No. 20-50721

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Noble Capital Group, L.L.C.; Noble Capital Fund Management, L.L.C.,

PLAINTIFFS – APPELLANTS

v.

Us Capital Partners, Incorporated; Jeffrey Sweeney; Charles Towle; Patrick Steele,

DEFENDANTS – APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, NO. 1:19-CV-01255

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1) **Plaintiffs-Appellants**

   Noble Capital Group, L.L.C.; Noble Capital Fund Management, L.L.C.

2) **Defendants-Appellees**

   US Capital Partners, Incorporated; Jeffrey Sweeney; Charles Towle; Patrick Steele

3) **Counsel for Plaintiffs-Appellants**

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Date: November 2, 2020

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs-Appellants Noble Capital Group, L.L.C. and Noble Capital Fund Management, L.L.C. respectfully request oral argument. Oral argument will aid the Court because this appeal presents significant questions regarding the enforceability of arbitration clauses that will impact future appeals related to motions to compel arbitration.

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants obtained jurisdiction in the district court pursuant to 28 U.S.C. § 1332 because the parties are of diverse citizenship. Plaintiffs-Appellants Noble Capital Group, L.L.C. and Noble Capital Fund Management, L.L.C. are Texas limited liability companies with their principal place of business in Austin, Texas. ROA.169. No member of either entity is a resident of California. ROA.169. Defendant-Appellee US Capital Partners, Incorporated is a California corporation with its principal place of business in California. ROA.169. Defendants-Appellees Jeffrey Sweeney, Charles Towle, and Patrick Steele are all residents of California. ROA.169.

This Court has jurisdiction over this appeal pursuant to the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1, *et seq*. Section 16 of the FAA governs appeals in arbitration disputes under the FAA. Appeals in the United States courts may be taken from "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). "A district court order compelling arbitration and dismissing a party's underlying claims is immediately appealable because it is a 'final decision with respect to an arbitration' within the meaning of the Federal Arbitration Act." *Brandom v. Gulf Coast Bank & Tr. Co.*, 253 F.3d 706, 2001 WL 498720, at *1 (5th Cir. 2001) (per curiam) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, (2000) (citing 9 U.S.C. § 16(a)(3))).

On May 12, 2020, the Magistrate Judge for the District Court for the Western District of Texas issued her Report and Recommendation regarding Defendants-Appellees' motion to compel arbitration, recommending dismissal of the action in favor of arbitration. ROA.471-88. On July 31, 2020, after the Plaintiffs-Appellants submitted their objections to the Report and Recommendation, the District Judge for the District Court for the Western District of Texas Court accepted the Report and Recommendation and ordered that this case be dismissed in favor of arbitration. ROA.528-30. The same day, the district court entered its Final Judgment, dismissing the case with prejudice. ROA.531. Plaintiffs-Appellants filed their notice of appeal on August 28, 2020, within the thirty-day timeframe to do so pursuant to Fed. R. App. P. 4(a)(1)(A). ROA.532-33.

Because this appeal is from a final judgment that disposes of the entire case in favor of arbitration, this Court has jurisdiction over this timely-filed appeal under 9 U.S.C. § 16(a)(3), 28 U.S.C. § 1291, and Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

Whether, in granting Defendants-Appellees' motion to compel arbitration, the district court erred in:

(1) Referring to the arbitrators the question whether the arbitration clauses were procured by fraud;

(2) Determining that those arbitration clauses are binding on a nonsignatory to the agreements that is not named in the agreements and is not intended to be bound by the agreements; and

(3) Determining that those arbitration clauses can be enforced by nonsignatories to the agreements who were not intended to benefit from the agreements, and where the claims against them are not intertwined with the agreements containing the arbitration clauses.

STATEMENT OF THE CASE

I. Factual Background

Plaintiffs-Appellants Noble Capital Group, L.L.C. ("Noble Capital") and Noble Capital Fund Management, L.L.C. ("NCFM," and, together with Noble Capital, "Appellants") brought this action to recover for the fraud perpetrated by Defendants-Appellees US Capital Partners, Incorporated ("US Capital"), Jeffrey Sweeney ("Sweeney"), Charles Towle ("Towle"), and Patrick Steele ("Steele") (collectively, "Appellees"). ROA.168-69. Appellants agreed to finance Appellees' investment projects because Appellees misrepresented that they could raise capital and operate an investment fund. ROA.168. Appellees also fraudulently induced NCFM to agree to confidential arbitration clauses with US Capital by misrepresenting and concealing facts regarding US Capital's activities and prior disputes. ROA.176-78. By inducing NCFM to agree to these confidential arbitration clauses, Appellees ensured that they could continue to perpetrate their fraudulent activity outside the public's knowledge. ROA.171-76. Appellees now seek to enforce these arbitration clauses, but they are invalid and unenforceable because they were procured by fraud. ROA.176-80. That is why NCFM, together with Noble Capital (which is not a party to any of the arbitration agreements at issue), ROA.232-69, brought their claims in court.

A. The Parties

Noble Capital is a private lending organization founded to create alternative investment opportunities that provide shelter from the volatility associated with many other investment models. ROA.170, 354-56. NCFM is the operations arm of that lending organization and a subsidiary of Noble Capital. ROA.170. Noble Capital and NCFM specialize in making private loans to real estate entrepreneurs seeking to acquire residential property in Texas. ROA.170. Noble Capital and NCFM provide the funding for these loans by raising funds from individual investors (Appellants' clients, not parties to this case). ROA.170.

US Capital is the parent company of a conglomeration of companies, some of which are registered investment advisers and registered broker dealers. ROA.170. Sweeney, Towle, and Steele are principals of US Capital. ROA.170, 213.

US Capital and Appellants were introduced in 2016 and began exploring the possibility of establishing an investment fund through which investors could invest in Appellants' private lending company. ROA.170-71. Sweeney, Towle, and Steele, seeking to collect fees through that relationship, made numerous fraudulent representations regarding US Capital's formation, its abilities and intent to raise funds, and its operational capabilities, all in order to induce Appellants to place investor funds with a US Capital affiliate. ROA.170-74.

Appellees' fraud worked; they induced the creation of US Capital/Noble

Capital Texas Real Estate Income Fund, LP (the "Fund") and convinced Appellants to fund it with their investors' capital. ROA.170-71.

B. Appellees' Fraudulent Inducement of the Arbitration Clauses

Sweeney, Towle, and Steele misrepresented the nature of US Capital's operations at every step of the way not only to defraud Appellants and their investors of funds, but to induce NCFM to agree to confidential arbitration clauses that would prevent it from bringing the Appellees' fraud to light in a public dispute resolution forum. ROA.176-80.

Between August 2016 and February 2017, NCFM was fraudulently induced to agree to confidential arbitration clauses found in three agreements (collectively, the "Agreements").[1] It is based on the arbitration clauses in these Agreements that the district court held that this matter belongs in arbitration. ROA.478-79, 487. The Agreements share the following characteristics:

(1) Appellees insisted on *confidential* arbitration provisions in each of these Agreements. ROA.235, 244-45, 251-52.

[1] Specifically, US Capital and NCFM signed a letter agreement on August 8, 2016 ("August 8, 2016 Letter Agreement"), through which US Capital agreed to act as a financial advisor to NCFM and raise up to $50,000,000 in equity and debt. ROA.232-39. On January 18, 2017, NCFM, the Fund, and US Capital Investment Management, LLC ("USCIM," a non-party to this case), entered into a Management Advisory Services Agreement ("MASA"), through which the Fund engaged NCFM to manage the Fund's investments. ROA.240-46. On February 3, 2017, NCFM entered into a letter agreement (the "February 3, 2017 Letter Agreement") with USCIM, which provided that US Capital Global Securities, Inc. ("USCGS," an affiliate of US Capital) would be the exclusive placement agent for the Fund. ROA.247-69.

(2) The confidential arbitration provisions in each of these Agreements were procured by Appellees' fraud. ROA.176-80.

(3) Noble Capital is not a party to any of these Agreements and is not named in them, the Agreements do not express an intent that Noble Capital be bound by them, and no party signed the Agreements on Noble Capital's behalf. ROA.232-69.

(4) Appellees Sweeney, Towle, and Steele are not parties to any of these Agreements and are not named in them, the Agreements do not express an intent that these individuals be bound by them in their personal capacities or that they benefit from them, and no party signed the Agreements on behalf of these individuals. ROA.232-69.

To induce NCFM to agree to confidential arbitration, Sweeney, Towle, and Steele went to great lengths to conceal the history of fraudulent acts that they and US Capital had committed. ROA.176. Prior to the execution of any of the Agreements, Chris Ragland, Chief Operating Officer of Noble Capital, who also supervises NCFM and its employees, met with Towle. ROA.177, 354-56. Ragland inquired about prior disputes involving US Capital and its principals. ROA.177. Towle represented that he and US Capital had only been involved in a couple of lawsuits, all of which had been baseless and all of which had been settled quickly. ROA.177. Steele also represented that he had never been involved in any dispute;

indeed, he touted the fact that he had never had a customer complaint. ROA.177. Those were lies of commission: the truth was that US Capital and its principals had been involved in numerous lawsuits involving serious allegations of misrepresentations made by US Capital principals—mostly about their ability and intent to raise investment capital—in order to secure business deals. ROA.177. Those were also lies of omission: in addition to the myriad of lawsuits against US Capital and its principals, Appellants believe that numerous confidential arbitrations involving similar allegations have been brought against Appellees. ROA.177.

Towle and Steele lied with the singular purpose of inducing assent to the confidential arbitration clauses in the Agreements. ROA.177. They had learned from experience that the practice of lying to potential business partners to obtain their business results in disputes, that disputes lead to litigation, and that the public nature of litigation makes it more difficult to defraud others. ROA.177. An arbitration clause—specifically a *confidential* arbitration clause—is required to perpetuate the scheme. ROA.177.

After the details of Appellees' fraud began to surface, Towle confirmed the nature of the scheme to obtain assent to confidential arbitration clauses. ROA.178. Specifically, when initial efforts at settling the dispute failed, Towle told Ragland that he was used to seeing settlements fail. ROA.178. He explained that he had been involved in other disputes and knew from experience that US Capital's clients

would only agree to confidential settlements after being forced to spend large sums of money on the arbitration process. ROA.178. Thus, a costly dispute resolution mechanism was necessary to perpetrate the scheme.

II. Procedural History

Appellants initiated this action on December 27, 2019. ROA.2. They filed their Amended Complaint against Appellees on February 19, 2020, asserting claims for fraudulent inducement, fraud, and conspiracy. ROA.3, 168-91. Appellees moved to compel arbitration, and the district court referred the motion to the Magistrate Judge. ROA.4, 211-331, 416. Appellants objected to arbitration on the grounds that the arbitration clauses were procured by fraud, nonsignatory Noble Capital is not bound by the Agreements, and nonsigatories Sweeney, Towle, and Steele cannot enforce the Agreements. ROA.334-56.

In her Report and Recommendation, issued on May 12, 2020, the Magistrate Judge recommended granting Appellees' motion to compel arbitration. ROA.471-88. The Court first held that arbitrators are to decide whether arbitration clauses are procured by fraud. ROA.480-82. However, the Court found that the arbitration clauses in the Agreements delegate to the arbitrator the authority to decide "the 'validity' of the agreements and any claims of 'fraud or fraud in the inducement.'" ROA.479. Based on these delegation clauses, the Court concluded that "the arbitrator has exclusive authority to resolve any disputes about the enforceability of

the agreements, including [Appellants'] claim that they were fraudulently induced into entering the arbitration clauses." ROA.480. The Court acknowledged that challenges to the arbitration clauses are generally for the courts to decide, but it held that, because Appellants had not challenged the delegation clauses, the matter was to be referred to the arbitrators. ROA.480-82.

The Court also held that the nonsignatories to the Agreements can be bound by and can enforce the Agreements. ROA.483-87. The Court found that, although Noble Capital is a not a signatory to the Agreements, "the Agreements apply to NCFM and its 'affiliates,' 'subsidiaries,' 'associated companies,' 'co-managed companies,' 'successors,' and 'assigns.'" ROA.484. The Court concluded that Noble Capital falls into those categories and is bound by the Agreements because Noble Capital is NCFM's parent company and the entities have the same principal place of business. ROA.484. The Court further held that Appellants had not disputed that they are "affiliates, associated companies, co-managed companies, or alter egos." ROA.484.

As to nonsignatories Sweeney, Towle, and Steele, the Court held they can enforce the Agreements because they "stood to benefit personally from the contracts[.]" ROA.485.

Finally, the Court concluded that the theory of equitable estoppel binds the parties to the Agreements because Appellees have an interconnected relationship

and because Appellants alleged that Appellees acted together in defrauding them. ROA.485-86.

Appellants objected to the Report and Recommendation. ROA.489-505. Over these objections, the district court adopted the Report and Recommendation, granted the motion to compel, and entered final judgment dismissing this case with prejudice on July 31, 2020. ROA.528-31. Appellants timely filed their notice of appeal on August 28, 2020. ROA.532-33; *see* Fed. R. App. P. 4(a)(1)(A).

SUMMARY OF THE ARGUMENT

Appellants' claims belong in court because the claims are not subject to any valid arbitration agreement among the parties to this dispute.

First, the district court erred in concluding that arbitrators are to decide whether the arbitration clauses within the three Agreements at issue were procured by fraud. Well-established precedent dictates that the courts, and not the arbitrators, are to resolve questions of fraudulent inducement when "the claim is fraud in the inducement of the *arbitration clause itself*—an issue which goes to the 'making' of the agreement to arbitrate[.]" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

Appellants specifically challenged the validity and enforceability of the arbitration clauses in the Agreements (the same clauses that Appellees sought to enforce through their motion to compel) and demonstrated that the clauses were procured by fraud—namely, the fraudulent misrepresentations of Appellees US Capital, Sweeney, Towle, and Steele. Appellees made those fraudulent misrepresentations with the specific purpose of inducing NCFM to agree to confidential arbitration. Appellees concealed the true history of US Capital's failed operations and litany of past accusations and litigations, and on this basis, convinced NCFM that confidential arbitration would be a suitable venue for dispute resolution. Because the arbitration clauses within the Agreements were fraudulently procured,

they are invalid and cannot force the parties to arbitrate.

The district court did not reach this conclusion because it referred the matter to arbitration based on the presence of "delegation clauses" within the arbitration clauses, which it found granted the arbitrator the authority to decide certain claims, including fraudulent inducement claims. This was error. The delegation clauses do not delegate to the arbitrators the specific inquiry that is at issue here: whether the arbitration clauses—and not the Agreements as a whole—were procured by fraud. Therefore, the delegation clauses do not change the requirement that the courts, and not the arbitrators, are to decide whether the arbitration clauses were fraudulently procured. Moreover, even if the delegation clauses here gave the arbitrator the authority to decide this issue, those delegation clauses are phrases embedded within the arbitration clauses, and Appellants have thus challenged them, requiring again that the courts, and not the arbitrators, consider the issue.

Second, even if the arbitration clauses were valid, referring this matter to arbitration would still be contrary to law because Appellant Noble Capital is not a party to any of the Agreements. Noble Capital's name appears nowhere in the Agreements, and the Agreements do not reflect an intent that Noble Capital be bound by them. Although the Agreements state they are binding on NCFM's "affiliates" and other types of entities, these terms are not defined, and there is no evidence that Noble Capital was intended to be bound by the Agreements as NCFM's "affiliate"

or based on any other characteristic. The district court erred in concluding that nonsignatory Noble Capital is bound by the Agreements based on the inclusion of undefined terms such as "affiliate." The district court also erred because it improperly reversed the burden of proof on this issue; instead of requiring that Appellees show that Noble Capital can be forced to arbitrate, the district court required Appellants to *disprove* that Noble Capital could be bound by the Agreements, which is contrary to what the law requires.

Third, even if the arbitration clauses were valid, and even if Noble Capital could be bound by them, forcing the parties to arbitrate this matter would still be contrary to law because no basis exists to allow nonsignatory Appellees Sweeney, Towle, and Steele to enforce the Agreements. They are sued in their individual capacities because they committed fraud in their individual capacities. They cannot seek shelter under US Capital's corporate structure, nor were they intended to benefit from the Agreements that US Capital entered as a corporate entity, and which do not identify them as third-party beneficiaries. The district court erred in concluding that nonsignatory Appellees Sweeney, Towle, and Steele can enforce the Agreements because they stood to benefit from their roles as corporate officers of US Capital and its related entities.

In addition, the district court erred in finding that principles of equitable estoppel allow Appellees to enforce the Agreements. Equitable estoppel applies

when the allegations are inextricably intertwined with arbitration agreements or connected with the obligations they impose. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013). Here, Appellants' claims are not intertwined with the obligations of the Agreements. Appellants do not seek to recover based on the failure of US Capital (the only Appellee that is a signatory to the Agreements) to adhere to its contractual obligations; Appellants instead seek recovery for the fraudulent conduct and inducement that all Appellees—nonsignatories and signatory alike—perpetrated against Appellants. Therefore, equitable estoppel does not apply.

Because no basis exists to enforce arbitration provisions that were fraudulently procured, and because the Agreements can be enforced neither *against* nonsignatory Noble Capital nor *by* nonsignatories Sweeney, Towle, or Steele, the district court erred in dismissing this case in favor of arbitration. The Court should reverse the order dismissing the case and remand the matter to the district court for further proceedings.

ARGUMENT

I. Standard of Review

This Court reviews the district court's grant of a motion to compel arbitration de novo. *Morrison v. Amway Corp.*, 517 F.3d 248, 253 (5th Cir. 2008). The Court must first determine "whether the parties agreed to arbitrate the particular type of dispute at issue." *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012) (citing *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007)). In answering this question, the Court considers: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Id.* (quoting *JP Morgan Chase & Co.*, 492 F.3d at 598). Ordinarily, both steps are questions for the Court. *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003).

The Federal Arbitration Act's policy in favor of arbitration "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Morrison*, 517 F.3d at 254 (quoting *Fleetwood Enters. Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)). That policy also "does not extend to those who are not parties to an arbitration agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (quoting *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009)). Given the Supreme Court's determination "that arbitration is a matter of contract," *AT&T Mobility L.L.C. v.*

Concepcion, 563 U.S. 333, 339 (2011), "this Court determines whether there is a valid agreement to arbitrate and who is bound by it based on 'ordinary contract principles.'" *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 538 (5th Cir. 2003) (quoting *Fleetwood Enters. Inc.*, 280 F.3d at 1073-74). The parties have agreed that California law applies in this case. ROA.476.

II. The Arbitration Clauses Are Not Valid And Enforceable Because They Were Procured By Fraud.

"[W]hen the challenge is to the arbitration clause itself," "the court, rather than an arbitrator, decides whether the arbitration agreement, as distinct from the contract in which it appears, is valid, irrevocable, or enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 815-16 (5th Cir. 2017), *as revised* (Apr. 12, 2017) (quoting 9 U.S.C. § 2). Appellants specifically challenge the Agreements' *arbitration clauses* (the precise clauses that Appellees sought to enforce by their motion to compel) because those clauses were procured by Appellees' fraudulent representations. Therefore, the arbitration clauses are not valid and cannot be enforced. This was an issue for the district court to decide, and it erred in referring the issue to the arbitrators based on the presence of delegation clauses within the arbitration clauses in the Agreements. Those delegation clauses do not give the arbitrators the authority to decide the specific inquiry at issue, and they do not change the requirement that the courts, not the arbitrators, are to decide

whether the arbitration clauses were fraudulently procured.

A. Claims for fraudulent inducement of the arbitration clauses are for the courts to decide.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). The law is clear that "ordinary contract principles prohibit parties from engaging in fraud to induce other parties to sign agreements." *Am. Heritage Life Ins. Co.*, 321 F.3d at 538 (citation omitted); *see also Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 973 (Cal. 1997), *as modified* (July 30, 1997) ("Fraud is one of the grounds on which a contract can be rescinded.");[2] *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 591 (Cal. Ct. App. 1971) ("An inducement to enter into a contract by a false promise touching a substantial part of the consideration moving to the party to whom it is made constitutes fraud which may render the contract void.").

Fraud includes "conscious misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter the contract." *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123, 128 (Cal. Ct. App. 1966)

[2] "An arbitration clause, like any contract, may be rescinded for fraud and thereby not be enforced." *Ruzzano v. Spectrum Pac. Learning Co., LLC*, No. D059377, 2012 WL 1403342, at *4 (Cal. Ct. App. Apr. 24, 2012) (citing Cal. Code Civ. Proc. § 1281.2(b); Cal. Civ. Code, § 1689(b)(1); *Engalla*, 15 Cal. 4th at 973-74).

(citations omitted). Accordingly, arbitration agreements can be invalidated if they are procured by a party who "misrepresented the facts [or] acted in less than good faith." *Am. Heritage Life Ins. Co.*, 321 F.3d at 538 (quoting *Southern Nat'l Bank v. Crateo*, 458 F.2d 688, 692 (5th Cir. 1972)).

Under well-established precedent, when the challenge is to the validity "of the precise agreement to arbitrate at issue, the federal court ***must*** consider the challenge before ordering compliance with that agreement[.]" *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (emphasis added). Thus, "if the claim is fraud in the inducement of the *arbitration clause itself*—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (emphasis added); *see also Am. Heritage Life Ins. Co.*, 321 F.3d at 539 (concluding "claim of fraud in the inducement is not arbitrable because it goes to the making of the arbitration agreement," which "is for the court to adjudicate"); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939 (S.D. Tex. 2001) (unconscionability "claims are for the Court to decide when they relate specifically to the arbitration clause"); *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 419 (Cal. 1996) ("Claims that a party has employed fraud in inducing consent specifically to the arbitration agreement (e.g., by actively concealing its existence or misrepresenting its meaning or value) are, under *Prima Paint*, to be decided by the court, because

they go to the valid making of the arbitration clause itself.").

B. Appellants' challenges were to the specific arbitration clauses, which was an issue for the district court to decide.

The district court erred because it failed to apply established precedent that claims for "fraud in the inducement of the *arbitration clause itself*—an issue which goes to the 'making' of the agreement to arbitrate" are for the courts to decide. *Prima Paint*, 388 U.S. at 403-04 (emphasis added).

Appellees moved to compel arbitration based on arbitration clauses in the Agreements that called for arbitration of:

> [a]ny dispute, claim or controversy arising out of or relating to this Agreement, including the negotiation, breach, validity or performance of the Agreement, the rights and obligations contemplated by the Agreement, any claims of fraud or fraud in the inducement, and any claims related to the scope or applicability of this agreement to arbitrate[.]

ROA.214-15, 235, 244, 251.

Appellants challenged these specific arbitration clauses in the Agreements and demonstrated, through verified facts, that Appellees procured these arbitration clauses by fraud. ROA.176-80, 336-40, 354-56. Specifically, Appellees made misrepresentations regarding the arbitration provisions that were distinct from, and in addition to, the misrepresentations they made to induce Appellants to provide funding to US Capital and its associates. ROA.170-80, 338-40, 354-56. Appellees misrepresented their history of disputes in order to convince NCFM that confidential

arbitration would be a suitable forum, when in fact, it was used as a way to conceal and perpetuate Appellees' fraudulent scheme outside the public's view. ROA.176-78, 354-56. Had NCFM known the truth—that US Capital and its principals had a lengthy history of both litigation and confidential arbitration—NCFM would not have agreed to the confidential arbitration clauses. ROA.179, 354-56.

The district court recognized that Appellants "oppose[d] the [motion to compel], contending that the arbitration clauses at issue are unenforceable because they were fraudulently procured," yet nevertheless referred the matter to arbitration without determining whether the clauses were fraudulently procured. ROA.474, 482. This decision was error because it ignored the precedent outlined above, namely, that "when the challenge is to the arbitration clause itself," "the court, rather than an arbitrator, decides whether the arbitration agreement, as distinct from the contract in which it appears, is valid, irrevocable, or enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr.*, 853 F.3d at 815-16 (quoting 9 U.S.C. § 2); *see also supra*, Section II.A.[3]

[3] Later in its ruling, the district court concluded that Appellants' "fraudulent inducement claim focuses on the Arbitration Agreements as a whole." ROA.482. To the extent the district court used the term "Arbitration Agreements" in this statement to refer to the entire Agreements, as opposed to the arbitration clauses within the Agreements, this statement is erroneous because it contradicts the district court's earlier acknowledgement that Appellants have challenged the arbitration clauses, and it fails to consider the fact that Appellants did object to the specific arbitration clauses within the Agreements. ROA.336-40, 474, 482.

In addition to erring in failing to consider whether the arbitration clauses were fraudulently procured, the district court also erred in failing to reach a decision that the clauses were in fact procured by fraud. Here, Appellees misrepresented and concealed US Capital's involvement in disputes in order to induce NCFM to believe that confidential arbitration would be a suitable method for resolving disputes and would sufficiently safeguard NCFM's access to fair avenues of dispute resolution. ROA.176-80, 354-56. This constitutes a misrepresentation as to the arbitration clause's "meaning or value," *Rosenthal*, 14 Cal. 4th at 419, and thus demonstrates that the clause was fraudulently procured. For example, in *Engalla*, the Supreme Court of California considered a challenge to an arbitration clause in a health care plan based on the argument that the health management organization ("HMO") had fraudulently induced an employee's agreement to that clause. 15 Cal. 4th at 973-81. The HMO had represented that arbitrators would be selected within a set timeframe, inducing reliance on the representation that the arbitration would be conducted in an expedient manner. *Id.* at 974-75. In reality, the HMO was aware that its prior history of arbitrating disputes did not support such a representation, as past arbitrations had resulted in a lengthier process than that promised to the employee. *Id.* The Court concluded "there is evidence to support the . . . claims that [the HMO] fraudulently induced [the employee] to enter the arbitration agreement in that it misrepresented the speed of its arbitration program, a misrepresentation on which [the employee's]

employer relied by selecting [the HMO's] health plan for its employees." *Id.* at 981;[4] *see also Am. Heritage Life Ins.*, 321 F.3d at 539-40 (evidence indicated that "dispute may not be arbitrable because the parties may not have a valid arbitration agreement" due to misrepresentations and failure to inform party he was signing arbitration agreements); *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 930, 933 (N.D. Cal. 2018) (arbitration agreement void where party "purported to describe the contents of the Franchise Agreement . . . and did not disclose that the Franchise Agreement . . . included an agreement to arbitrate disputes between the parties."). Here, the misrepresentations are far more flagrant than in other situations deemed sufficient to invalidate an arbitration clause; Appellees' misrepresentations do not reflect a mere failure to accurately describe a procedural aspect of the arbitration process or to draw attention to a fact set forth in the agreement. Instead, Appellees intentionally concealed and misrepresented facts regarding their prior history of financial fraud in order to induce NCFM to agree to confidential arbitration, thereby using the arbitration process as a shield for their illegal conduct.

[4] The Court reversed the appellate ruling compelling the case to arbitration and remanded the case to "the trial court to resolve conflicting factual evidence in order to properly adjudicate [the HMO's] petition to compel arbitration." *Engalla*, 15 Cal. 4th at 981, 986.

C. The arbitrators' delegation of authority to decide certain *claims* under the Agreements does not usurp the Court's authority to decide whether the *arbitration clauses* were fraudulently procured in the first instance.

The delegation of authority to the arbitrators, allowing them to decide certain matters, does not impact the inquiry here. A "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 561 U.S. at 68-69 (noting that parties can agree to arbitrate "gateway" issues of "arbitrability," "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy"). "[T]he party contending that an arbitrator has authority to decide arbitrability 'bears the burden of demonstrating ***clearly and unmistakably*** that the parties agreed to have the arbitrator decide that threshold question[.]'" *Houston Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 408 (5th Cir. 2014) (emphasis added) (quoting *ConocoPhillips, Inc. v. Local 13-0555 United Steelworkers Int'l Union*, 741 F.3d 627, 630 (5th Cir. 2014)). The "clear and unmistakable" test requires a "heightened standard" of proof. *Rent-A-Center*, 561 U.S. at 69 n.1.

The district court referred the matter to arbitration because it found that the Agreements contain delegation clauses that give arbitrators the authority to decide Appellants' claims and because it concluded that Appellants had not challenged the specific delegation clauses that gave the arbitrators such authority. ROA.480. This was error because (1) the delegation clauses do not allow the arbitrators to decide

whether the arbitration clauses were fraudulently procured, and (2) even if they did, Appellants' challenge to the arbitration clauses was sufficient to keep this matter with the district court.[5]

1) The delegation clauses do not allow arbitrators to decide whether the arbitration clauses were fraudulently procured.

The district court found that the Agreements contain delegation clauses and held that these clauses evince the parties' intent that arbitrators decide whether the arbitration clauses were fraudulently procured. ROA.478-80. The district court focused its analysis on the following emphasized phrases in the arbitration clauses:

> Any dispute, claim, or controversy arising out of or relating to [the] Agreement, including the negotiation, breach, ***validity*** or performance of the Agreement, the rights and obligations contemplated by the Agreement, ***any claims of fraud or fraud in the inducement***, and any claims related to the scope or applicability of this agreement to arbitrate, shall be resolved [by arbitration pursuant to JAMS/FINRA rules and procedures].

ROA.478-80 (emphasis in original).[6]

[5] Appellees did not identify or rely on the "delegation clauses" within the arbitration clauses in moving to compel arbitration, and instead solely relied on the arbitration clauses. ROA.214-15. Therefore, the district court's decision to refer the matter to arbitration based on the delegation clauses was further error because that issue was not before the court. *See Hicks v. R.H. Lending, Inc.*, No. 3:18-CV-0586-D, 2019 WL 1556101, at *10 (N.D. Tex. Apr. 10, 2019) (declining to consider argument on motion for summary judgment "[b]ecause the court cannot grant a motion for summary judgment on grounds not raised by a party unless it first gives notice and a reasonable time to respond[.]").

[6] The three arbitration clauses that the district court relied upon are substantially the same, except that two of the agreements provide that the arbitration is to be conducted under JAMS rules, and one of the Agreements provides that it is to be conducted under FINRA rules. ROA.235, 244, 251, 478-79.

The district court's ruling was error because the delegation clauses highlighted above do not reflect a "clear and unmistakable" intent to refer to the arbitrator challenges to the validity of the arbitration clauses. The district court incorrectly held that, because the clauses "delegate[] to the arbitrator the 'validity' of the agreements and *any* claims of 'fraud or fraud in the inducement,'" they show the parties intended to refer Appellants' claim to arbitration. ROA.479 (emphasis added). This was error, because the clauses only allow the arbitrator to decide substantive fraudulent inducement claims pertaining to the *Agreements*. In contrast, here, Appellants assert that the *arbitration clauses* were fraudulently induced and are thus invalid. This, the arbitrators have not been tasked to decide. *See Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 787, (Cal. Ct. App. 2012) (intent to arbitrate claims was distinguishable from intent to arbitrate enforceability of the arbitration clause, and clear and unmistakable intent to arbitrate issues pertaining to arbitration clause was lacking).

The plain language of the clauses distinguishes between the arbitrator's authority to decide claims that the *Agreements* were fraudulently induced or are otherwise invalid from claims that the *arbitration clauses* were fraudulently induced or are otherwise invalid. The clauses begin by delegating to the arbitrator the authority to hear certain claims: subject to arbitration is "[a]ny dispute, . . . including the negotiation, breach, *validity*, or performance of the *Agreement, any claims of*

fraud or fraud in the inducement . . . ." ROA.478-79 (emphasis added). Here, "Agreement," as defined in the respective Agreements, refers to the entire contract. ROA.232, 240, 247. Thereafter, the clauses delegate to the arbitrator "any claims related to the scope or applicability of ***this agreement to arbitrate***"—meaning, the specific arbitration clause. ROA.478-79 (emphasis added). Whereas the first portions of the clauses allow the arbitrator to decide the *Agreement's validity*, the second portions of the clauses do *not* allow the arbitrator to decide the validity of the specific "agreement to arbitrate." Similarly, whereas the first portions of the clauses allow the arbitrator to decide fraudulent inducement claims pertaining to the *Agreement*, the second portions of the clauses do *not* allow the arbitrator to decide fraudulent inducement claims pertaining to the specific "agreement to arbitrate." In contrast with the first portions of the clauses, the second portions of the clauses, pertaining to the "arbitration agreement," clearly omit the term "validity" and clearly omit "claims for fraud in the inducement." The second portions of the clauses, pertaining to the "agreement to arbitrate," instead limit the arbitrator's authority to the "scope and applicability" of the arbitration clauses. ROA.478-79.

Had the parties to the Agreements wished to delegate to the arbitrators the authority to decide the validity and enforceability of the "agreement to arbitrate," they easily could have done so. "The absence of such express language (or extrinsic evidence to the same effect) therefore gives rise to the inference that the parties did

not consider the matter." *Ajamian*, 203 Cal. App. at 787. "Indeed, because the issue is arcane and not likely contemplated by the parties, silence or ambiguity as to who would decide the enforceability of the arbitration provision suggests it was not a matter on which the parties mutually agreed and, therefore, the enforceability issue cannot be arbitrated—no matter how much public policy favors the notion of arbitration generally." *Id*. As a result, the validity of the agreement to arbitrate, based on the plain language of the Agreements and established law, is for the courts. *See supra* Section II.A.[7]

Therefore, even if Appellants were required to challenge the particular components of the arbitration clauses that delegate to the arbitrator the authority to decide the validity of the arbitration clauses, Appellants would have nothing to challenge, because the Agreements do not give the arbitrators the authority to decide

[7] The district court did not expressly rule that the arbitration clauses' statement that the arbitration would be conducted pursuant to "JAMS Comprehensive Arbitration Rules & Procedures" (with respect to two of the Agreements) and pursuant to "FINRA Comprehensive Arbitration Rules & Procedures" (with respect to the third Agreement) provides the clear and unmistakable intent that is necessary to delegate the validity of the clauses to the arbitrator. ROA.480-82. Nor did Appellees raise this argument in their motion to compel. ROA.211-27. Even if these provisions, on their own, could supply that clear and unmistakable intent, the remainder of the clauses provide the more specific outline of what is to be arbitrated and thus override the reference to JAMS and FINRA rules. *See Arnold v. Homeaway, Inc.*, 890 F.3d 546, 553 (5th Cir. 2018) ("We do not foreclose that a contract might incorporate the AAA rules but nonetheless otherwise muddy the clarity of the parties' intent to delegate."); *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 494 (5th Cir. 2017) ("It is not the case that any mention in the parties' contract of the AAA Rules trumps all other contract language."), *vacated and remanded on other grounds*, 139 S. Ct. 524 (2019); *see also Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 282 (5th Cir. 2019) ("The parties could have unambiguously delegated [the arbitrability] question, but they did not" because the agreement included a carve-out of the AAA rules.), *cert. granted*, 207 L. Ed. 2d 1050 (June 15, 2020), *and cert. denied*, 207 L. Ed. 2d 1053 (June 15, 2020).

whether the *arbitration clauses* were procured by fraud or are otherwise invalid.

Indeed, the clauses here stand in stark contrast with the clauses in the key cases considered by the district court in discussing the applicability of the delegation clauses. ROA.477, 479, 482.

In *Rent-A-Center*, the delegation clause provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, ***enforceability or formation*** of this Agreement including, but not limited to any claim that all or ***any part of this Agreement is void or voidable***." 561 U.S. at 66 (emphasis added). That clause did not create a distinction between "Agreement" and "agreement to arbitrate;" the ones at issue here do, requiring that this distinction be given effect. *See Tennessee Gas Pipeline Co. v. F.E.R.C.*, 17 F.3d 98, 103 (5th Cir. 1994) ("Not only must courts give meaning to each *provision*, courts must also give meaning, effect, and purpose to every *word* in the contract, if at all possible." (emphasis in original)); *In re Crystal Props., Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001) (Under California law, "a court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage").[8]

[8] The ruling in *Bowles v. OneMain Financial Group, L.L.C.*, is distinguishable for this reason as well. 954 F.3d 722, 724 (5th Cir. 2020). There, the delegation clause gave the arbitrator authority to decide "any legal dispute . . . arising out of, relating to, or concerning the validity, enforceability or breach of this Agreement." *Id.* Again, unlike the clauses here, the clause considered in *Bowles* did not create a distinction between the authority to decide issues pertaining to the "Agreement" and the authority to decide issues pertaining to the "agreement to arbitrate." *Id.*

In *Arnold v. Homeaway, Inc.*, the plaintiff argued the arbitration provision was illusory and therefore invalid. 890 F.3d 546, 550 (5th Cir. 2018). This Court found that the incorporation of the American Arbitration Association ("AAA") rules evinced the parties' "clear and unmistakable" intent to delegate to the arbitrator the authority to decide whether the dispute is arbitrable. *Id.* at 553. The provision in *Arnold*, however, did not contain the qualifiers present here—namely, that while the validity of the Agreement may be for the arbitrator to decide, the validity of the agreement to arbitrate is not. *Id.* at 549;[9] *see also supra* note 7.

In *Kubala v. Supreme Production Services, Inc.*, the parties disagreed whether preexisting claims were subject to arbitration; whether the arbitration clause was fraudulently procured was not at issue, unlike here. 830 F.3d 199, 201, 203 (5th Cir. 2016). Moreover, the delegation clause in that case provided: "The arbitrator shall have the sole authority to rule on his/her own jurisdiction, ***including any challenges or objections with respect to the existence***, applicability, scope, ***enforceability***, construction, ***validity*** and interpretation ***of this Policy*** and ***any agreement to arbitrate*** a Covered Dispute." *Id.* at 204 (emphasis added). The clause in *Kubala* contained specific language allowing arbitration not only of the agreement as a

[9] The ruling in *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, is likewise distinguishable on this basis. 687 F.3d 671, 675 (5th Cir. 2012). While the incorporation of AAA rules reflected the intent to delegate the matter to the arbitrators, no qualifiers similar to those present here were discussed in that case.

whole—the "Policy"—but also as to the "agreement to arbitrate." *Id.* In contrast, the clauses that Appellees seek to enforce here do not grant the arbitrator the authority to decide the validity of the specific "agreement to arbitrate." ROA.235, 244, 251-52.

In *Gay v. Manchester Management, LLC*, the Court first concluded "that the question whether the parties formed a valid agreement to arbitrate is for the court to decide, and that [defendant] has established that there is a valid agreement between the parties to arbitrate." No. 3:18-CV-1378-D, 2018 WL 5255267, at *3 (N.D. Tex. Oct. 22, 2018). Here, the validity of the agreement to arbitrate is likewise for the courts, but there has been no judicial determination that there is a valid agreement to arbitrate. *See supra* Section II.A. The Court then concluded that whether the claim falls in the scope of the agreement is for the arbitrators to decide because the agreement incorporated the AAA rules (without including qualifiers like those present here) and contained a broad delegation clause similar to that in *Kubala*—and thus, again, distinguishable from the one present here. *Id.* at *5. Finally, plaintiff claimed that the "[A]greement is unconscionable," thus failing to challenge the specific arbitration clause at issue, unlike Appellants here. *Id.*

In contrast to these rulings, the fraudulent inducement of the arbitration clauses in the Agreements here was not an issue clearly and unmistakably delegated to the arbitrator. Absent such clear and unmistakable intent, shown through a

"heightened standard" of proof, *Rent-A-Center*, 561 U.S. at 69 n.1, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc.*, 475 U.S. at 649.

2) Even if the delegation clauses conferred the arbitrators the authority to decide this dispute, Appellants' challenge to the arbitration clauses is sufficient.

Even assuming, *arguendo*, that the delegation clauses allow the arbitrators to decide Appellants' claim that the arbitration clauses are invalid, the district court erred in ruling that Appellants were required to specifically challenge the delegation phrases within the arbitration clause. Appellants' challenge to the arbitration clauses was sufficient.

The district court relied on the Supreme Court's ruling in *Rent-A-Center* in concluding that, "if a party challenges the validity of the agreement to arbitrate, the federal court must consider the challenge; but unless the party resisting arbitration has 'challenged the delegation provision specifically, we must treat it as valid . . . leaving any challenge to the validity of the Agreement as a whole for the arbitrator.'" ROA.482 (quoting *Rent-A-Center*, 561 U.S. at 71).

The distinctions between *Rent-A-Center* and this case demonstrate that the district court did not apply *Rent-A-Center*'s holding correctly here, requiring reversal of the district court's holding. The Supreme Court in *Rent-A-Center* was clear that "[t]here are *two* types of validity challenges under § 2 [of the Federal

Arbitration Act]: 'One type challenges specifically the validity of the agreement to arbitrate,' and '[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.'" 561 U.S. at 70 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)) (emphasis added). "If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, *the federal court must consider the challenge* before ordering compliance with that agreement under § 4." *Id*. at 71 (emphasis added).

The entire contract at issue in *Rent-A-Center* was an arbitration agreement. *Id.* at 72. The two relevant clauses were a clause providing for the arbitration of all claims, as well as a distinct "delegation clause" that gave the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement." *Id.* at 68. The "delegation clause" was the specific provision within the contract that outlined the authority to arbitrate, and that was the provision that the employer sought to enforce to compel arbitration. *Id.* at 68, 72. Because the "delegation clause" was "the 'written provision . . . to settle by arbitration a controversy,'" that was the provision that the employee was required to challenge in that particular case. *Id.* at 71-72 (quoting 9 U.S.C. § 2). And because the employee did not challenge the specific delegation clause but "challenged only the validity of

the contract as a whole," the matter was referred to arbitration. *Id.* at 72.

The ruling in *Rent-A-Center* is an "[a]pplication of the severability rule"—namely, that "'as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'" *Id*. at 70-72 (quoting *Buckeye Check Cashing*, 546 U.S. at 445 (alterations omitted)). Thus, when a party challenges a contract, "but not specifically its arbitration provisions, those [arbitration] provisions are enforceable apart from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 446. This "severability rule" is the basis for requiring that the "specific 'written provision' to 'settle by arbitration a controversy'" be challenged; otherwise, a challenge to the remainder of the agreement will not invalidate the arbitration clause, because it is severable. *Rent-A-Center*, 561 U.S. at 72 (discussing 9 U.S.C. § 2).

Here, in contrast, Appellants challenge the exact arbitration clauses that Appellees sought to enforce, and in which the delegation provisions are embedded. ROA.214-15, 336-40. Moreover, severability issues are not implicated. Appellants do not seek to invalidate the arbitration clauses through a broad challenge to the entire Agreements, and thus there is no concern that a valid arbitration clause will be improperly set aside because of a challenge to the Agreements' remaining provisions. Instead, Appellants make a surgical challenge to the arbitration clauses and only ask that *they* be invalidated. This complies with *Rent-A-Center*'s

requirement that "the specific 'written provision' to 'settle by arbitration a controversy'" be challenged. 561 U.S. at 72 (quoting 9 U.S.C. § 2).

Conversely, challenging the specific *phrases* within the arbitration clauses that delegate authority to the arbitrator is not warranted in this case, because the delegation "clauses" are not severable from the arbitration clauses; unlike in *Rent-A-Center*, the delegation "clauses" here are not distinct from the clauses providing for arbitration of certain controversies. ROA.478-79; *see also Rent-A-Center*, 561 U.S. at 68. As discussed in Section II.C.1, and as implicitly acknowledged by the district court, the delegation clauses—or, more appropriately, the "delegation phrases"—are embedded within the arbitration clauses.[10] Consequently, Appellants submit that they have sufficiently challenged the delegation clauses when they challenged the validity of the arbitration clauses.

Therefore, even if certain provisions gave the arbitrators the authority to decide the validity of the arbitration clauses, the presence of those delegation provisions within the arbitration clauses would not alter the analysis that the Supreme Court has repeatedly required: that, when "the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of

[10] The district court acknowledged this fact by quoting the arbitration clauses and emphasizing, within those same paragraphs, the phrases regarding the arbitrators' delegation of authority. ROA.478-79 (quoting Agreements).

the agreement to arbitrate—the federal court may proceed to adjudicate it." *Prima Paint*, 388 U.S. at 403-04. Appellants have sufficiently challenged the arbitration clauses and the delegation of authority that they contain. Only once the Court confirms that the arbitration clauses are valid can the delegation clauses have any force. In sum, it is for the Court to decide whether the arbitration clauses were fraudulently procured.

III. Even If The Agreements Were Valid, They Would Not Bind Nonsignatory Appellant Noble Capital.

Even if the arbitration clauses in the Agreements had not been procured by fraud, referring this matter to arbitration would still be error because Noble Capital is not a signatory to the Agreements and cannot be bound by those Agreements.

A. Nonsignatory Noble Capital is not bound by the Agreements as an "affiliate" of NCFM.

It is undisputed that Noble Capital is not a signatory to the Agreements. ROA.232-69. The district court held that Noble Capital is nevertheless bound by the Agreements because the Agreements purport to bind NCFM and its "affiliates," "subsidiaries," "associated companies," "co-managed entities," "successors," and "assigns." ROA.484 (citing ROA.232, 240, 243, 247). The district court reasoned that these provisions bind Noble Capital because it is the parent corporation of NCFM and because the two entities have the same principal place of business. ROA.484. This conclusion is contrary to law and the intent of the parties, as

expressed in the Agreements.

"[A]rbitration is a matter of contract, [a]nd consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes[.]" *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (emphasis in original) (alterations, citations, and quotations omitted). "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *see also Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (nonsignatory could not "be bound to the terms of a contract he didn't sign"); *Rael v. Davis*, 166 Cal. App. 4th 1608, 1617 (Cal. Ct. App. 2008) (because party "did not sign the mediation agreement, he is not bound by it as a settlement of the underlying dispute.").

Courts do "not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House, Inc.*, 534 U.S. at 294. "The fundamental rule is that interpretation of any contract is governed by the mutual intent of the parties at the time they form the contract." *Securitas Sec. Servs. USA, Inc. v. Super. Ct.*, 234 Cal. App. 4th 1109, 1125 (Cal. Ct. App. 2015) (quotations and ellipses omitted). "The parties' intent is found, if possible, solely in the contract's written provisions." *Id.* "The parties' expressed objective intent, not their unexpressed

subjective intent, governs." *Id*. (citations omitted).

Noble Capital is *never* mentioned in the Agreements, reflecting the parties' clear intent that Noble Capital would not be bound by them. ROA.232-69. Moreover, the term "affiliate" and the other terms relied upon by the district court are not defined in the Agreements, much less in a way that supports even an inference that Noble Capital falls within the scope of the definition. ROA.232, 247, 484. Nor did NCFM sign the Agreements on Noble Capital's behalf. To the contrary, the August 8, 2016 Letter reveals that US Capital and NCFM—and no one else—signed the agreement. ROA.237. The January 18, 2017 Management Advisory Services Agreement was signed by NCFM and two other entities that are not parties to this case. ROA.246. The February 3, 2017 Letter was likewise signed by NCFM and four entities that are not parties to this case. ROA.255. The signatures on all three agreements bear no indication that they are made on behalf of any other "affiliate," "associated company," or other entity—much less Noble Capital. ROA.237, 246, 255. Only the signatory entities' names are listed; these names are not accompanied by any term that could be construed as encompassing Noble Capital. *Id*.

As the basis for concluding that Noble Capital is bound by the Agreements' references to "affiliates," "subsidiaries," "associated companies," "co-managed entities," "successors," and "assigns," the district court noted that NCFM and Noble

Capital have the same principal place of business and have a parent-subsidiary relationship. ROA.484. This reasoning was error. Although "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles," *Comer*, 436 F.3d at 1101, the fact that the Agreements purport to be binding on NCFM's unnamed and unidentified "affiliates," "associated companies," "successors," and other vaguely-described entities is not sufficient to establish that any of these "contract and agency principles" apply. ROA.232, 243, 247. Crucially, whether Noble Capital and NCFM can be referred to colloquially as, for example, "affiliates" or "associated companies," whether they have the same principal place of business, or whether they are part of the same corporate structure are *not* the inquiries here. Instead, the inquiry is whether the nonspecific references to "affiliates" and other descriptors were intended to cover Noble Capital. In other words, did the parties intend and agree that Noble Capital was ***the*** "affiliate," "subsidiary," or other type of entity referenced in the Agreements? Neither these vague and undefined terms in the Agreements, nor anything else in the record, supplies evidence of such intent or agreement. *See Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC*, No. 2:13-CV-1018-ODW MLG, 2014 WL 505178, at *4-6 (C.D. Cal. Feb. 7, 2014) (rejecting argument that non-party was bound by agreement through the term "affiliate," where non-party was not named as affiliated entity and nothing suggested parties' intent to bind non-party to agreement, noting

that "the absence of [non-party's] name in the [agreement] is probative of a lack of intent to make [non-party] subject to its general releases"); *see also In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d 185, 191 (Tex. 2007) ("A corporate relationship is generally not enough to bind a nonsignatory to an arbitration agreement. . . . Thus, a contract with one corporation—including a contract to arbitrate disputes—is generally not a contract with any other corporate affiliates." (citations and quotations omitted)); *Janvey v. Alguire*, 847 F.3d 231, 242 (5th Cir. 2017) (affirming denial of motion to compel arbitration because "references to 'affiliates' in the arbitration agreements [were] insufficient to bind" nonsignatory bank).

To bind an entity to an agreement in such a case—based on nothing more than the inclusion of vague and generic terms like "affiliates," "subsidiaries," or "associated companies"—would undermine fundamental principles of contract and corporate law. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (collecting authority) (internal quotations omitted); *see also Agricola Baja Best, S. De. R.L. de C.V. v. Harris Moran Seed Co.*, 44 F. Supp. 3d 974, 982 (S.D. Cal. 2014) ("Generally, a parent corporation is not liable for the conduct of its subsidiaries."); *In re Merrill Lynch Tr. Co. FSB*, 235 S.W.3d at 191 ("[C]orporate affiliates are

generally created to separate the businesses, liabilities, and contracts of each."). "Only under unusual circumstances will the law permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary." *Agricola Baja Best*, 44 F. Supp. 3d at 982 (citing *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004)). The district court did not make findings that such circumstances exist, and indeed, no such circumstances exist here. ROA.483-84.

Requiring Noble Capital to arbitrate its claims on this basis would suggest that any company with which NCFM becomes "affiliated" or "associated," even in the vaguest manner, would lose its right to litigate in court. This would violate the letter and spirit of the Federal Arbitration Act. *See Rent-A-Center*, 561 U.S. at 67 ("The FAA reflects the fundamental principle that arbitration is a matter of contract.").

B. Appellees have the burden to show that nonsignatory Noble Capital can be bound by the Agreements.

"The question whether a nonsignatory can be bound to, or permitted to enforce, an arbitration agreement is one for the court, not the arbitrator, and the party seeking arbitration bears the burden to establish the arbitration agreement applies." *Hays v. HCA Holdings, Inc.*, No. A-15-CA-432-SS, 2015 WL 5737963, at *4 (W.D. Tex. Sept. 30, 2015), *aff'd*, 838 F.3d 605 (5th Cir. 2016). In reaching its conclusion that Noble Capital is bound by the Agreements, the district court committed an additional error because it effectively reversed the burden, stating: "[Appellants] do

not dispute that Noble Capital Group and NCFM are affiliates, associated companies, co-managed companies, or alter egos." ROA.484. Thus, Appellants were asked to affirmatively demonstrate that Noble Capital should ***not*** be bound, which is contrary to what the law requires.[11]

Relatedly, the district court also erred in stating that "[Appellants] do not dispute that Noble Capital Group and NCFM are . . . alter egos." ROA.484. ***First***, the issue of alter ego was not properly before the district court because Appellees had not made that allegation. ROA.211-27. Only in their reply in support of their motion to compel did Appellees, for the first time, make an indirect reference to alter ego without any supporting argument or authority: "It follows that Noble has pled facts which establish that [Noble Capital] is an affiliate of and co-managed by NCFM. In the least, NCFM is an agent, or alter ego of [Noble Capital]." ROA.370. After receiving Appellees' reply, the district court did not request further briefing or evidence on this issue, and it proceeded to rule that Appellants had not disputed they were alter egos. ROA.484. Thus, it was error for the district court to consider the issue of alter ego. *See United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) ("Arguments raised for the first time in a reply brief, even by pro se litigants . . ., are waived."); *Calvasina v. Wal-Mart Real Estate Bus. Tr.*, 899 F. Supp. 2d 590,

[11] Moreover, Appellants had in fact argued that Noble Capital cannot be bound by the Agreements based on the references to "affiliates" and other types of entities. ROA.341-44.

608 (W.D. Tex. 2012) (argument raised for the first time in reply "was not timely raised"); *IAS Servs. Grp., LLC v. Jim Buckley & Assocs., Inc.*, No. CV SA-14-CA-180-FB, 2015 WL 13775347, at *4 n.38 (W.D. Tex. Sept. 10, 2015) ("This argument is not properly before the Court because it is raised for the first time in [the] reply brief.").

Second, even if Appellees had properly asserted a claim of alter ego, Appellees had the burden to support that assertion with facts. *See Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 358-59 (5th Cir. 2003); *see also Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1066 (C.D. Cal. 2002) (citing *Minifie v. Rowley*, 187 Cal. 481, 488 (Cal. 1921)).

Third, even if Appellees had presented facts in support of their claim, the district court was required to allow Appellants an opportunity to respond, especially given the fact-intensive nature of the alter ego inquiry. *See Bridas*, 345 F.3d at 358-59 ("Alter ego determinations are highly fact-based, and require considering the totality of the circumstances in which the instrumentality functions.").

Fourth, the district court was required to make findings to support its holding that the entities are alter egos, which it failed to do. *See id.* at 359-60 ("Because the district court failed to take into account all of the aspects of the relationship between the Government and Turkmenneft, it committed an error of law and must reconsider the issue on remand.").

Fifth, and relatedly, the district court reached its conclusion by improperly placing the burden on Appellants to *disprove* that they are alter egos, concluding that "[Appellants] do not dispute that Noble Capital Group and NCFM are . . . alter egos." ROA.484. This was error, because the moving party bears the burden to establish the applicability of the alter ego theory. *Wady*, 216 F. Supp. at 1066.

IV. Even If The Agreements Were Valid, They Would Not Be Enforceable By Nonsignatory Appellees Sweeney, Towle, and Steele.

Even if the arbitration clauses in the Agreements had not been procured by fraud, and even if nonsignatory Noble Capital were bound by the Agreements, referral to arbitration would still be contrary to law because Appellees Sweeney, Towle, and Steele have not signed the Agreements, are not bound by them, are not entitled to enforce them under the third-party beneficiary theory, and are not entitled to enforce them under the equitable estoppel theory.

A. Nonsignatories Sweeney, Towle, and Steele cannot enforce the Agreements under the third-party beneficiary theory.

The district court erred in concluding that Sweeney, Towle, and Steele can enforce the Agreements because they stood to benefit from them. ROA.485. The third-party beneficiary theory was not before the district court as a basis to enforce the Agreements against Appellants. Appellees did not raise this theory in their motion and thus waived it. ROA.211-27; *see Jackson*, 426 F.3d at 304 n.2; *Calvasina*, 899 F. Supp. 2d at 608; *Hicks*, 2019 WL 1556101, at *10; *IAS Servs.*

Grp., *LLC*, 2015 WL 13775347, at *4 n.38.

Regardless, the requirements of the third-party beneficiary theory are not met here, and the district court erred in holding otherwise. ROA.484-85. "Parties are presumed to be contracting for themselves only." *Bridas*, 345 F.3d at 362 (citations omitted). "A third party may only assert rights under a contract if the parties to the agreement intended the contract to benefit the third party[.]" *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1234 (9th Cir. 2013). Critically, "[t]he mere fact that a contract results in benefits to a third party does not render that party a 'third party beneficiary'; rather, the parties to the contract must have expressly intended that the third party would benefit." *Id.* (quoting *Matthau v. Super. Ct.*, 151 Cal. App. 4th 593, 602 (Cal. Ct. App. 2007)) (internal quotations omitted). Neither the Agreements nor anything else in the record demonstrates an intent to make Sweeney, Towle, or Steele beneficiaries of the Agreements. In fact, the only purported benefits that Sweeney, Towle, and Steele highlighted for the district court were tied to their compensation and reputation, which they claimed were *in turn* "determined based upon the business functions of the [US Capital] entities, *including* the execution of their contract agreements." ROA.371 (emphasis added). The alleged benefits are vague and tangential, they are not directly linked to US Capital, and they are in no way linked to the Agreements. At most, Sweeney, Towle, and Steele have an interest in enforcing the Agreements, but this is not sufficient. *See Murphy*, 724 F.3d at 1234

(third-party beneficiary theory did not apply because "[t]he terms of the Customer Agreement do not demonstrate that [signatory] intended to benefit [nonsignatory] through the contract"); *see also Janvey*, 847 F.3d at 243 ("[T]he third-party beneficiary doctrine . . . does not apply when a person merely is directly affected by the parties' conduct or has a substantial interest in a contract's enforcement.").

The district court also erred in relying on the fact that Sweeney, Towle, and Steele are principals of US Capital in concluding that they stood to benefit from the Agreements and can be bound by them. ROA.484. The corporate positions of the nonsignatory Appellees does not demonstrate that the Agreements were "made expressly for [their] benefit," as is required under the third-party beneficiary theory. *Matthau*, 151 Cal. App. 4th at 602. Moreover, Sweeney, Towle, and Steele are sued in their personal capacities due to the fraud they personally committed (separate from any violations of any agreement), not in their capacities as officers of an entity that may have entered into the Agreements. "A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf." *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999) (citation and quotation omitted). A corporate officer cannot "hide behind the corporation where [the officer] is an actual participant in the tort." *Id*. (citation and quotation omitted). "Directors are liable to third persons injured by

their own tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable." *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490, 504 (Cal. 1986). At issue here is Sweeney's, Towle's, and Steele's personal participation in the fraud. ROA.170-78. As a result, whether they signed the Agreements in their representative capacities is irrelevant and does not allow them to use the Agreements' arbitration clauses as a shield to their personal liability and as a sword to enforce the Agreements against Appellants.

In adopting Appellees' reasoning that Sweeney, Towle, Steele can enforce the Agreements because they stood to benefit from them, the district court failed to apply the requirements of the third-party beneficiary theory to the facts in the record, warranting reversal. ROA.484-85.

B. The equitable estoppel theory does not apply and does not allow arbitration of the dispute.

This district court held the equitable estoppel applies because Sweeney, Towle, and Steele, "all corporate officers and employees of [US Capital], have an interconnected relationship with [US Capital]." ROA.485. This ruling is error because it is not supported by the record and fails to consider the remaining requirements of the estoppel theory.

Under California law, equitable estoppel can bind a party to arbitration only (1) "when a signatory must rely on the terms of the written agreement in asserting

its claims against the nonsignatory or the claims are 'intimately founded in and intertwined with' the underlying contract," and (2) "when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory *and* 'the allegations of interdependent misconduct [are] founded in or intimately connected with the obligations of the underlying agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013) (quoting *Goldman v. KPMG, LLP*, 173 Cal. App. 4th 209, 219-21 (Cal. Ct. App. 2009) (emphasis added); ROA.485. Neither of these circumstances exists here.

The first prong of the theory does not apply here. Appellants' claims are not intimately founded in and intertwined with the Agreements. To sufficiently rely on or be intertwined with the agreement, claims "must rely on or depend on the terms of the written agreement, . . . not simply on the fact that an agreement exists." *Goldman*, 173 Cal. App. 4th at 231 (citations and quotations omitted). Merely "presum[ing] the existence of" an agreement is not sufficient. *Id*. Instead, there must be "actual reliance on the terms of the agreement to impose liability on the nonsignatory." *Id*. "[T]he correct analysis is whether [Appellants] would have a claim independent of the existence of the [Agreements] . . ., not whether the court must look to the [Agreements] to ascertain the requested relief." *Kramer*, 705 F.3d at 1131-32. Notably, courts have emphasized that claims are not intertwined with an arbitration agreement merely because they would not have existed "but for" the

agreement. *DMS Servs., LLC v. Super. Ct.*, 205 Cal. App. 4th 1346, 1356-57 (Cal. Ct. App. 2012) (claims "not founded in the contract containing the arbitration provision" did not support equitable estoppel even though agreement was but-for cause of claims); *Jones v. Jacobson*, 195 Cal. App. 4th 1, 21 (2011), *as modified* (June 1, 2011) (fact that investors would not have had claims related to their investments against nonsignatory investment advisors and financial institutions "but for" their account agreements with securities entity was not sufficient to compel arbitration on basis of intertwined-claims estoppel).

Here, Appellants assert claims for fraud, fraudulent inducement of the arbitration clauses, and conspiracy (based on the misrepresentations of nonsignatories Sweeney, Towle, and Steele regarding US Capital). ROA.179-80. In bringing these claims, Appellants do not need to refer to, much less "rely on or depend on the terms of the Agreements" or any obligation that the Agreements impose on the signatory, US Capital. ROA.179-80; *see Goldman*, 173 Cal. App. 4th at 231 (affirming denial of motion to compel and concluding investors were not estopped from refusing to arbitrate fraud and other claims related to their investments against nonsignatory lawyers and accountants, even though investors' agreement with advisers regarding those investments had broad arbitration provisions); *Jones*, 195 Cal. App. 4th at 21 (affirming denial of motion to compel on estoppel theory where "[n]one of the allegations in the amended complaint [was]

based on the account agreement or any of its provisions").

The second prong of the estoppel theory is likewise inapplicable because there is no "substantially interdependent and concerted misconduct by the nonsignatory and another signatory." *Kramer*, 705 F.3d at 1129. The district court erred in applying estoppel on this basis because Appellees did not carry their burden to establish that Appellants' allegations of fraud are sufficient to show the concerted conduct that is needed. Appellants' allegations that Sweeney, Towle, and Steele all made misrepresentation about US Capital do not rise to the level of "interdependent misconduct" that is required; for example, in *Kramer*, the Ninth Circuit—in affirming the denial of defendants' motion to compel—found "unconvincing [nonsignatory defendants'] claim that a pattern of denial or concealment by both [nonsignatory defendants] and the [signatories] amounts to allegations of collusion or interdependent misconduct for purposes of equitable estoppel." *Id.* at 1133.

In assessing this prong, the district court also erred because it limited its analysis to whether the Appellees were connected to one another and were alleged to have engaged in interconnected misconduct. ROA.485-86.[12] This is contrary to "California state contract law," which "does not allow a nonsignatory to enforce an

[12] The district court concluded: "Equitable estoppel applies because the Individual Defendants [Sweeney, Towle, and Steele], all corporate officers and employees of [US Capital], have an interconnected relationship with [US Capital]," and because "[Appellants] make the same factual allegations against [US Capital] and the Individual Defendants, and also allege that they were acting together as a single unit to make false misrepresentations to induce [Appellants] to enter into the Agreements and violate their terms." ROA.485-86.

arbitration agreement based upon a mere allegation of collusion or interdependent misconduct between a signatory and nonsignatory." *Kramer*, 705 F.3d at 1132-33. "In *any* case applying equitable estoppel to compel arbitration despite the lack of an agreement to arbitrate, a nonsignatory may compel arbitration only when the claims against the nonsignatory are founded in and inextricably bound up with *the obligations imposed by the agreement containing the arbitration clause*." *Id*. at 1133 (quoting *Goldman*, 173 Cal. App. 4th at 219) (emphasis in original). "In other words, allegations of substantially interdependent and concerted misconduct by signatories and nonsignatories, standing alone, are not enough: the allegations of interdependent misconduct must be founded in or intimately connected with the obligations of the underlying agreement." *Id*. (quoting *Goldman*, 173 Cal. App. 4th at 219). "It is the relationship of the claims [to the contract], not merely the collusive behavior of the signatory and nonsignatory parties, that is key." *Waymo LLC v. Uber Techs., Inc.*, 252 F. Supp. 3d 934, 939 (N.D. Cal.), *aff'd*, 870 F.3d 1342 (Fed. Cir. 2017) (denying motion to compel on estoppel theory); *see also Janvey*, 847 F.3d at 243 (estoppel did not apply and action was not referred to arbitration because receiver did "not seek to enforce the various contracts" even though he sought "to unwind them and reclaim the benefits fraudulently distributed to the defendants under the contracts").

Here, Appellants do not allege that US Capital (the only party to the

Agreements) violated a specific term of those Agreements, and they do not allege that Appellees colluded to violate the Agreements. ROA.179-80. The claims are not dependent on the provisions of the Agreements, and therefore, equitable estoppel does not apply. This aligns with principles of equity and common sense: "The proposition that a court should compel arbitration to avoid denying the signatory defendant the benefit of his arbitration clause, and merely to avoid duplicative litigation, is, to the extent it purports to be based on principles of equitable estoppel, simply wrong." *Goldman*, 173 Cal. App. 4th at 231.

The district court also erred because it applied the equitable estoppel theory as if the nonsignatories Sweeney, Towle, and Steele were seeking to enforce the Agreements against two signatories. In reality, Noble Capital is not a signatory to the Agreements and is not bound by them. The district court did not make findings that support the application of the estoppel theory when nonsignatories appear on both sides of the dispute. ROA.486.

Relatedly, it was error for the district court to find that both Appellants should arbitrate their claims because *NCFM* had previously initiated an arbitration against another entity that is *not a party* to this action. ROA.486; *see DMS Servs., LLC*, 205 Cal. App. 4th at 1357-58 (reversing trial court's order compelling arbitration and concluding that estoppel theory did not apply; fact that prior arbitration and plaintiff's lawsuit against nonsignatories "involve[d] interpretation of the deductible

or policy agreements" or had "common questions of law and fact" did not establish claims were "inextricably intertwined with" arbitration agreement). So too here, equitable estoppel does not apply: Noble Capital has never agreed to arbitrate any dispute against *any of the Appellees*, and NCFM has never agreed to arbitrate its disputes against Sweeney, Towle, and Steele. That NCFM has engaged in other arbitration against non-parties to this case does not warrant disturbing the cornerstone of arbitration law, namely that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Tittle*, 463 F.3d at 418 (quoting *AT&T Techs., Inc.*, 475 U.S. at 648).

CONCLUSION

Because Appellants challenged the arbitration clauses within the Agreements, it was for the district court—not the arbitrator—to decide whether the clauses were fraudulently procured. Indeed, Appellees fraudulently procured the arbitration clauses that they now seek to enforce, and this matter therefore belongs in court. Moreover, nonsignatories appear on both sides of the dispute, and the arbitration provisions can be enforced neither against Appellant Noble Capital nor by Appellees Sweeney, Towle, and Steele. It was error for the district court to refer this matter to

arbitration. This Court should reverse the district court's order dismissing this case and remand this matter to the district court for further proceedings.[13]

[13] In the event the district court concludes, after conducting its own determination of the issues, that the arbitration clauses can be enforced, it should also determine whether Appellants' claims fall within the scope of those provisions. *See Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr.*, 853 F.3d at 818 (deciding issue as to enforceability of the agreement and adding: "What the parties intended to arbitrate, as expressed in the arbitration provisions, is not part of this appeal and is a matter to be resolved in further proceedings. On remand, the district court should resolve the scope of the arbitration agreement[.]").

Dated: November 2, 2020

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CERTIFICATE OF SERVICE

I certify that on November 2, 2020, the foregoing document was served via the Court's CM/ECF Document Filing System, in compliance with Fed. R. App. P. 25(b) and (c), on the following registered CM/ECF users:

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Pursuant to Fed. R. App. P. 32(g)(1), the undersigned counsel certifies that:

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Dated: November 2, 2020