Plaintiffs run from them. They distort governing law, mischaracterize facts, and advance waived arguments—all to escape their own allegations, which doom them here. Nowhere is this clearer than with regard to the central issue on appeal: equitable estoppel.

Appellants previously explained that equitable estoppel requires arbitration because Plaintiffs' own allegations demonstrate both that their claims are intertwined with the IBO Agreement and that Appellants and ACN have a close relationship. *Ragone v. Atlantic Video at Manhattan Ctr.*, 595 F.3d 115, 126-27 (2d Cir. 2010). Appellants outlined how the complaint mentions ACN over 700 times, references IBOs more than 100 times, describes Appellants as having a "longstanding commercial relationship with ACN" that included "close personal and financial ties to ACN's founders and principals," and spends countless paragraphs alleging that ACN and Appellants worked together to induce individuals to enter into IBO Agreements with ACN.

To all of this, Plaintiffs offer *nothing* in response. Instead, they run from their own allegations, mentioning only a single paragraph in their 505-paragraph complaint when addressing "intertwinedness" or the "close relationship" between ACN and Appellants. Shifting course, they now argue that North Carolina law applies to the equitable-estoppel question. But they waived reliance on North

Carolina law by opting to litigate under federal law below. In any event, North Carolina law defeats them just the same; North Carolina courts apply equitable estoppel even more broadly to enforce arbitration agreements. In the end, no matter the choice of law or the standard, the answer is the same. Plaintiffs are doomed by their own complaint.

As set out more fully below, the Court should reverse, and this case should proceed to arbitration.

ARGUMENT

I. Plaintiffs cannot evade *Contec*.

A. *Contec* requires the equitable-estoppel and timeliness issues to be referred to arbitration.

Questions of arbitrability are for courts to decide unless they have been clearly and unmistakably delegated to the arbitrator. *Contec Corp v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). Circuit precedent instructs that parties may effectuate such a "clear and unmistakable" delegation (1) through "broad language in an arbitration clause," *Bell v. Cendant Corp.*, 293 F.3d 563, 569 (2d Cir. 2002); or (2) by selecting AAA rules, *Contec*, 398 F.3d at 208. Plaintiffs did both: they agreed to arbitrate disputes "arising out of or relating to [the IBO] Agreement," App. 523, which is "the paradigm of a broad clause," *Collins & Aikman Prod. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995); and they agreed that arbitration would be conducted under

AAA rules, App. 523. It's thus undisputed that Plaintiffs agreed to delegate arbitrability issues to the arbitrator.

Even though Appellants are nonsignatories, *Contec* makes clear this delegation applies just the same. 398 F.3d at 209. *Contec* requires only that the nonsignatory meet the intertwinedness element of equitable estoppel; that alone constitutes "relational sufficiency" to allow a nonsignatory to enforce the delegation of arbitrability issues. *Id.* Appellants easily meet that test, *see* Appellants' Br. 15-16; *see also supra* 8-10, as the district court found below, App. 528.[1]

B. Plaintiffs' attempts to evade *Contec* are meritless.

Hemmed in by *Contec*, Plaintiffs press three meritless arguments hoping to evade its application. First, they claim the application of equitable estoppel is a "question of contract formation" that cannot be delegated to the arbitrator. Pls.' Br. 49. Second, they claim they did not clearly and unmistakably delegate arbitrability questions. Pls.' Br. 52. Third, they claim Appellants waived this issue by arguing it "for the first time on appeal." Pls.' Br. 46. Plaintiffs are wrong on all counts.

There is no issue of contract formation; Plaintiffs' argument to the contrary misapprehends the law of arbitrability. Plaintiffs conceded for present purposes that they entered into an arbitration agreement. Pls. Br. 11; App. 425. There thus is no

[1] North Carolina courts have adopted the same rule as *Contec*. *See infra* 11-18. Plaintiffs waived reliance on North Carolina law, but it would defeat their position in any event. *See id.*

issue of contract formation. And by agreeing to AAA rules, "[t]here can be no doubt that the [IBO] Agreements bound [Plaintiffs] to arbitrate any disputes with the Agreement's other signatory, namely, [ACN]." *Contec*, 398 F.3d at 208.

Yet, Plaintiffs persist. Hoping to evade *Contec*, they claim equitable estoppel is a "contract formation" issue that is not delegable to the arbitrator. Pls. Br. 49.

Contec itself forecloses this argument. In *Contec*, this Court held a nonsignatory who sought to enforce an arbitration agreement via equitable estoppel was entitled to refer that arbitrability issue to the arbitrator. 398 F.3d at 209. That is precisely what Appellants seek to do here. Thus, the Court must "permit [Appellants] to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable because [Appellants] cannot claim [arbitral] rights under the [IBO] Agreement." *Id.*[2]

Plaintiffs' claim that they did not clearly and unmistakably delegate arbitrability questions is equally meritless. It, too, is foreclosed by *Contec*. Again, it is undisputed that Plaintiffs agreed to arbitrate arbitrability issues with ACN. Yet Plaintiffs claim that their express delegation of arbitrability issues does not extend

[2] Plaintiffs cite inapposite, out-of-circuit cases for their contract formation point. *See* Pls.' Br. 49-51 (citing *Lavigne v. Herbalife, Ltd.*, 967 F.3d 1110 (11th Cir. 2020); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967 (C.D. Cal. 2012)). Those cases are both distinguishable and wrongly decided. More importantly, they are not the law in this Circuit.

to Appellants because the arbitration agreement does not specifically identify Appellants. Pls.' Br. 53-54.

Plaintiffs fundamentally misread *Contec*, which forecloses their position. Under *Contec*, a nonsignatory may rely on the signatory's selection of AAA rules as a delegation of arbitrability issues to the arbitrator. 398 F.3d at 208-09. It doesn't matter that "[t]he delegation provision appears in a bilateral contract between Plaintiffs and ACN." Pls.' Br. 54. That was true in *Contec*. 398 F.3d at 209. Likewise, it doesn't matter that the arbitration "agreement between Plaintiffs and ACN" specifically identifies only "[Plaintiffs] and ACN.'" Pls.' Br. 54. That was equally true in *Contec*. 398 F.3d at 209. Indeed, the agreement in *Contec* "included both a prohibition on the assignment of rights … and an exclusion of third party rights" altogether. *Id.* Yet, this Court held that a nonsignatory could force arbitrability issues to the arbitrator on the basis of the signatory's express delegation. *Id.*

Plaintiffs further misread *Contec* by suggesting that it is inconsistent with *First Options'* presumption that arbitrability issues are for the courts to decide. It is true that *First Options* instructs courts "not [to] assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." 514 U.S. at 944 (cleaned up). But *Contec* is this Court's rule about *how to apply First Options* when parties have expressly delegated arbitrability issues by selecting

AAA rules. *Contec*, 398 F.3d at 208-09. Again, it is governing precedent that "when, as here, parties explicitly incorporate [AAA] rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as *clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator*." *Id.* at 208 (emphasis added). *Contec* extends that delegation to nonsignatories when they establish "relational sufficiency" through the "intertwinedness" element of equitable estoppel. *Id*. at 209.[3]

Plaintiffs suggest the Court's unpublished decision in *Republic of Iraq v. BNP Paribas USA*, 472 F. App'x 11 (2d Cir. 2012), requires a different result. Again, Plaintiffs are wrong. *BNP Paribas* addressed *Contec* but held it didn't allow a sanctioned foreign sovereign (and nonsignatory) to force an American business with which it had no relationship to arbitrate questions of arbitrability. *Id.* at 12-13. Its unique facts may be the reason why this Court has never cited *BNP Paribas* in a subsequent case. It clearly has no application here.[4]

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[3] *Contec*'s "relational sufficiency" is a lower bar than the equitable estoppel test because it involves only its intertwinedness element. But *Contec* does not do away with *First Options*' requirement of a "clear and unmistakable" delegation. Pls.' Br. 53-54. The clear and unmistakable evidence of such a delegation is accomplished by Plaintiffs' agreement to arbitrate under AAA rules; *Contec* extends that delegation to Appellants because they meet the added requirement of intertwinedness to establish "relational sufficiency."

[4] *BNP Paribas* may have no application anywhere; Westlaw searches identify no case in which this Court has cited it. Moreover, it is out of step with *Contec*. The *BNP Paribas* panel decided an arbitrability issue against the Republic of Iraq and used that decision to rule that Iraq could not require delegation of that issue to the

Plaintiffs wrongly claim that Appellants waived reliance on Contec by arguing it "for the first time on appeal." Appellants clearly argued the *Contec* rule below: they cited *Contec*; recited the language of the IBO Agreement's arbitration clause (which expressly incorporates AAA rules); and argued that "when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, that incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." D.Ct. ECF 114 at 9 (cleaned up). That is the entirety of the argument. No more is needed to understand it; thus no more is needed to preserve it. *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997) (preserving an argument requires a party to "state the issue and advance an argument"); *Gen. Refractories Co. v. First State Ins. Co.*, 855 F.3d 152, 162 (3d Cir. 2017) ("To preserve an argument, a party must 'unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.'").[5]

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arbitrator. *BNP Paribas*, 472 F. App'x at 13 ("[T]he arbitration clause does not clearly vest any right to invoke arbitration in a non-party such as Iraq, *a fortiori*, it does not afford Iraq the right to have arbitrators rather than a court determine the arbitrability of its dispute."). That has it backwards. *Contec*, 398 F.3d at 209 ("permit[ting] Contec Corporation to compel arbitration even if, in the end, an arbitrator were to determine that the dispute itself is not arbitrable because Contec Corporation cannot claim rights under the 1999 Agreement"). To the extent these cases are inconsistent, *Contec* controls. *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010).

[5] It is worth noting that Plaintiffs misunderstand the argument they're pressing here. If a party fails to preserve an argument, that is a *forfeiture*, not a

II. Plaintiffs fundamentally misunderstand nonsignatory enforcement of arbitration agreements.

Circuit precedent articulates two elements of equitable estoppel, and both are met here. First, Plaintiffs' claims are plainly "intertwined with" the IBO Agreements. *Ragone*, 595 F.3d at 126-27. As the district court concluded, "[t]he gravamen of the Amended Complaint is that [Appellants] made untrue, misleading and unfair statements to induce Plaintiffs to enter the [IBO] Agreements" with ACN and thus that "Plaintiffs' claims arise from the subject matter of the [IBO] Agreements." App. 528. That is putting it lightly. Plaintiffs' allegations reference ACN *more than 700 times* while claiming they were deceived into entering into the IBO Agreements with ACN and improperly induced into investing in ACN. App. 213-15 (¶¶1-7), 218-22 (¶¶16-26), 224-25 (¶¶32-35), 246-249 (¶¶86-92), 258-259 (¶¶105-08), 262-65 (¶¶113-19), 273-76 (¶¶140-50), 288-90 (¶¶190-98), 293-94

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waiver. *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999) ("The term 'waiver' is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term 'forfeiture' is more appropriate."). There is an important distinction between the two. A party may not revive a waived argument; it is gone forever. *Patterson v. Balsamico*, 440 F.3d 104, 112 (2d Cir. 2006); *United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995). Forfeiture, on the other hand, may be excused. *Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 142 (2d Cir. 2000). If the Court were to find that Appellants did not sufficiently preserve their argument that *Contec* requires sending arbitrability issues to the arbitrator, Appellants can advance this issue on appeal because ACN "'pressed [it] below.'" *United States v. Harrell*, 268 F.3d 141, 146-48 (2d Cir. 2001). *See* D.Ct. ECF 168 at 3.

(¶¶212-14), 296-97 (¶¶222-26), 301-02 (¶¶242-46), 303-04 (¶¶251-54), 306-07 (¶¶262-68), 309-10 (¶¶275-79). Moreover, Plaintiffs' claimed harm is the loss of money they allegedly invested with ACN under those Agreements. App. 290-91 (¶¶196-99), 292-93 (¶¶207-09), 302 (¶249), 303 (¶252), 308-09 (¶¶272-73), 310 (¶¶278-79). In the end, whether Plaintiffs suffered any legal harm is a result of ACN's alleged failure to deliver on their side of the IBO Agreements; the extent of their damages is solely a result of the amounts they invested in ACN; and their ability to recover damages depends on their ability to set aside their contractual agreement that they were not entitled to recoup any portion of their investment. Appellants' Br. 19-21. Plaintiffs' own allegations thus easily demonstrate intertwinedness.

Second, Plaintiffs' allegations also demonstrate a close relationship between Appellants and ACN. *Ragone*, 595 F.3d at 127. Plaintiffs repeatedly detail the "close relationship" between ACN and Appellants under which Appellants endorsed and promoted ACN. *See, e.g.*, App. 223 (¶29), 274 (¶144), 275-76 (¶146-49), 282 (¶170), 186-87 (¶180), 293-94 (¶212), 297 (¶226), 304 (¶254), 311 (¶282). Indeed, Plaintiffs' entire theory of this case is that Appellants and ACN exploited that relationship, convincing Plaintiffs to enter into the IBO Agreements based on representations about ACN's business made in ACN-branded events, videos, and publications. *See, e.g.*, App. 218 (¶16), 219-20 (¶21), 247-55 (¶88-99), 259 (¶107-

08), 269-70 (¶130-33), 271-76 (¶137-53), 280-81 (¶163-65), 376-78 (¶438-39), 389 (¶483), 390-92 (¶492), 393-95 (¶501).

Plaintiffs undoubtedly recognize the weakness of their position; their appellate strategy serves only to highlight that weakness, as they lead off their equitable-estoppel argument by declining to defend the decision below on its own terms. Despite choosing federal law below, Plaintiffs now want this issue adjudged under North Carolina law. Pls.' Br. 24-25. But they waived reliance on North Carolina law by affirmatively arguing for Circuit law instead. Even then, if the Court were to apply North Carolina law, it could not save Plaintiffs because North Carolina law requires sending this dispute to arbitration.

Once Plaintiffs turn back to Circuit precedent, they fail to deal with it head on. Plaintiffs continue to act as if nonsignatories cannot enforce arbitration agreements, ignoring this Court's precedents regularly authorizing nonsignatory enforcement. And when they finally address the relevant test for equitable estoppel, they run from the allegations in their complaint. As the district court found, this is an easy case on intertwinedness. App. 528. It is likewise an easy case on close relationship, especially given Plaintiffs' repeated allegations about Appellants "longstanding commercial relationship with ACN" and "close personal and financial ties to ACN's founders and principals." App. 52 (¶18); *see also, e.g.*, App. 275 (¶146) ("special relationship"). On top of all that, Plaintiffs fail to seriously grapple

with their nakedly strategic attempt to plead around their arbitral obligations by not naming ACN as a defendant.

A. Plaintiffs' resort to North Carolina law is foreclosed and fails anyway.

Plaintiffs waived reliance on North Carolina law by choosing to litigate under federal law. Though the IBO Agreements contain a choice-of-law provision designating North Carolina as the applicable law, Plaintiffs affirmatively waived reliance on state law by choosing to rely on federal law. *Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999) ("Allstate also waived its argument by failing to bring to the attention of the district court the potential applicability of Florida law to the issue of prejudgment interest."); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 164 (2d Cir. 1998) ("Without reaching the merits of [the defendant's] contention, we conclude that he has waived this argument. He failed to bring New Jersey law on unconscionability to the attention of the district court ...."), *cert. denied*, 525 U.S. 1103 (1999). It makes no difference that the IBO Agreements select North Carolina law. *Cargill, Inc. v. Charles Kowsky Resources, Inc.*, 949 F.2d 51, 55 (2d Cir. 1991) ("[E]ven when the parties include a choice-of-law clause in their contract, their conduct during litigation may indicate assent to the application of another state's law."). Having chosen to litigate under federal law, Plaintiffs are barred from relying on another jurisdiction's law. *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 130 (2d Cir. 1997) ("On appeal, the franchisees make an elaborate

argument that either Illinois or Connecticut law should apply, or at least 'have some significance,' on the waiver issue. However, they apparently waived this choice-of-law argument by not raising it in the district court."). Put simply, an appeal is not an opportunity for a do-over on choice of law. *Id.*

Plaintiffs try to avoid the consequences of having chosen federal law, arguing they can make any argument—including new arguments—in support of the judgment below. Pls.' Br. 26-27. While that proposition is generally true, *Schweiker v. Hogan*, 457 U.S. 569, 585 (1982), it does not allow a party to revive a *waived* argument, *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 65-66 (2d Cir. 2007) (first culling out waived arguments, then deciding remaining arguments in accordance with any ground supported by the record rule).

North Carolina law defeats Plaintiffs anyway. Even if this Court were to allow Plaintiffs to flip-flop on their choice of law, North Carolina law would require arbitration.

First, the arbitrability issues must go to the arbitrator because North Carolina courts have adopted the same delegation rule this Court adopted in *Contec*. *Hall v. Dancy*, 2018 WL 3198753, at *3 (N.C. Super. Ct. June 27, 2018). That is, "incorporation of the AAA rules demonstrate[s] that the parties agreed the arbitrator should decide issues of substantive arbitrability." *Epic Games, Inc. v. Murphy-Johnson*, 785 S.E.2d 137, 144 (2016); *see also AP Atl., Inc. v. Crescent Univ.,* 2016

WL 4165886, at *5-6 (N.C. Bus. Ct. July 28, 2016); *Gaylor, Inc. v. Vizor, LLC*, 2015 WL 6659662, at *6-7 (N.C. Bus. Ct. Oct. 30, 2015). Thus, "[u]nder either the FAA or the North Carolina Act, when the parties' arbitration agreement specifically incorporates [AAA] rules, such incorporation demonstrates that the parties clearly and unmistakably intended for the arbitrator to resolve disputes regarding arbitrability." *Hall*, 2018 WL 3198753, at *3.

Moreover, applying North Carolina law would require enforcement of the arbitration clause via equitable estoppel. *Bergenstock v. LegalZoom.com, Inc.*, 2015 WL 3866703 (N.C. Bus. Ct. June 23, 2015); *Carter v. TD Ameritrade Holding Corp.*, 721 S.E.2d 256 (N.C. Ct. App. 2012); *LSB Fin. Servs., Inc. v. Harrison*, 144 N.C. App. 542 (2001); *McMillan v. Unique Places, LLC*, 2015 WL 222752 (N.C. Bus. Ct. Jan. 14, 2015); *see also Speedway Motorsports Int'l, Inc. v. Bronwen*, 2009 WL 406688 (N.C. Bus. Ct. Feb. 18, 2009) (applying equitable-estoppel principles from arbitration context to allow nonsignatory to enforce forum-selection clause); *Big League Analysis, LLC v. Office of Commissioner of Baseball*, 2016 WL 4684670 (N.C. Bus. Ct. Aug. 29, 2016) (same).

This is because North Carolina courts apply equitable estoppel to allow nonsignatory enforcement of arbitration agreements more broadly than this Court. Specifically, North Carolina courts regularly apply the Fourth Circuit's tests in *American Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623 (2006), and *Brantley v.*

Republic Mortg. Ins. Co., 424 F.3d 392 (2005), to enforce arbitration agreements in favor of nonsignatories. *Bergenstock*, 2015 WL 3866703, at *8 (*American Bankers*); *Carter*, 721 S.E.2d at 263-64 (same); *McMillan*, 2015 WL 222752, at *4 (same); *Speedway*, 2009 WL 406688, at *6 (*Brantley*); *Big League*, 2016 WL 4684670, at *6-8 (same).

Under *American Bankers*, "[w]hen each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate." 453 F.3d at 627. Moreover, *American Bankers* involves facts that parallel Plaintiffs' allegations here: a company had issued the plaintiffs a promissory note in connection with a subscription agreement containing an arbitration clause; the plaintiffs later contended the note was worthless. Instead of suing the issuing company (a signatory), the plaintiffs sued a nonsignatory, alleging that the nonsignatory had persuaded the parties to issue and receive the note and had structured the note so that it would have first priority in the event of a default. *Id.* at 625. Although the plaintiffs in *American Bankers* brought only tort claims against the nonsignatory, the Fourth Circuit held those claims arose out of the note and subscription agreement because, if the issuing company "had never issued the Note,

the [plaintiffs] would have no basis for recovery against [the nonsignatory]." *Id.* at 630.

Under *Brantley*, "application of equitable estoppel is warranted when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." 424 F.3d at 396 (cleaned up). Importantly, these tests bar signatories from "using artful pleading to avoid arbitration." *American Bankers*, 453 F.3d at 628 (cleaned up).

Just as under Circuit precedent, Plaintiffs own allegations do them in. But under North Carolina law, Appellants' case for equitable estoppel is even more straightforward. Take the *American Bankers* test: it cannot seriously be disputed that each of Plaintiffs' claims "makes reference to or presumes the existence of the [IBO Agreements]," *American Bankers*, 453 F.3d at 627, given that the complaint mentions ACN more than 700 times, references IBOs more than 100 times, and spends countless paragraphs alleging that ACN and Appellants worked together to induce individuals to enter into IBO Agreements with ACN. *See generally* App. 43-205.

Similarly, Plaintiffs' complaint is shot through with "allegations of ... substantially interdependent and concerted misconduct by [Plaintiffs] and [ACN]." *Brantley*, 424 F.3d at 396; *see also Speedway*, 2009 WL 406688, at *6; *Big League*,

2016 WL 4684670, at *6. The very heart of Plaintiffs' complaint is that ACN was "central to [Appellants'] fraudulent scheme" and conspired with Appellants to make "secret payments to promote and endorse ACN" in "ACN-related videos, publications, and events." App. 213 (¶3), App. 218 (¶16); *see also, e.g.,* App. 285 (¶177) (alleging ACN "associate[d] itself with the Trump brand—a right that ACN secretly bought from [Appellants]"), App. 285 (¶178) ("ACN directed IBOs that they could only use materials featuring [Appellants] that were created by ACN itself, because ACN had 'exclusive and limited permission to reference Donald J. Trump and use his image on ACN created material that has been approved by [Appellants].").

In short, equitable estoppel would apply either under *American Bankers* or the "interdependent and concerted misconduct" test. Applying North Carolina law thus would require enforcement of the IBO Agreement's arbitration clause. Moreover, North Carolina courts would not countenance Plaintiffs' naked attempt to "evade" their obligations "by artful pleading and the omission of key parties." *Big League,* 2016 WL 4684670, at *6; *see also American Bankers*, 453 F.3d at 628.

Plaintiffs' two citations to North Carolina law are not to the contrary. In *Carter*, the North Carolina Court of Appeals applied the *American Bankers* test and allowed a group of defendants to enforce an arbitration agreement against nonsignatory plaintiff investors. *Carter*, 218 N.C. App. at 231-32. *Carter* thus

supports Appellants. The result in *Carter* is noteworthy for two reasons. First, there was an unresolved question whether *anyone* had ever entered into an arbitration agreement with the defendants. *Id.* at 228. Second, the Court of Appeals enforced the arbitration *against nonsignatories*. *Id.* at 232. The Court of Appeals' willingness to apply equitable estoppel when there was no evidence that *anyone* had agreed to arbitrate and bind *nonsignatories* demonstrates how broadly North Carolina applies equitable estoppel.

Plaintiffs' only other North Carolina case—*Smith Jamison Constr. v. APAC-Atl., Inc.*, 811 S.E.2d 635 (N.C. Ct. App. 2018)—is distinguishable. In that case, a subcontractor (Smith Jamison) was terminated from a contracted job and replaced by a competitor firm (Yates). *Id.* at 637. After Smith Jamison sued Yates for tortious interference (and other torts), Yates sought to force Smith Jamison to arbitrate under the terminated subcontract between Smith Jamison and the general contractor. *Id.* at 638. The appellate court held that there was no basis for Yates to enforce the arbitration agreement in the subcontract because Smith Jamison's claims arose out of state-law duties having no basis therein. *Id.* at 638-39.

Smith Jamison is easily distinguishable from the present case. Here, Plaintiffs allege that Appellants duped them into entering into the contracts that are the underlying basis for all Plaintiffs' claims. Further, Plaintiffs can establish a legal basis for relief *only* by showing that the missing signatory (ACN) did not deliver on

its end of the IBO Agreements, and their measure of relief depends upon the funds they invested with ACN. *See supra* 8-9. Moreover, *Smith Jamison* is an outlier, as the great weight of North Carolina precedent supports broad enforcement of arbitration agreements in favor of nonsignatories. Thus, even if the Court were to give Plaintiffs a do-over on their choice of law, North Carolina law would require arbitration.

B. Under Circuit precedent, Appellants are entitled to enforce the arbitration clause against Plaintiffs.

Nonsignatory enforcement is commonplace. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Smith/Enron Cogeneration Ltd. P'Ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999). Yet Plaintiffs act as though it is prohibited. For example, they claim "[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." Pls.' Br. 4. This is an incorrect statement of the law. This Court regularly allows arbitration agreements to be enforced by and against nonsignatories, under a variety of theories including equitable estoppel. Appellants' Br. 4-5, 16-26. In the circumstances here, where nonsignatories (Appellants) seek to hold signatories (Plaintiffs) to their agreement to arbitrate, equitable estoppel applies more easily. *Smith/Enron,* 198 F.3d at 97.

Plaintiffs know all this. Indeed, their attempted flip-flop to North Carolina law suggests they understand the weakness of their argument under Circuit law. Not

surprisingly, that weakness shows through once they actually articulate their position. They say their claims are not "intertwined" with the IBO Agreements and that there was no "close relationship" between Appellants and ACN. Pls. Br. 27-37. The problem for Plaintiffs is their own allegations prove otherwise.

As Appellants explained in their opening brief, Plaintiffs' complaint references ACN more than 700 times, IBOs more than 100 times, and the ACN "business opportunity" more than 50 times. Appellants' Br. 2, 25. Further, "Plaintiffs' allegations repeatedly highlight and detail the 'close relationship' between ACN and Appellants under which Appellants endorsed and promoted ACN." *Id.* at 21. In making these points, Appellants referenced several dozen complaint paragraphs demonstrating that Plaintiffs' claims are intertwined with the IBO Agreements and that Appellants and ACN had a "close relationship." *Id.* at 18-21.

What do Plaintiffs say in response to all of these details from their complaint? *Nothing.*

In ten pages of briefing on these issues, Plaintiffs do not respond to any of these points. They don't ever try to explain away the 700+ references to ACN or the 100+ references to IBOs. They don't ever try to explain away any of the dozens of paragraphs Appellants cited to show both "intertwinedness" and a "close relationship." In fact, in their entire ten-page argument, *Plaintiffs only reference a*

single paragraph of their 505-paragraph complaint. *See* Pls.' Br. 27-37. They simply run away from it. Their lack of response should be seen for what it is: a concession that their own allegations demonstrate both elements of the equitable-estoppel analysis.

With nowhere to turn, Plaintiffs resort to arguing irrelevancies. For example, they claim that Plaintiffs did not know the details of the alleged financial deal between Appellants and ACN. Pls.' Br. 28-29. But the "close relationship" test does not require that Plaintiffs know the details of any deal between Appellants and ACN. It simply requires what it says: a "close relationship." Again, Plaintiffs are boxed in by their own allegations, describing Appellants as having a "longstanding commercial relationship with ACN" that included "close personal and financial ties to ACN's founders and principals." App. 52 (¶18); *see also, e.g.*, App. 275 (¶146) ("special relationship").

This illustrates is why it makes no difference whether the Court applies federal law or North Carolina law (or any other standard) on equitable estoppel. No matter the standard, Plaintiffs are defeated by their own allegations, and Appellants are entitled to enforce the IBO Agreement's arbitration clause against Plaintiffs.[6]

[6] Plaintiffs' identify a few irrelevant factual differences between the Court's equitable-estoppel precedents and this case, hoping to distinguish this case from the wall of Circuit precedent enforcing arbitration agreements in favor of nonsignatories. Pls.' Br. 30-33. This is a dead-end. Because their own allegations so

C. Plaintiffs' attempt to end run their arbitral obligations is an additional reason why equitable estoppel requires arbitration here.

Equitable estoppel requires arbitration here, even without taking into account Plaintiffs' attempt to evade the FAA and their arbitral obligations via artful pleading. Their gamesmanship just makes this an easier case.

To be clear, Plaintiffs don't dispute that their decision not to include ACN in the caption is an attempted "end-run around the arbitration clause," *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 530 (2000). *See* Appellants' Br. 10-11. They just think they should be permitted to get away with it. But the FAA and its "'liberal federal policy favoring arbitration agreements,'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), were not designed for such easy circumvention. That is why federal courts police attempts "to bypass … arbitration clause[s]" through artful pleading. *Grigson*, 210 F.3d at 530.

Plaintiffs write off *Grigson* as an outlier that is not controlling here. Pls.' Br. 37-40. But *Grigson* is not an outlier. The Seventh Circuit has warned against a party attempting to avoid an arbitration agreement by suing a "related party with which it has no arbitration agreement." *IDS Life Ins. Co. v. SunAmerica, Inc.,* 103 F.3d 524, 530 (7th Cir. 1996). As that court put it, "[s]uch a maneuver should not be allowed to succeed." *Id.* The Fourth Circuit likewise bars parties from "using artful pleading

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thoroughly defeat their position, this is an even more straightforward case for equitable estoppel.

to avoid arbitration." *American Bankers*, 453 F.3d at 628 (cleaned up). So does this Court. *Smith/Enron.*, 198 F.3d at 98 ("SCI cannot now shield itself from arbitration by arguing that only the 1994 Agreement contains an enforceable arbitration clause, and that only EDR and EDRO—the parties SCI intentionally did not sue in the Dominican Lawsuit—would have the right to invoke it."). Plaintiffs' attempt to plead around their arbitral obligations thus is an additional reason to require arbitration here.

III. Appellants asserted their arbitral rights in a timely manner; Plaintiffs' counterarguments are meritless.

Plaintiffs do not mention this Court's longstanding precedents permitting the assertion of arbitral rights *following a decision* on a 12(b)(6) motion—let alone attempt to distinguish them. And for good reason: they can't. In *Rush v. Oppenheimer*, 779 F.2d 885 (2d Cir. 1985), this Court held that a motion to compel was timely, notwithstanding that it was filed after the defendant's "extensive involvement over the course of eight months in the litigation," including filing a motion to dismiss, answering the complaint, and participating in discovery. *Id.* at 887-91. And in *Sweater Bee By Banff v. Manhattan Indus.*, 754 F.2d 457 (2d Cir. 1985), this Court similarly held that a motion to compel was timely after a 12(b)(6) motion was briefed and decided. *Id.* at 463-66. Appellants fit easily within those cases. Appellants' Br. 26-31.

As Appellants explained previously, there had been very little litigation in the eight months between the filing of this action in October 2018 and Appellants' assertion of their arbitral rights in July 2019—much less the type of "extensive" litigation this Court has permitted without finding waiver. *Rush*, 779 F.2d at 887-91. The district court had held only one conference and made only two procedural rulings; no discovery had taken place; and Appellants' 12(b)(6) motion remained pending. Appellants' Br. 27-29. Plaintiffs cannot establish prejudice—the "key" to waiver analysis, *La. Stadium & Exposition Dist. v. Merrill Lynch,* 626 F.3d 156, 159 (2d Cir. 2010)—on those facts. "This Circuit"—and countless others—have "refused to find waiver in a number of cases where delay in trial proceedings was not accompanied by substantial motion practice or discovery." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002) (per curiam). Nor can Plaintiffs establish prejudice because of the "expense that Plaintiffs incurred from briefing procedural issues and the motion to dismiss, and in amending their complaint." Pl. Br. 43. "Incurring legal expenses inherent in litigation without more, is insufficient evidence of prejudice to justify a finding of waiver." *PPG Indus. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997).

Plaintiffs' final attempt to show prejudice also falls flat. Plaintiffs claim that Appellants have "availed themselves of intrusive discovery procedures that would have been unavailable in arbitration, serving numerous non-party subpoenas on

plaintiffs' friends and family." Pl. Br. 41. At best, that statement is misleading. Appellants have not yet formally sought information from Plaintiffs' "friends and family." On January 16, 2019, Appellants sent Plaintiffs eight *preservation* subpoenas addressed to unnamed individuals referenced in the complaint. SA 59. Far from being "intrusive," those notices sought only the preservation of evidence. Appellants asked Plaintiffs to accept service of the document-preservation subpoenas on behalf of those individuals since Plaintiffs would not provide the relevant contact information. Plaintiffs accepted service. Then, on January 30, 2020, after the district court denied Appellants' motion to dismiss, Appellants sought to discover from Plaintiffs the identities of those individuals in order to serve Rule 45 subpoenas on them. D.Ct. ECF 263 at 10-11; SA165-66. Plaintiffs refused to provide that information, representing that those witnesses were in the process of retaining independent counsel for purposes of discovery. *Id*. No such counsel surfaced, and the subpoenas in question were not served. In any event, neither the preservation subpoenas nor unserved Rule 45 subpoenas come close to constituting the "substantial motion practice or discovery" this Court has required (in conjunction with serious delay) to find waiver. *Thyssen,* 310 F.3d at 105. Plaintiffs' attempt to manufacture prejudice out of nothing bespeaks the weakness of their position.

Importantly, Appellants repeatedly objected to all discovery (other than that addressed to arbitrability) pending a decision on their motion to compel arbitration

and ACN's parallel request. *E.g.*, D.Ct. ECF 177 at 1 (requesting a stay of discovery); D.Ct. ECF 233 at 12 (objecting to continued discovery).

Plaintiffs also fail to distinguish (or, again, even mention) the wall of precedent from courts around the country showing that Appellants timely asserted their arbitral rights. Without providing any explanation, Plaintiffs claim (at 44) that "it matters" to the waiver analysis that Appellants are nonsignatories to the IBO agreements. It doesn't. This Court considers three factors in analyzing the waiver of arbitral rights: "(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*, 626 F.3d at 159. Appellants are not aware of any case in this or any other court that adds "was the party a signatory" to its waiver analysis. Moreover, Plaintiffs falsely claim (at 45) that none of Appellants' cases involve a nonsignatory. *Crossville Med. Oncology, P.C. v. Glenwood Sys., LLC*, 310 F. App'x 858 (6th Cir. 2009), for example, specifically rejected the argument that a nonsignatory "cannot enforce the agreement's arbitration clause because it was not a signatory to the agreement." *Id.* at 859-60. The court went on to conclude that the nonsignatory defendant did not waive its right to arbitrate "by engaging in litigation for eight months before demanding arbitration." *Id.* at 859. Again, Plaintiffs' position is demonstrably incorrect.

Instead of addressing this Court's governing precedent—or *any* case Appellants cited—Plaintiffs cite two easily distinguishable cases in arguing that Appellants waived their arbitral rights. In *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, the defendant chose to be in federal court by removing an action from state court, filed multiple pleadings, asserted several counterclaims, and "vigorously pursued discovery," all before asserting its arbitral rights "[o]nly at the eleventh hour, with trial imminent." 67 F.3d 20, 26 (2d Cir. 1995). Put simply, *Leadertex* is nothing like this case. *PPG Industries* is likewise distinguishable for several reasons, including because the *plaintiff* belatedly sought to compel arbitration after having affirmatively chosen to proceed by litigation. 128 F.3d at 107-09. Further, both *Leadertex* and *PPG Industries* acknowledged that, where defendants have participated in discovery, this Court has "refused to find that the plaintiff was prejudiced by the defendant's pursuit of discovery where the plaintiff divulged no 'significant information' to the defendant during the discovery process." 128 F.3d at 109. Thus, to the extent they are relevant here, *Leadertex* and *PPG Industries* support Appellants.

Finally, the district court hindered Appellants' ability to assert their arbitral rights by allowing Plaintiffs to proceed pseudonymously. This fact bolsters Appellants' case for timeliness. Plaintiffs sought the court's guidance on how to proceed in light of the pseudonymity order, which made this unlike the "typical case"

where "Plaintiffs' names would appear in the caption and [Appellants] could have asked ACN to search its records for Plaintiffs' IBO Agreements months ago." D.Ct. ECF 104 at 10. Plaintiffs' unfounded accusation (at 44) that this was "pretextual" is just that—an unfounded accusation. In allowing Plaintiffs to withhold their names, the district court prevented Appellants from discovering Plaintiffs' arbitration agreements, forcing Appellants to seek the court's guidance about how to proceed.

In short, Appellants timely asserted their arbitral rights. Were there any doubt, Appellants still should prevail given the federal policy favoring arbitration and this Court's emphasis that "[w]aiver is not to be lightly inferred," *Rush*, 779 F.2d at 887.

* * *

Proceedings below are currently stayed. The Court should keep that stay in place until this appeal is resolved, for the reasons previously articulated. Appellants' Br. 32-34; 2d Cir. ECF 59 at 10-21; 2d Cir. ECF 120 at 1-10. Indeed, those reasons apply even more forcefully now; since this appeal has been expedited, a continued stay would be of only modest duration.

CONCLUSION

Appellants respectfully request that the Court reverse the decision below and remand with instructions to grant the motion to compel arbitration. Appellants also respectfully request that the Court extend the current stay until it reaches a decision on the merits.

September 8, 2020

Respectfully submitted,

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Dated: September 8, 2020 */s/ Thomas R. McCarthy*

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I hereby certify that on September 8, 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.

By: */s/ Thomas R. McCarthy*