No. 20-11242

IN THE
United States Court of Appeals
For the Eleventh Circuit

BRAD TUCKMAN,

Appellee,

v.

JPMORGAN CHASE BANK, N.A. and JOHN TORRES,

Appellants.

On Appeal from the United States District Court for the Southern District of Florida

No. 19-cv-62843

APPELLEE'S RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS

As required by Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, Appellee Brad Tuckman lists the following interested persons omitted from the certificates of interested persons in Appellants' briefs:

Creative Drive LLC (business in which Appellee has an interest)

Kreate Films, LLC (business in which Appellee has an interest)

Tuckman, Shona (Appellee's wife)

Xendoo, Inc. (business in which Appellee has an interest)

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STATEMENT REGARDING ORAL ARGUMENT

Because this case involves the straightforward application of binding law, oral argument is unnecessary.

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INTRODUCTION

Appellee, Brad Tuckman, is a victim of a Ponzi scheme orchestrated by two men who have been indicted by the U.S. Attorney's Office for the Southern District of Florida. Appellants, JPMorgan Chase Bank, N.A. and its employee John Torres, were integral parts of the scheme and intentionally helped these conmen swindle Tuckman. In response to this lawsuit, Chase and Torres, not having any agreement themselves with Tuckman, sought to compel arbitration based on arbitration and delegation clauses of a document, used by the conmen, called the Depositor Funding Agreement. This Agreement, according to the indictment and two of the defendants who pleaded guilty, was "false and fraudulent" and used by the conmen to defraud victims such as Tuckman and an entity that he partially owns.

The district court denied the motion to compel arbitration because, quite simply, there is no agreement to arbitrate or delegate anything as between the litigants in this lawsuit. The undisputed summary-judgment evidence compelled this result. It showed that: Tuckman was not, personally, a signatory to the Depositor Funding Agreement; Chase was not a signatory to the Depositor Funding

Agreement; and Torres was not a signatory to the Depositor Funding Agreement. Moreover, the actual signatories to the Depositor Funding Agreement (which included fraudulent entities controlled by the conmen) amended the Agreement to axe the delegation clause Chase and Torres seek to invoke.

Knowing that they have no basis for binding Tuckman to the Depositor Funding Agreement, for invoking the delegation clause, or for pretending the delegation clause exists, Chase and Torres resort to asserting that federal courts cannot consider even whether the litigants agreed to the delegation clause. But this argument ignores Supreme Court precedent, which acknowledges that delegation clauses are just antecedent agreements to arbitrate the question of arbitrability. The Supreme Court's dictate on this is clear; five U.S. circuit courts of appeals have held as much.

Accordingly, before enforcing a delegation clause, a court must satisfy itself that the litigants agreed to the delegation clause and that the clause exists. Here, they did not and it does not. The Eleventh Circuit should therefore follow Supreme Court precedent and affirm the district court's denial of the motion to compel arbitration.

STATEMENT OF THE ISSUES

1. This Court has held that delegation clauses are simply antecedent agreements to arbitrate and that the Federal Arbitration Act operates on a delegation clause as it does on any other arbitration agreement. Under the FAA, courts must satisfy themselves that the litigants agreed to the arbitration agreement that one of those litigants seeks to enforce. Must a court under the FAA consider whether the litigants agreed to the delegation clause one litigant seeks to invoke?

2. Under Florida law, when an agent signs an agreement on behalf of a principal, that agent is not a party to the agreement. Here, an agent for a limited liability company signed on the LLC's behalf an agreement with arbitration terms and later sues other non-signatories to the agreement. Is the agent bound by those terms to arbitrate his dispute with the non-signatories?

3. To pierce the corporate veil under Florida law, a party must show that an entity's owner dominated the entity, the owner used the entity for illegal or fraudulent purposes, and the illegal or fraudulent purpose injured the party. Here, an entity's owner did not dominate the entity's finances or policies, and the entity never injured any creditor,

including the party seeking to pierce the corporate veil. Under those circumstances, should a court pierce the corporate veil?

4. Three entities litigated a breach-of-contract dispute in Florida state court. Under Florida law, judicial estoppel applies only where the same parties litigate the same issues. Does Florida's judicial-estoppel doctrine apply when, later on, a non-party to the state litigation sues two other non-parties to that litigation?

5. In Florida, the third-party beneficiary doctrine applies if a contract expresses an intent to primarily and directly benefits a third party who did not sign the contract. Here, a contract expresses an intent to directly and primarily benefit and bind the signatories. Is a non-signatory barely mentioned in the contract a third-party beneficiary under Florida law?

6. In Florida, a non-signatory can invoke an arbitration agreement and force a signatory to arbitrate under equitable estoppel if the signatory's refusal to arbitrate is inconsistent with its previous actions. Here, the signatories to the relevant agreement litigated their disputes in Florida state court. Can a non-signatory force another non-

signatory to arbitrate under the arbitration agreement that the signatories never invoked when they litigated?

7. Here, signatories to a contract with an arbitration agreement amended the contract so that one signatory alone could demand arbitration. Florida law, which governs, allows signatories to amend their contracts as they will. Can a non-signatory invoke the arbitration agreement if the sole signatory with any right to do so has not?

8. Courts do not enforce contractual terms that further or hide crimes. In Florida, it is a crime to steal someone's money. Can a thief invoke arbitration clauses in an admittedly false and fraudulent agreement when doing so assists in hiding the thief's criminal activities from public view?

STATEMENT OF THE CASE

This lawsuit began in November of 2019, when Appellee, Brad Tuckman, filed his Complaint in the United States District Court for the Southern District of Florida, suing, among others, the Appellants JPMorgan Chase Bank, N.A. and John Torres for committing, conspiring, or aiding and abetting fraud and civil RICO. Chase moved to

compel arbitration (and Torres joined that motion) based on an agreement, titled the "Depositor Funding Agreement."

I. THE COMPLAINT ALLEGES CHASE'S AND TORRES'S INTENTIONAL PARTICIPATION IN A PONZI SCHEME.

The Complaint alleges that JPMorgan Chase Bank, N.A. and John Torres intentionally participated in a Ponzi scheme orchestrated by Benjamin McConley and Jason Van Eman. McConley and Van Eman, the Complaint alleged, were indicted criminal defendants. The United States Attorney's Office for the Southern District of Florida charged each of them with dozens of wire-fraud counts, listed Tuckman as a victim of their Ponzi scheme, and described their modus operandi as convincing filmmakers to give them money through the use of false and fraudulent funding agreements.

The Complaint's allegations mirror in many ways the criminal indictment. In 2017, Van Eman's "company" (Weathervane Productions, Inc.) and McConley's "company" (Forrest Capital Partners, Inc.) convinced Tuckman that they could finance a movie titled *Dr. Bird's Advice for Sad Poets*. The financing agreement, titled the Depositor Funding Agreement, was executed in October of 2017 by Weathervane

Productions, Forrest Capital, and Bird Film Fund, LLC. [ECF No. 1 ¶¶ 112–13]

Under the Depositor Funding Agreement, Weathervane Productions and Forrest Capital would collectively deposit $1.85 million into a bank account at Chase (the "Chase Account"), and Bird Film Fund would deposit $1.85 million into the same account. [ECF No. 1 ¶ 109] Weathervane Productions and Forrest Capital would use the $3.7 million to receive a $3.7 million line of credit from Chase. [ECF No. 1 ¶ 111] When the line of credit was received, Weathervane Productions and Forrest Capital would return Bird Film Fund's $1.85 million and use the line of credit to fund *Dr. Bird's Advice for Sad Poets*. [ECF No. 1 ¶¶ 101–11]

Tuckman was part owner and managing member of Bird Film Fund, and he was going to wire his own money to the purportedly secure Chase Account. [ECF No. 1 ¶ 123] Before doing so, however, Tuckman sought reassurance from Chase and its employee who at all material times worked as a banker, Torres, that the Chase Account was, in fact, secure. [ECF No. 1 ¶ 114] To this end, on November 1, 2017, the owner of Weathervane Productions sent Tuckman an e-mail

with a letter attachment. The letter, which contained Chase's letterhead, stated that Chase had opened a secured account "managed in accordance" with the Depositor Funding Agreement. [ECF No. 1 ¶ 115] The letter also stated that Forrest Capital had accounts in "good standing" at Chase and that those accounts had over $3.7 million in funds without restrictions or holds. [ECF No. 1 ¶ 115] The letter was signed by Torres. [ECF No. 1 ¶ 115]

Not done there, Van Eman sent an e-mail to Torres (at his Chase e-mail address), Tuckman, McConley, and two others, in which he asked Torres to confirm the letter. [ECF No. 1 ¶ 118] Torres confirmed; he also wrote that Chase was "ready to open the account for the new project." [ECF No. 1 ¶ 119]

Torres's statements were fabrications. There was no secure Chase Account, but based on those statements, Tuckman wired $1.85 million of his money to the Chase Account. McConley and Van Eman swiftly stole Tuckman's $1.85 million.

Torres would lie to Tuckman again, when Tuckman hounded him for his money. For instance, on April 6, 2018—long after Weathervane Productions and Forrest Capital promised to obtain a line of credit—

Tuckman had a call with Van Eman and Torres. On that call, Torres told Tuckman that his $1.85 million would be returned by wire that Friday; Torres also pleaded with Tuckman to give the wire transfer until the upcoming Monday, because Torres did not want Tuckman calling the Chase branch on Friday. [ECF No. 1 ¶ 135] Torres told Tuckman that calling the Chase branch before that deadline might jeopardize the line of credit from processing. [ECF No. 1 ¶135] These statements from Torres, of course, were fabrications too.

Based on these allegations, Tuckman sued Chase and Torres for fraud, violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)–(d), conspiracy to defraud, aiding and abetting fraud, and aiding and abetting conversion.

II. CHASE MOVES TO COMPEL ARBITRATION.

On January 17, 2020, Chase filed a motion to compel arbitration or to, alternatively, "dismiss this action" based on judicial estoppel. [ECF No. 40 at 19] On the same day, Torres filed a notice that he joined Chase's motion to compel arbitration. [ECF No. 41]

Under binding precedent, whether an agreement to arbitrate exists between or among the litigants is a matter of state law, and a

summary-judgment-like standard applies. *See Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1329–30, 1333 (11th Cir. 2016). To attempt to meet its burden of proving that Chase, Torres, and Tuckman had agreed to arbitrate their dispute, Chase introduced the Depositor Funding Agreement as evidence, as well as a handful of consent judgments that Bird Film Fund received against Weathervane Productions and Forrest Capital in Florida state court. In opposition and consistent with summary-judgment principles, Tuckman filed a statement of material facts and a declaration, along with verified, authentic amendments to the Depositor Funding Agreement and the criminal indictment issued by the U.S. Attorney's Office.

Those facts, when viewed in the light most favorable to the nonmoving party (i.e., Tuckman), show the following.

A. None of the Signatories to the Depositor Funding Agreement Are Litigants in this Lawsuit.

In October of 2017, Weathervane Productions, Forrest Capital, and Bird Film Fund executed the Depositor Funding Agreement. The Depositor Funding Agreement required Bird Film Fund to deposit $1,850,000 into the Chase Account and Forrest Capital to match that deposit in the same account. Within 90 days of having the $3.7 million,

Forrest Capital and Weathervane Productions had to obtain a $3.7 million line of credit to fund the movie. [ECF No. 54-2 §§ 4–5] Once the line of credit was obtained, the $1.85 million had to be returned. [ECF No. 54-2 § 4]

The Depositor Funding Agreement defined Weathervane Productions, Forrest Capital, and Bird Film Fund, collectively, as the "Parties" both in its introduction and in section 1. [ECF No. 54-2 at 2 & § 1][1] At other locations, the Depositor Funding Agreement stated that it bound "the Parties" and "their respective successors and permitted assigns." [ECF No. 54-2 at 11]

It also had a signature page. There, Van Eman signed that agreement as "President" of Weathervane Productions, Inc.; McConley signed it as "Managing Partner" of Forrest Capital Partners, Inc.; and Brad Tuckman signed it as "Managing Member" of Bird Film Fund, LLC. [ECF No. 54-2 at 12] In his declaration, Tuckman attested that he

[1] When citing material in the district court's docket, this brief cites the page number listed on the ECF-created header, not the page number of the individual documents. For example, this citation (ECF No. 54-2 at 2) is citing page 2 of Document 54-2 on ECF, which, in turn, is page 1 of the Depositor Funding Agreement.

signed the Depositor Funding Agreement on Bird Film Fund's behalf, alone, and did not sign in his individual capacity. [ECF No. 54-1 ¶ 5]

Tuckman was not the sole owner of Bird Film Fund, never dominated Bird Film Fund's finances, and never used Bird Film Fund for improper or illegal purposes. [ECF No. 54-1 ¶ 18] Likewise, the summary-judgment evidence is that Bird Film Fund never injured any creditor. [ECF No. 54-1 ¶ 18]

Two other clauses in the Depositor Funding Agreement are relevant. First, the Depositor Funding Agreement had an arbitration clause in section 14, which stated:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Agreement to arbitrate, shall be determined by binding arbitration in Miami, Florida before one arbitrator selected pursuant to the JAMS rules and procedures. The arbitration shall be administered by JAMS pursuant to its JAMS' [*sic*] Comprehensive Arbitration Rules and Procedures. The Parties agree to confidential arbitration and any disclosure of said arbitration or the parameters of the terms of the dispute, claims or controversy constitutes an automatically [*sic*] forfeiture of the breaching parties [*sic*] claim. The Parties hereby agree to waive the right to seek punitive damages or

> equitable [*sic*] and the arbitrator shall not have the authority to award such damages or relief.

[ECF No. 54-2 § 14.B]

Second, the Depositor Funding Agreement also explained certain mechanisms about Weathervane Productions, Forrest Capital, and Bird Film Fund's management of the Chase Account. Section 8 stated:

> The [Chase Account] shall be in the name of [Bird Film Fund] and controlled by [Forrest Capital], [Weathervane Productions], and [Bird Film Fund], and shall have one signatory assigned from each of [Forrest Capital], [Bird Film Fund] and [Weathervane Productions] as follows: Benjamin McConley [for Forrest Capital], Brad Tuckman [for Bird Film Fund] and Jason Van Eman [for Weathervane Productions]. These signatories specifically agree to the terms set forth in this Section 8 . . . .

[ECF No. 54-2 § 8.A] Section 8 of the Depositor Funding Agreement explains only as follows: "The [Chase Account] shall operate in accordance with the written relevant account operation mechanics as required by Chase and the provisions of this Agreement, all subject to [Bird Film Fund's] consent." [ECF No. 54-2 § 8.B]

The Depositor Funding Agreement never mentions third-party beneficiaries. The evidence reflects that no third-party beneficiaries were ever intended. [ECF No. 54-1 ¶ 6]

B. The Signatories Amended the Arbitration Terms.

The summary-judgment evidence also showed that the Depositor Funding Agreement's signatories—Weathervane Productions, Forrest Capital, and Bird Film Fund—amended the Depositor Funding Agreement beyond recognition.

Amendment in June of 2018. When Weathervane Productions and Forrest Capital could not produce the required line of credit, they agreed to modify the Depositor Funding Agreement. [ECF No. 54-1 ¶ 8] On June 20, 2018, Weathervane Productions, Bird Film Fund, and Forrest Capital executed a "Settlement and Forbearance Agreement." [ECF No. 54-1 ¶ 8; ECF No. 54-3] The Settlement and Forbearance Agreement acknowledged that Forrest Capital and Weathervane Productions had breached the Depositor Funding Agreement and amended its terms by requiring Forrest Capital to make payment by a time certain. [ECF No. 54-1 ¶ 9] If Forrest Capital or Weathervane Productions breached the Settlement and Forbearance Agreement or the Depositor Funding Agreement's unmodified terms, Bird Film Fund would be entitled to execute the Consent Judgment, which was attached as an exhibit. [ECF No. 54-3 § 4.2] The Consent Judgment, by its plain

terms, was to be filed in the "Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida," not before JAMS or any other arbitral body. [ECF No. 54-3 at 7; ECF No. 54-1 ¶ 10]

Litigation in State Court. Weathervane Productions and Forrest Capital defaulted, so in July of 2018, Bird Film Fund and the film's production company sued Forrest Capital, Weathervane, and McConley in Florida state court. [ECF No. 54-1 ¶ 10] At no point did any of the parties to the Depositor Funding Agreement move to compel arbitration. Instead, they litigated. [ECF No. 54-1 ¶ 10]

Another Amendment in October of 2018. As the state-court litigation continued, Weathervane Productions, Forrest Capital, Bird Film Fund, and the film's production company executed the October 23, 2018 Amendment, an authentic copy of which Tuckman provided in the record. [ECF No. 54-1 ¶ 11; ECF No. 54-4] Under this agreement, Weathervane Productions and Forrest Capital agreed to terminate any earlier arbitration rights they held under the Depositor Funding Agreement. Specifically, "in the event of a default," Weathervane Productions and Forrest Capital agreed "to give up all their rights, entitlements and benefits under" the Depositor Funding Agreement and

Settlement Forbearance Agreement, "[e]xcept" for their "right to receive back the actual dollars invested" and Weathervane Productions' "profit share from the net proceeds from" the film. [ECF No. 54-4 at 2] This language is clear, but Tuckman also declared that the contractual parties' intention in using that language was to waive all rights that Weathervane Productions and Forrest Capital had, including the right to arbitrate. [ECF No. 54-1 ¶ 12] There is no dispute that Weathervane Productions and Forrest Capital defaulted, because on October 29, 2018, Weathervane Productions, Forrest Capital, Bird Film Fund, and the film's production company executed yet another amendment, which recognized the default and recognized that Weathervane Productions and Forrest Capital had abandoned all their rights, entitlements, and benefits under (among other documents) the Depositor Funding Agreement. [ECF No. 54-5]

Consent Judgments. In November of 2018, the Florida Circuit Court for the Seventeenth Judicial Circuit issued consent judgments against Weathervane Productions and Forrest Capital and on Bird Film Fund's (not Tuckman's) behalf. [ECF No. 54-1 ¶ 16] At no time was Tuckman, individually, a party to the Florida state court action.

Contrary to Chase's and Torres's insinuations that Tuckman is seeking double recovery, the summary-judgment evidence is that Bird Film Fund has not been able to collect on these consent judgments. [ECF No. 54-1 ¶ 17]

C. McConley and Van Eman Ran a Ponzi Scheme and the Delegation Clause Is an Artifice of Fraud.

The Complaint alleged that the U.S. Attorney's Office indicted McConley, Van Eman, and a Wells Fargo employee with a modus operandi similar to Torres's. Tuckman provided the district court with a copy of that indictment. [ECF No. 54-7]

That criminal proceeding is before the same judge who considered the motion to compel arbitration in this lawsuit. In the indictment, the government alleges that McConley and Van Eman conspired to persuade "victims, through false and fraudulent pretenses, representations, and promises, to send monies to certain bank accounts controlled by defendants" and then transferred "those same monies, without the victims' knowledge or authorization." [ECF No. 54-7 at 6 ¶ 3] In describing the Ponzi scheme, the government alleges that "to lure investors, producers, and lenders," McConley and Van Eman "executed false and fraudulent 'funding agreements,'" which purported to

guarantee "the victims' cash contributions or loans would be matched dollar-for-dollar" and to guarantee "the victims that their monies would be held in a secure bank account." [ECF No. 54-7 at 7 ¶ 8] According to the indictment, the "false and fraudulent funding agreements" required funds to be deposited in "bank accounts at," among other banks, "JP Morgan Chase Bank." [ECF No. 54-7 at 7 ¶ 9]

In describing Count 23, the government lists Tuckman as a victim of this Ponzi scheme. [ECF No. 54-7 at 16] Though in their briefs Appellants state that no evidence exists that the government is discussing Tuckman in the indictment, that representation contradicts the sole evidence on the record. In his declaration, Tuckman wrote, "I am identified by my initials 'B.T.' in the Government's July 25, 2019 indictment of McConley, Van Eman, and Benjamin Rafael." [ECF No. 54-1 ¶ 19]

In October of 2019, McConley pleaded guilty to conspiring to commit wire fraud. In the factual basis of his plea agreement, McConley admitted that the funding agreements used by McConley and Van Eman were meant to defraud victims. *See United States v. McConley*, No. 19-20447, ECF No. 48 ¶¶ 4–11 (S.D. Fla. Oct. 28, 2019). Thus, the

summary-judgment evidence before the district court was the Government's allegations that the Depositor Funding Agreement was "false and fraudulent," Tuckman's declaration that McConley and Van Eman used the Depositor Funding Agreement to steal his money, and McConley's admission to all of this. The summary-judgment evidence supports the conclusion that Tuckman was a victim of this scheme.

D. The District Court Denies the Motion To Compel.

The district court denied Chase's motion to compel arbitration and Torres's joinder in that motion. In its order, the district court agreed with three of Tuckman's arguments. [ECF No. 85 at 5] Those arguments, as explained by the district court, included that (1) "none of the parties to this action are parties to the [Depositor] Funding Agreement," (2) that the Appellants "ignore[d]" the threshold inquiry—i.e., did the litigants agree to arbitrate arbitrability and is there an existing delegation clause—and (3) that, in any event, they failed to meet their burden to "meet the first step," that is, the threshold inquiry. [ECF No. 85 at 4]

SUMMARY OF THE ARGUMENT

The main argument by Chase and Torres is that the delegation clause in the Depositor Funding Agreement constitutes "clear and unmistakable evidence" that Torres, Chase, and Tuckman agreed to arbitrate the issue of arbitrability. Yet the delegation clause is simply an additional, antecedent agreement that Chase and Torres are asking this Court to enforce. To decide whether to enforce the delegation clause, this Court must apply the FAA on this additional arbitration agreement just as it would on any other. Accordingly, before a federal court can apply the delegation clause, the federal court must satisfy itself that Torres, Chase, and Tuckman agreed to the delegation clause.

With that principle in mind, Torres's and Chase's argument falls by the wayside, since they introduced no summary-judgment evidence that Tuckman agreed to the delegation clause, that Torres or Chase can enforce the delegation clause, or that the delegation clause even existed at the time they moved to compel arbitration.

First, Chase and Torres provided no evidence or valid argument showing that Tuckman is bound by the "Depositor Funding Agreement." Tuckman signed the "Depositor Funding Agreement" on behalf of an

entity, so Florida law holds that Tuckman is not a party to that agreement. Nor can Chase or Torres bind Tuckman by piercing the corporate veil. Florida law, which governs, allows a litigant to pierce the corporate veil only if an owner dominated the entity, if the owner used it for an illegal or a fraudulent purpose, *and* if the improper use harmed that litigant. Chase or Torres never explain how any impropriety financially injured them. They offer no evidence that Tuckman "dominated" Bird Film Fund. And they do not explain, except by diktat, how a limited liability company's humdrum decision to sue for breach of contract constitutes an illegal or a fraudulent purpose under Florida law. Finally, Chase's and Torres's attempt to bind Tuckman to the Depositor Funding Agreement via judicial estoppel fails as well because under Florida law judicial estoppel applies only if the same parties litigated the same questions in a previous litigation. But the previous litigation on which Chase and Torres rely did not involve Tuckman, Chase, or Torres.

Second, Chase and Torres could not and cannot show that they can invoke the Depositor Funding Agreement's delegation clause. Chase first contends that it is a third-party beneficiary to the Depositor

Funding Agreement, a contention squarely contradicted by the Depositor Funding Agreement. Just as (if not more) importantly, the only other evidence before the district court was Tuckman's declaration, which stated that Bird Film Fund never intended to have Chase as a third-party beneficiary. Torres and Chase also try to invoke equitable estoppel as a means of enforcing the delegation clause. But Florida law does not allow a litigant to use equitable estoppel to compel a non-signatory, like Tuckman, to arbitrate. Nor could a non-signatory ever force a signatory to arbitrate where, like here, the signatories have already litigated their disputes.

Third, Torres and Chase wholly ignore that the signatories to the Depositor Funding Agreement amended that agreement such that the delegation clause and other arbitration clauses no longer exist. Accordingly, there are no arbitration clauses for the federal courts to even enforce.

Finally, the delegation clause and arbitration clause are unenforceable under public policy. McConley himself has admitted that the Depositor Funding Agreement was an artifice of fraud. Any provisions that help McConley, Van Eman, Chase, or Torres perpetuate

or hide their crimes, including the delegation clause, are individually unenforceable as a matter of law.

ARGUMENT

This Court reviews the denial of a motion to compel arbitration de novo. *Gutierrez v. Wells Fargo Bank, N.A.*, 889 F.3d 1230, 1235 (11th Cir. 2018). Chase's and Torres's argument is largely a strawman—a way to avoid the futile but necessary task of showing a federal court that (1) Tuckman is bound by the Depositor Funding Agreement, (2) Torres and Chase can invoke and enforce the delegation clause, and (3) the signatories did not amend or supersede the delegation clause and arbitration clause. But Supreme Court precedents contradict the Appellants' red-herring. This Court, like the district court, must therefore consider the "threshold" question—did the litigants agree to arbitrate issues of arbitrability? And, just as the district court found, this Court will find no support for the Appellants' contentions.

I. CHASE AND TORRES MISCONSTRUE THE POWER OF THE DELEGATION CLAUSE.

The Depositor Funding Agreement, in section 14.B, has what courts call a "delegation clause"—an agreement to arbitrate the gateway issues of "arbitrability." "Arbitrability" is "[t]he question

whether the parties have submitted a particular dispute to arbitration." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Because the Depositor Funding Agreement's "delegation clause" requires the arbitrator to decide the issues of arbitrability, Chase and Torres argue that the district court erred in considering the issues raised by Tuckman. Under their view, the district court (and this Court) must send the dispute to arbitration without analysis. This view is incorrect.

A. The Default Rule Is that Courts Must Determine Whether the Litigants Agreed To Arbitrate.

The Federal Arbitration Act, 9 U.S.C. §§ 1–16, governs Chase's motion to compel (and Torres's joinder). "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002). This is so because "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Standford Junior Univ.*, 489 U.S. 468, 479 (1989).

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement" can move to compel

arbitration under the FAA. 9 U.S.C. § 4.[2] "Under § 4 . . . the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue.'" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967). And, under § 2 of the FAA, federal courts must enforce written provisions to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

As interpreted by the Supreme Court, this statutory language means that "where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010). The same applies to disputes on whether non-parties to an arbitration agreement can enforce the

[2] Unfortunately, diction in the FAA context can be confusing. The term "party" as used in the statutory language of the FAA means "parties to the litigation rather than parties to the contract." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 n.4 (2009). That said, courts largely use the term "party" synonymously with both "litigant" and "party to the contract" for the obvious reason that in most cases the litigants are, in fact, parties to the relevant contract. That is not so here. Therefore, for clarity's sake, the Appellee uses, except when called for by the statutory language of the FAA, the term "litigant" to describe a party to the litigation and "party to the contract" or "signatory" to describe a person or entity that is a party to an agreement.

arbitration clause, *Lawson v. Life of S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011), and whether the signatories superseded the arbitration clause, *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115–16 (11th Cir. 2014). These issues—which boil down to whether the litigants agreed to arbitrate anything at all—are sometimes called the "threshold question" or questions of "formation" or questions of "existence" or the first step in a "two-step inquiry."[3]

These threshold questions are crucial, because "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock*, 561 U.S. at 299 (internal quotation marks & citations omitted). Thus, the general rule is that courts must decide whether the litigants agreed to arbitrate the dispute before the court.

[3] *See, e.g.*, *Granite Rock*, 561 U.S. at 296 ("formation"); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1302–03 (11th Cir. 2017) (using "existence" and "formation"); *Dasher*, 745 F.3d at 1122 ("threshold determination"); *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) ("first step").

B. A Delegation Clause Can Change the Default Rule and Allow Arbitrators To Decide If the Parties Agreed To Arbitrate.

To be sure, parties to an arbitration agreement can overcome that general rule when the litigants provide "'clea[r] and unmistakabl[e]' evidence that" they "agreed to arbitrate" the gateway issue of "arbitrability." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (alterations in original). If the litigants' agreement to arbitrate contains a delegation clause that incorporates arbitral rules and if those arbitral rules allow an arbitrator to decide arbitrability, then the delegation clause constitutes "clear and unmistakable evidence" that all arbitrability issues should be decided by an arbitrator. *JPay, Inc. v. Kobel*, 904 F.3d 923, 938, 943 (11th Cir. 2018).

Chase and Torres twist this principle beyond recognition. They assert that, even where litigants dispute whether they agreed to the delegation clause, that delegation clause constitutes irrefutable evidence that the litigants wanted an arbitrator to decide the gateway issues of arbitrability. This argument, however, misunderstands how delegation clauses work. It ignores Supreme Court precedent to boot.

C. The Delegation Clause Changes the Default Rule Only if the Litigants Agreed to the Delegation Clause.

Delegation clauses are not, as Chase and Torres believe, silver bullets that prevent federal courts from considering any arbitrability issues. Rather, a delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010); *accord New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) ("A delegation clause is merely a specialized type of arbitration agreement, and the Act 'operates on this additional arbitration agreement just as it does on any other.'").

Importantly, the "additional agreement"—that is, the delegation clause—"is valid under § 2 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rent-A-Center*, 561 U.S. at 70. And a court can enforce it only after a court is "satisfied that the issue . . . is referable to arbitration." 9 U.S.C. § 3. Hence, before a court can compel arbitration of a delegation clause, it must perform the same analysis on that delegation clause that it would apply to an arbitration agreement generally.

And this analysis includes the threshold question, namely, did the litigants agree to the delegation clause.

> Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. . . . [T]hese issues *always* include whether the clause was agreed to, and may include when that agreement was formed.

Granite Rock, 561 U.S. at 297 (second emphasis added) (citations omitted); *see also Biller v. S-H Opco Greenwhich Bay Manor, LLC*, 961 F.3d 502, 508 (1st Cir. 2020) ("A party seeking to compel arbitration under the FAA must demonstrate 'that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope.'"). Thus, at essence, to invoke a delegation clause a litigant must show that it and the other litigant agreed to arbitrate the issue of arbitrability.

This framework—which comes from the Supreme Court—is not some rogue standard. The Second, Fifth, Eighth, Ninth, and Tenth Circuits have all applied it in one form or another.

The Tenth Circuit, for example, squarely agrees that this standard controls. In *Belnap v. Iasis Healthcare*, a surgeon and a medical center executed an agreement with an arbitration provision and a delegation clause. 844 F.3d 1272, 1274 (10th Cir. 2017). After the medical center disciplined the surgeon, the surgeon sued the medical center, the medical center's parent company, and several of the medical center's employees; all these defendants moved to compel arbitration. *See id.* When it came to the surgeon and the medical center, the Tenth Circuit easily concluded that they "clearly and unmistakably agreed to arbitrate arbitrability when they incorporated the JAMS Rules into" their written agreement. *Id.* at 1281. Like Torres and Chase here, the Tenth Circuit quoted JAMS Rule 8(c) for that basic, uncontested proposition. *See id.*

But then the Tenth Circuit turned to the "arbitrability of the claims against" those defendants "that did *not* sign" the agreement. *Id.* at 1293. Unlike what Torres and Chase ask this Court to hold, the

Tenth Circuit held that, "[t]o determine whether" the non-signatories "can compel" the surgeon "to arbitrate based on the arbitration provision," the Tenth Circuit *had* to decide if the non-signatories could enforce the delegation clause under "Utah law" (the state law applicable to the agreement). *Id.* at 1293. The Tenth Circuit ran through the applicable doctrines under state law that allow non-signatories to enforce arbitration or delegation clauses. The Tenth Circuit concluded that no doctrine permitted "the nonsignator[ies] . . . to compel Dr. Belnap to arbitrate based on the arbitration provision." *Id.* at 1298.

The Eighth Circuit did something similar. In *Shockley v. PrimeLending*, an agreement contained a delegation clause (which like the clause here incorporated the JAMS rules), but the Eighth Circuit did not simply ship the case to arbitration. 929 F.3d 1012, 1018 (8th Cir. 2019). Instead, contrary to what Chase and Torres ask this Court to do, the Eighth Circuit applied "the same state-law contract principles to the delegation provision as [it would] to arbitration agreements generally." *Id.* The Eighth Circuit applied state-law principles and concluded that one litigant had not accepted the terms of the agreement; "therefore, no contract was created." *Id.* at 1019. Based on

that, it held the "delegation clause . . . invalid." *Id.* And, for the same reason, it found the arbitration clause invalid. *See id.* at 1020.

Last year, the Fifth Circuit applied the same analysis. As the Fifth Circuit explained it, even if an agreement contained a delegation clause, courts ask "whether there is a *valid* delegation clause." *Tower Loan of Miss., LLC v. Willis (In re Willis)*, 944 F.3d 577, 579 (5th Cir. 2019) (emphasis added). The Fifth Circuit undertook that task under the relevant state law, concluded that the litigants agreed to the delegation clause, and only then compelled arbitration. *Id.* at 583.

The Second Circuit applied the same framework. According to the Second Circuit, "even assuming that" an agreement has a delegation clause, it is for the court to "resolve the disagreement over the formation of the parties' arbitration agreement before referring the dispute to arbitration." *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 n.6 (2d Cir. 2019) (internal quotation marks omitted). That is so because, "[t]o take the question of contract formation away from the courts would essentially force parties into arbitration when the parties dispute whether they ever consented to arbitrate anything in the first place." *Id.* at 251; *see also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122,

1127–28 (9th Cir. 2013) (rejecting argument that it was for arbitrator to determine whether non-signatory could enforce delegation clause).

As this caselaw shows, to find that the delegation clause constitutes clear and unmistakable evidence that the litigants agreed to arbitrate arbitrability, that court must find that the litigants actually agreed to an existing delegation clause. Any other rule, frankly, would be illogical. For, if yet another clause delegated the determination of the delegation clause's existence to an arbitrator, then that new clause would undergo the same scrutiny. As this Court put it in a different context, "[t]ruly, this is 'turtles all the way down.'" *United States v. Rosales-Bruno*, 789 F.3d 1249, 1264 (11th Cir. 2015). And, at the bottom, the same question would remain: Did the litigants agree to arbitrate at all?

And there's the rub, for Tuckman argued before the district court that he did not agree to the Depositor Funding Agreement at all, including the delegation clause. He argued that Chase and Torres could not enforce the Depositor Funding Agreement, including the delegation clause. And he argued that the parties to the Depositor Funding Agreement (Bird Film Fund, Weathervane Productions, and Forrest

Capital) amended that delegation clause out of existence. In other words, no delegation clause exists to which the litigants agreed.

The district court concurred. Yet, before the district court and now on appeal, the Appellants simply shirk this analysis, pretending it ought not to exist.

This Court should reject Chase's and Torres's wayward argument and follow the Second, Fifth, Eighth, Ninth, and Tenth Circuit's application of Supreme Court precedent. After all, Chase's and Torres's argument ignores the Supreme Court's and this Court's dictate that "the FAA operates on" a delegation clause "just as it does on any other" arbitration clause, *Rent-A-Center*, 561 U.S. at 70, and so requires an analysis on whether the litigants agreed to the delegation clause. Their argument discards the FAA's and Supreme Court's mandate that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock*, 561 U.S. at 299. And their argument leads to absurd results. By Chase's and Torres's preposterous logic, if a corporation's agent signed an agreement with a delegation clause on behalf of her corporation, *any* person whatsoever could force that agent to arbitrate arbitrability on *any* claim whatsoever. That's nonsense.

D. Chase and Torres Butcher *Rent-A-Center* and *Henry Schein*.

In support of their belief that this Court cannot analyze the delegation clause at all, Chase and Torres largely rely on two Supreme Court opinions (that Chase calls "dispositive"[4]): *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63. As Chase and Torres read *Henry Schein* and *Rent-A-Center*, so long as the delegation clause "is clear and unmistakable, *any* question of arbitrability must be sent to the arbitrator." [Chase Br. at 20] *Henry Schein* and *Rent-A-Center* themselves refute this reading.

To begin with, *Henry Schein* explicitly rejected Chase's and Torres's position that a federal court cannot determine whether the delegation clause itself exists:

> This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But *if* a valid agreement exists, and *if* the agreement delegates the arbitrability

[4] [Chase Br. at 16]

> issues to an arbitrator, a court may not decide the arbitrability issue.

139 S. Ct. at 530 (citations omitted) (emphasis added). By its plain language, *Henry Schein* notes that arbitrability is for the arbitrator only (1) if a valid agreement exists and (2) if that agreement delegates arbitrability to an arbitrator. Chase's and Torres's main argument before the district court and this Court ignores that first condition. This is why the district court agreed with Tuckman that the motion to compel arbitration "ignore[d]" the threshold inquiry. [ECF No. 85 at 4]

Henry Schein's language is so clear that every circuit court to consider Chase's and Torres's reading has rejected it, decidedly. *See VIP, Inc. v. KYB Corp. (In re Auto. Parts Antitrust Litig.)*, 951 F.3d 377, 382–83 (6th Cir. 2020) (rejecting Appellants' interpretation); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 n.3 (2d Cir. 2019) (same); *Lloyd's Syndicate 457 v. FloaTec, LLC*, 921 F.3d 508, 514 n.3, 515 (5th Cir. 2019) (same); *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 & n.9 (4th Cir. 2019) (same).

Chase's and Torres's interpretation of *Rent-A-Center* fares no better. Though Chase and Torres apparently believe that opinion dispositive, the Supreme Court explicitly noted that *Rent-A-Center* did

not consider, at all, the issue here—"whether any agreement between the parties," meaning litigants, "was ever concluded." 561 U.S. at 70 n.2.

In a final effort to support their argument, Chase and Torres rely on *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), and *Eckert/Wordell Architects, Inc. v. FJM Properties of Wilmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014). But those opinions are distinguishable.

Take, first, *Eckert/Wordell*. In that case, unlike here, the litigants agreed to arbitrate. *See Eckert/Wordell*, 756 F.3d at 1099 ("Shortly after the demand for arbitration was filed with the AAA, FJM Properties and Eckert Wordell *agreed* to have their dispute decided by a privately chosen arbitrator." (emphasis added)). The litigants proceeded to discovery *in arbitration*, until one of the litigants changed its mind and argued for the first time that "it had no agreement . . . requiring it to arbitrate disputes." *Id.* At that point, the litigant ran to federal court requesting a declaratory judgment stating it had no need to arbitrate—a request rejected at the summary-judgment stage. *See id.*

One more point on *Eckert/Wordell*. The Appellants' interpretation of *Eckert/Wordell* places that opinion in direct conflict with other

opinions by the Eighth Circuit, where it did not kowtow to a delegation clause but instead undertook the analysis required by the Supreme Court. *See Shockley*, 929 F.3d at 1018–19; *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014).

For its part, in *Apollo*, the First Circuit apparently applied federal law to the question of whether a non-signatory could compel arbitration. But as this Court explained, in 2009, the Supreme Court held in *Arthur Andersen*, 556 U.S. 624, that "traditional principles of state law," not federal law, govern whether a contract can "be enforced by or against nonparties to the contract." *Lawson*, 648 F.3d at 1170. In any event, in *Apollo*, no one disputed that the non-signatory seeking to enforce the delegation clause was a signatory's assignee. 886 F.2d at 470.

A final distinction. In *Apollo*, the litigant opposing the motion to compel arbitration was a party to the contract. *See id.* Though Tuckman disagrees that this difference is dispositive,[5] the Sixth Circuit has held that distinction to be fundamental. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 848 (6th Cir. 2020) ("Imagine, for instance, that Piersing had never signed the arbitration agreement. In

[5] *See* discussion *supra* Part I.C.

that context, our court has said, the question goes to the very 'existence of [a valid arbitration] agreement' and thus the court must itself resolve the question even if the agreement incorporates the AAA Rules." (alteration in original)). Here, Tuckman is not a signatory to the delegation clause. Because of this fundamental distinction, even Chase's and Torres's authority cannot support reversal.

II. THE LITIGANTS DID NOT AGREE TO ARBITRATE ANYTHING, NOT EVEN ARBITRABILITY.

As shown above, contrary to Chase's and Torres's beliefs, this Court must decide whether the litigants agreed to arbitrate arbitrability. This includes, under Eleventh Circuit law, whether the delegation clause was superseded or amended. *See Dasher*, 745 F.3d at 1122 ("The threshold determination of whether a subsequent agreement . . . superseded a prior agreement is made under state law, without applying the FAA's presumption."). Thus, to prevail, Chase and Torres must prove three things: (1) Tuckman, personally, agreed to the delegation clause, (2) Chase and Torres can enforce the delegation clause, and (3) the delegation clause exists. They can prove none.

A. The Court Applies the Summary-Judgment Standard and Substantive State Law.

For these threshold questions, the "applicable state law provides the rule of decision." *Lawson*, 648 F.3d at 1170–71. Because these threshold issues go to whether litigants consented to arbitrate, the pro-arbitration presumption of the FAA does not apply. *See id.* at 1170. Here, because the Depositor Funding Agreement purportedly has a choice-of-law provision stating that Florida law applies and the litigators have consistently assumed that Florida law applies, Florida law governs these threshold issues. *See Mazzoni Farms, Inc. v. EI DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000).

What's more, as a procedural matter, a district court can grant or deny a motion to compel arbitration under the summary-judgment standard. *See Bazemore*, 827 F.3d at 1333. In other words, a court can grant or deny a motion to compel arbitration without a trial if the admissible evidence (including affidavits or declarations based on *personal* knowledge) provides that there is no genuine dispute as to any material fact and judgment as a matter of law is merited. *See* FED. R. CIV. P. 56(a), (c).

B. Tuckman Is Not a Party to the Depositor Funding Agreement.

Under Florida law, "no person or entity is bound by a contract absent the essential elements of offer and acceptance (its agreement to be bound to the contract terms), supported by consideration." *Leesburg Cmty. Cancer Ctr. v. Leesburg Reg'l Med. Ctr., In.*, 972 So. 2d 203, 206 (Fla. Dist. Ct. App. 2007). An agent who signs a contract on behalf of her principal, moreover, has not accepted to be bound by that contract's terms: "[T]he signature of a corporate officer placed under the name of the corporation and preceded by the word 'By' does not create personal liability." *See Delta Air Lines, Inc. v. Wilson*, 210 So. 2d 761 763 (Fla. Dist. Ct. App. 1968). This principle is black-letter law. *See* RESTATEMENT (THIRD) OF AGENCY § 6.01 ("When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, . . . the agent is not a party to the contract unless the agent and third party agree otherwise."); *Signatory*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A person or entity that signs a document, personally or through an agent, *and thereby becomes a party to an agreement*." (emphasis added)). Under this framework, Tuckman is not a signatory to the Depositor Funding Agreement.

i. Tuckman did not sign personally.

The summary-judgment evidence is that Tuckman did not, personally, agree to be bound by the Depositor Funding Agreement. After all, the Depositor Funding Agreement twice defines the "Parties" who are bound by its terms as Weathervane Productions, Forrest Capital, and Bird Film Fund. [ECF No. 54-2 at 2] By its plain terms, the Depositor Funding Agreement states that it binds "the Parties," never mentioning Tuckman personally. [ECF No. 54-2 at 11] And the Depositor Funding Agreement was signed by Van Eman, McConley, and Tuckman exclusively as agents for Weathervane Productions, Forrest Capital, and Bird Film Fund, respectively. Indeed, the snapshot that Chase places on the first page of its brief makes this clear: Brad Tuckman signed as "Managing Member" of "**BIRD FILM FUND, LLC**, a limited liability company to be formed in Florida," with the warranty that "I," meaning Brad Tuckman, had "the authority to bind the company," meaning Bird Film Fund. [ECF No. 54-2 at 12]

Lest the plain language of the Depositor Funding Agreement be insufficient, the only evidence from anyone with personal knowledge comes from Tuckman's declaration, which states that he never,

personally, signed the Depositor Funding Agreement. Thus, under summary-judgment principles, the only conclusion is that Tuckman did not personally sign. *See Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246–47 (11th Cir. 1999) (per curiam).

Nor, as Chase disingenuously insinuates,[6] did Tuckman become a "signatory" to the Depositor Funding Agreement because of section 8. By its clear terms, section 8 states that *the Chase Account* "shall have one signatory assigned from each of [Forrest Capital], [Bird Film Fund] and [Weathervane Productions] as follows: Benjamin McConley [for Forrest Capital], Brad Tuckman [for Bird Film Fund] and Jason Van Eman [for Weathervane Productions]." [ECF No. 54-2 § 8.A] By its plain language, which governs under Florida law, *see Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. Dist. Ct. App. 2009) (per curiam), section 8 states that Tuckman, McConley, and Van Eman are signatories to the Chase Account, not signatories to the Depositor Funding Agreement.

Besides, even if section 8 somehow mentioned Tuckman as a signatory to the Depositor Funding Agreement, Florida law acknowledges that that is not enough to contradict the signature page

[6] [Chase Br. at 4]

and the Depositor Funding Agreement's definition of the "Parties." In *Delta Air Lines, Inc. v. Wilson*, one litigant argued that a corporate officer was a "party to the contract" because the "typewritten word 'Personal' follow[ed]" the officer's signature. 210 So. 2d at 763. But this language, the court said, did not suffice to raise even a colorable claim given that, like here, the contract "clearly set out" the "parties to the contract . . . in the body of the contract" and that the officer's name was "preceded by the word 'By' under the corporate name." *Id.* The same rule applies here.[7]

ii. No evidence supports the piercing of the corporate veil.

In an attempt to bind Tuckman to the Depositor Funding Agreement's terms, Chase and Torres assert that Tuckman, as "sole principal," was an alter ego of Bird Film Fund and so this Court should pierce the corporate veil. [Chase Br. at 36] But the doctrine of piercing the corporate veil has elements under Florida law, which again governs.

[7] Even if by some quirk section 8 created ambiguity, Florida courts would look at parole evidence. *See Langford v. Paravant*, 912 So. 2d 359, 361 (Fla. Dist. Ct. App. 2005). And the only parole evidence is that Tuckman did not sign the Depositor Funding Agreement personally.

See Lawson, 648 F.3d at 1170–71. And the Appellants ignore those elements.

Under Florida law, "to disregard" the corporate form and hold an entity's "owners liable," a litigant must prove that (1) the owners "dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact non-existent" and the owners "were in fact alter egos of the corporation"; (2) the "corporate form must have been used fraudulently or for an improper purpose"; *and* (3) "the fraudulent or improper use of the corporate form caused injury to" that litigant. *Molinas Valle del Cibao v. Lama*, 633 F.3d 1330, 1349 (11th Cir. 2011) (citing *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2008) (per curiam)); *see also Steinhardt v. Banks*, 511 So. 2d 336, 339 (Fla. Dist. Ct. App. 1987) (per curiam) ("There was substantial competent evidence that the corporation was the individual appellant's alter ego, but that without more is not the proper test."). Though Torres and Chase must prove all three elements, the summary-judgment evidence shows that they could not meet even a single one.

First, as to domination, "[a] general principle of corporate law is that a corporation is a separate legal entity, distinct from the individual persons comprising them." *Beltran v. Vincent P. Miraglia, M.D., P.A.*, 125 So. 3d 855, 858 (Fla. Dist. Ct. App. 2013). "[T]he mere ownership of a corporation by a few shareholders, or even one shareholder, is . . . insufficient" to constitute domination. *Gasparini*, 972 So. 2d at 1055. Instead, the domination must be so strict that "the corporation's independent existence[] was in fact non-existent." *Id.* Here, Chase and Torres (who have no personal knowledge about Bird Film Fund's management) offer no summary-judgment evidence whatsoever that Tuckman dominated Bird Film Fund.

Instead, Tuckman declared that he never dominated Bird Film Fund's policies, finances, or business practices. [ECF No. 54-1 ¶ 18] He declared too that he was *not* the sole owner of Bird Film Fund. Hence, no evidence supports the first element necessary to pierce the corporate veil.

Second, as to injury, Chase and Torres do not explain how Tuckman's supposed improper use of Bird Film Fund has financially hurt them. Besides, the summary-judgment evidence is that Bird Film

Fund has never caused any injury to any creditor whatsoever. [ECF No. 54-1 ¶ 18]

Third, Chase's and Torres's claim for impropriety is laughable. An "unlawful or improper purpose" means "subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some analogous betrayal of trust." *Lipsig v. Ramlawi*, 760 So. 2d 170, 187 (Fla. Dist. Ct. App. 2000).[8] According to Chase and Torres, Bird Film Fund received a (worthless) multi-million dollar judgment against two fraudulent companies that ran a Ponzi scheme, and Tuckman now seeks to sue Chase and Torres for their fraud. Chase and Torres call these actions "improper," but nothing in Florida law agrees.

[8] The Florida state-court decisions relied on by the Appellants fall within these categories. One dealt with the creation and operation of a business to defraud creditors. *See XL Vision, LLC v. Holloway*, 856 So. 2d 1063, 1066 (Fla. Dist. Ct. App. 2003) ("Halloway alleges that Bertoldi and VennWorks formed, operated, and manipulated XL Vision Limited Liability Company to defraud creditors . . . ."). And the other dealt with a scenario in which two parties entered a joint venture, and one party sought to hide money in two companies, thus breaching her duties of honesty and fair dealing. *See Futch v. Head*, 511 So. 2d 314, 322 (Fla. Dist. Ct. App. 1987) ("Futch's conduct toward Head was improper given the duty of honesty and fair dealings which brokers are to abide by in dealing with one another.").

Bird Film Fund's and Tuckman's actions do not defraud creditors, hide assets, violate Florida statutes, or somehow betray Chase's eternal trust in Tuckman. No evidence suggests that Bird Film Fund ever failed to pay any creditor what it owed. Because they are the victims of the fraud, Bird Film Fund and Tuckman face no liability that could lead to them hiding assets. Neither Chase nor Torres—who made intentional, fraudulent misrepresentations to help two other fraudsters—can credibly argue that Tuckman betrayed *their* trust, rather than the other way around.

Nor have Bird Film Fund and Tuckman violated Florida law. To the contrary, Tuckman's and Bird Film Fund's actions actually follow Florida law.

Bird Film Fund, a signatory to the Depositor Funding Agreement and its amendments, could sue in Florida for breach of contract. Tuckman—a non-signatory—could not. *See Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1030–31 (Fla. Dist. Ct. App. 1994).[9] By contrast, Tuckman was a victim of a fraud to steal his

[9] That Bird Film Fund maintained the corporate distinction when it sued Weathervane Productions and Forrest Capital actually militates

money, so hornbook law dictates that those tortfeasors, including McConley, Torres, and Chase, are jointly and severally liable for their intentional wrongdoing. *See Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 975 (Fla. Dist. Ct. App. 1999). Because all tortfeasors are all jointly and severally liable, Tuckman, by definition, can sue all of them, any of them, or none of them, at *his*, not the fraudsters', discretion. *See Joint and Several Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, *at the adversary's discretion*." (emphasis added)). This rule of joint-and-several liability is recognized by Florida law. *See Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997); FLA. STAT. § 768.81(4).

The same logic, moreover, applies to Tuckman's decision to sue some of the fraudsters for fraud rather than Bird Film Fund for breach of whatever agreement he had with it.

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against piercing the corporate veil. *See Lipsig*, 760 So. 2d at 187 ("[E]ven if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained.").

To state a claim for fraud in Florida, a plaintiff must allege that (1) the defendant made a false, material statement, (2) the defendant knew the statement to be false, (3) the defendant intended to have the plaintiff rely on the statement, and (4) the plaintiff relied on the statement and was therefore injured. *See Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010). Tuckman meets those elements, easily: Torres lied to Tuckman in hopes of swindling money, Tuckman relied on those statements, and Tuckman was harmed (because he wired his own, personal money). Florida law requires nothing else. *See id.*

Besides, Torres's and Chase's argument is, in essence, that because Tuckman has an agreement with Bird Film Fund concerning the money he wired, it is improper for Tuckman to sue Torres and Chase for fraud. Florida courts have routinely rejected that argument. *See Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399, 406 (Fla. 2013) ("[W]e noted our refusal to extend [the economic-loss rule] . . . to actions based on fraudulent inducement . . . ."); *Gordon v. Omni Equities, Inc.*, 605 So. 2d 538, 541 (Fla. Dist. Ct. App. 1992) ("Appellees . . . assert that [certain] cases . . . preclude a finding of civil theft where there is a contractual relationship . . . . Such a broad interpretation of

these cases has been properly rejected by a number of appellate courts."). Based on these authorities, it is Chase's and Torres's argument (not Tuckman's actions) that is improper.

iii. Judicial estoppel does not bind Tuckman to the Depositor Funding Agreement.

Because Bird Film Fund received consent judgments against Weathervane Productions and Forrest Capital, Tuckman is bound to arbitrate, Chase and Torres contend, under judicial estoppel. Nonsense.

To begin with, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630. Hence, whether a non-signatory is bound by or can bind a signatory to an arbitration agreement is determined by state law. *Id.* Yet, Chase and Torres rely, almost exclusively, on federal law to argue that Tuckman should be "judicially estopped" and forced to arbitrate. [Chase Br. at 38–40; Torres Br. at 53–55] They avoid Florida law for a simple reason: Florida law defies their argument.

Under Florida law, a party seeking to use the doctrine of judicial estoppel must show that (1) "the party against whom estoppel is sought must have asserted a clearly inconsistent or conflicting position in a

prior judicial proceeding"; (2) "the position assumed in the former proceeding must have been successfully maintained"; (3) "both proceedings must involve the same parties and same questions"; (4) "the party claiming estoppel must have relied on or been misled by the former position"; and (5) "the party seeking estoppel must have changed his or her position to his or her detriment based on the representation." *Fintak v. Fintak*, 120 So. 3d 177, 186 (Fla. Dist. Ct. App. 2013). Chase and Torres do not even argue, let alone meet, these elements.

For instance, Bird Film Fund's, Weathervane Productions', and Forrest Capital's decision to litigate their dispute is not inconsistent with Tuckman's desire to litigate. Neither Torres nor Chase can explain how they detrimentally relied on the consent judgments. And this lawsuit does not "involve the same parties and same questions." *Id.* Torres's and Chase's attempts to rely on federal law rather than the binding state law is not just frivolous, it is disingenuous.

C. Neither Torres nor Chase Can Enforce the Delegation Clause.

As shown, Chase and Torres cannot force Tuckman to arbitrate because, under Florida law, Tuckman is not a signatory to the Depositor Funding Agreement and the doctrines of alter ego and judicial estoppel

do not bind Tuckman. That is enough to affirm. But, regardless, Chase and Torres cannot compel arbitration for a separate reason: Neither Chase nor Torres are signatories to the Depositor Funding Agreement, and neither can enforce the delegation clause—the agreement to arbitrate arbitrability—under Florida law. Affirmance is required.

"[T]raditional principles of state law may allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Lawson*, 648 F.3d at 1170 (internal quotation marks omitted). Here, Chase asserts that it can enforce the delegation clause because it is a third-party beneficiary to the Depositor Funding Agreement. Torres and Chase further contend that they can enforce the delegation clause in the Depositor Funding Agreement under the doctrine of equitable estoppel. Not true.

i. The third-party beneficiary theory is frivolous.

In its brief, Chase contends that the Complaint's "allegations confer" Chase with status as a "third-party beneficiary." [Chase Br. at 40] That argument is a farce.

"A party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of persons to which that party claims to belong." *Dingle v. Dellinger*, 134 So. 3d 484, 488 (Fla. Dist. Ct. App. 2014). "Florida law looks to the nature or terms of a contract to find the parties' clear or manifest intent that it be for the benefit of a third party." *Jenne v. Church & Tower, Inc.*, 814 So. 2d 522, 524 (Fla. Dist. Ct. App. 2002) (internal quotation marks omitted). "The real test is said to be whether the contracting parties *intended* that a third person should receive a benefit which might be enforced in the courts." *Id.* at 525–26.

And, on this point, there is no genuine dispute on whether Chase or Torres are third-party beneficiaries. The Depositor Funding Agreement mentions Chase because of the Chase Account, but it nowhere expresses "an intent to primarily and directly benefit" Chase. *Dingle*, 134 So. 3d at 488. By its plain language, the Depositor Funding Agreement was created to detail how the "financing for production of the intellectual property [*Dr. Bird's Advice for Sad Poets*] will be obtained and funded." [ECF No. 54-2 § 2] And Tuckman—once again

without contradiction—declared that Bird Film Fund did not intend Chase to be a third-party beneficiary of the Depositor Funding Agreement.

ii. Torres and Chase cannot enforce the delegation clause under equitable estoppel.

Next, Torres and Chase maintain that they can enforce the delegation clause because, under Florida's doctrine of equitable estoppel, Tuckman cannot contest their authority to enforce it. [*See* Chase Br. at 32 ("Tuckman is equitably estopped from denying Chase's right to enforce the arbitration agreement against him."); Torres Br. at 40 ("Traditional principles of Florida law permit Chase and Mr. Torres to enforce the DFA's arbitration provisions against Tuckman.")] Torres and Chase are wrong.

A non-signatory can enforce an arbitration clause under Florida law "when the signatory's claims allege 'substantially interdependent and concerted misconduct' by the signatory and the non-signatory" or "when the claims relate directly to the contract and the signatory is relying on the contract to assert its claims against the non-signatory." *Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC*, 249 So. 3d 765, 767 (Fla.

Dist. Ct. App. 2018). Torres and Chase argue that both situations are applicable here, but, in truth, both situations are irrelevant.

First, equitable estoppel cannot apply here, because under Florida law "a non-signatory," like Torres or Chase, "may compel a *signatory*," like Weathervane Productions, Bird Film Fund, or Forrest Capital, "to arbitration." *Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. Dist. Ct. App. 2010) (emphasis added); *see also Lash & Goldberg LLP v. Clarke*, 88 So. 3d 426, 427–28 (Fla. Dist. Ct. App. 2012) ("Generally, a non-signatory to an arbitration agreement cannot compel a signatory to submit to arbitration. One exception to the rule is that a *non-signatory* can compel arbitration when *the signatory* to the contract . . . alleges substantially interdependent and concerted misconduct . . . ." (emphasis added)). Nothing in Florida law allows a non-signatory to force another non-signatory, non-assignee to arbitrate. Tuckman is not a signatory.

Second, even if Tuckman were a signatory, Torres's and Chase's arguments would be foreclosed by *Marcus v. Florida Bagels, LLC*, 112

So. 3d 631 (Fla. Dist. Ct. App. 2013),[10] an opinion that Tuckman raised below and Torres and Chase promptly ignored.

In *Marcus*, franchisees sued a franchisor and the franchisor's officer for fraudulently inducing them to sign a franchise agreement; the franchise agreement was entered by the franchisees and the franchisor, and it contained an arbitration clause. 112 So. 3d at 633. The signatories pursued the litigation in state court, and the officer sought to compel arbitration against the franchisees through equitable estoppel. *See id.* Noting that under equitable estoppel a non-signatory could generally "estop a *signatory* from avoiding arbitration," the Florida court refused to apply equitable estoppel in the officer's favor. *Id.*

The Florida court noted that equitable estoppel could not possibly apply because the "*signatories* to the arbitration agreement" repudiated the arbitration clause by "electing to pursue judicial process." *Id.* at 634. As that court saw it, the franchisees had "not taken inconsistent

[10] "Where," as here, "the state's highest court has not spoken to an issue" of state law, federal courts "must adhere to the decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004).

positions—they want[ed] no part of arbitration for any aspect of their claim" and the other signatory "has elected to proceed in court," so estoppel could not apply. *Id.* at 635.

Marcus governs. Weathervane Productions, Forrest Capital, and Bird Film Fund actually litigated their dispute, thus repudiating arbitration. Even if for whatever reason Tuckman was a "signatory" to the Depositor Funding Agreement, he would not be acting inconsistently by litigating this dispute; he would simply be doing what he did against Weathervane Productions and Forrest Capital: litigating.

Third, under Florida's equitable estoppel, a non-signatory cannot rewrite an arbitration agreement and therefore extend its application beyond what the signatories could enforce, because "[s]uch a holding would be, well, inequitable." *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1356 (11th Cir. 2017); *accord Marcus*, 112 So. 3d at 634–35 ("[T]he arbitration agreement gives one of the parties . . . the unilateral right to bypass arbitration, meaning that the application of equitable estoppel to this case would effectively provide [the non-signatory] the ability to nullify [that] choice . . . ."). As shown in Part II.C, as modified by the signatories, the delegation clause

can be invoked by Bird Film Fund alone. To provide Chase and Torres this right would grant them rights inconsistent with the written Depositor Funding Agreement as modified by the signatories. And that Florida law does not countenance. *See Kroma*, 845 F.3d at 1356.

D. The Delegation Clause Does Not Exist.

Another independent reason exists for affirming. Even though Torres and Chase ignore the issue, the signatories (except Bird Film Fund) waived all rights to arbitrate. As this Court has made clear, this is a threshold question because it goes to whether the arbitration clause (or in this case delegation clause) still exists. *See Dasher*, 745 F.3d at 1122. "The 'threshold question of whether an arbitration agreement exists at all is 'simply a matter of contract.'" *Burch v. PJ Cheese, Inc.*, 861 F.3d 1338, 1346 (11th Cir. 2017). Therefore, Florida law applies to this question. *See Dasher*, 745 F.3d at 1121 n.7.

"It is well established that the parties to a contract can discharge or modify the contract, however made or evidenced, through a subsequent agreement." *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004). Here, the signatories to the Depositor Funding Agreement amended that agreement. Those amendments limited Weathervane

Productions' and Forrest Capital's rights; they agreed "to give up all their rights, entitlements and benefits under" the Depositor Funding Agreement, "[e]xcept" for their "right to receive back the actual dollars invested" and Weathervane Productions' "profit share from the net proceeds from the" film. [ECF No. 54-4 at 2] That exception clause does not list the right to arbitrate, so no delegation clause exists that non-signatories, like Chase and Torres, can enforce.

III. THE DELEGATION CLAUSE IS UNENFORCEABLE AS AN ARTIFICE OF CRIMINAL FRAUD.

Even if Tuckman or Chase and Torres had been parties to the Depositor Funding Agreement, the delegation clause and arbitration provision would nevertheless be unenforceable as a matter of law and would therefore be revocable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. While this Court has never squarely held that a delegation clause or arbitration provision can be found unenforceable under public policy, this case—in which the government has indicted the drafters of a fraudulent agreement—is atypical. And, as one prominent federal appellate judge has concluded, the simple application of Supreme Court precedent to

this scenario leads to one conclusion: The delegation clause is unenforceable.

Legal constraints that foreclose enforcement of arbitration terms, including a delegation clause, may include "fraud, duress, unconscionability, or another 'generally applicable contract defense.'" *Parnell v. CashCall, Inc.,* 804 F.3d 1142, 1146 (11th Cir. 2015). Under both federal and Florida law, public policy considerations constitute a generally applicable contract defense. *See Edwards v. Miami Transit Co.*, 7 So. 2d 440, 442 (Fla. 1942) ("A contract is not void, as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society." (citation omitted)); *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948) ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."); *Davis v. Oasis Legal Fin. Operating Co., LLC.*, 936 F.3d 1174, 1176 (11th Cir. 2019) ("American courts have long refused to enforce contractual provisions that contravene public policy.").

"[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy." *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972). And, here, the Depositor Funding Agreement helped conceal the commission of a crime.

It included several provisions that aim to prevent judicial scrutiny of the agreements, including confidentiality and non-disclosure provisions, arbitration provisions, a delegation clause, and limits on liability. [ECF No. 54-2 at 6–8] These terms helped McConley and Van Eman hide their theft, a crime under Florida law. FLA. STAT. § 812.014(1)(a).

As one prominent federal judge recently recognized, the delegation clause's and arbitration provision's attempts to hide the Ponzi scheme is enough to render them contrary to public policy:

> Arbitration agreements may be rejected when they are instruments of a criminal enterprise, as these arbitration agreements were. . . . At its core, a Ponzi scheme must have in its operation the ability to lull an investor by assuring payments from money of later investors, as there are few if any funds being generated by management of their investments. Its essence is to present an air of legitimacy, while simultaneously masking the source of the 'return on investment' . . . . Swindlers can use arbitration to mitigate discovery and cabin attending risk of exposing fraudulent

> activity while presenting arbitration, not as a tool of fraud, but as business as usual. In short, arbitration can assume a not insignificant role in protecting defendants' privacy . . . .

Janvey v. Alguire, 847 F.3d 231, 246–48 (5th Cir. 2017) (Higginbotham, J., concurring). Therefore, the Depositor Funding Agreement's arbitration terms, including the delegation clause, are plainly unenforceable as a matter of law because they attempt to shield a criminal Ponzi scheme from judicial scrutiny.

This is true even as to Torres and Chase. If enforced between the actual signatories, the delegation clause would have shielded the scheme from judicial scrutiny. If enforced here among three non-signatories, the result would be no different: Chase and Torres would be able to evade "the powerful discovery process of federal courts" by hatching a ride on delegation and other arbitration clauses originally designed to protect Van Eman and McConley—their co-conspirators—from precisely such scrutiny. *Id.* at 251 (Higginbotham, J., concurring).

The Appellants do not contest that the Depositor Funding Agreement is an artifice of fraud. Chase, rather, contends that this argument is foreclosed by *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), in which the Supreme Court held arbitration terms,

including a delegation clause, were enforceable because the plaintiffs challenged the non-arbitration terms of an agreement on public policy grounds, but not the arbitration terms specifically. Yet *Buckeye* does not apply here.

The *Buckeye* plaintiffs had entered into a series of deferred-payment transactions with the defendant, with each transaction established in a separate contract with its own arbitration terms, including delegation clauses. *Id.* at 442. The plaintiffs sued the defendant in Florida state court, claiming the defendant charged usurious rates that rendered the contracts illegal under Florida state law. *Id.* at 443. The Supreme Court held that because plaintiffs "challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." *Id.* at 446. But here Tuckman specifically challenges the delegation clause.

In short, the arbitration terms themselves would shield the Appellants from judicial scrutiny of their own roles in a disgraceful

criminal scheme that swindled investors out of millions. "Such conduct deserves no encomium." *Branzburg*, 408 U.S. at 697.

IV. ALL OTHER ARBITRATION PROVISIONS FAIL.

There's no reason to belabor the point. Because the principles that apply to the delegation clause apply to any other terms of the arbitration agreement, if the delegation clause fails, so does the remainder of the purported agreement to arbitrate. *See Shockley*, 929 F.3d at 1020.

V. NO STAY OR TRIAL IS WARRANTED.

Because this Court should affirm the district court's denial of the motion to compel arbitration, it should deny Torres's request to stay the lawsuit pending arbitration and Chase's request for a trial.

CONCLUSION

For these reasons, this Court should affirm the denial of Chase's motion to compel arbitration and Torres's joinder. This Court should also grant any relief it finds equitable under the circumstances.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Freddy Funes, certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,744 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

July 20, 2020

/s/Freddy Funes
FREDDY FUNES

CERTIFICATE OF SERVICE

I certify that, on July 20, 2020, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record via the CM/ECF system, as required by 11th Circuit Rule 25-3(a).

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