No. 17-50655

In the United States Court of Appeals for the Fifth Circuit

JERNARD GRIGGS,

Plaintiff–Appellant,

v.

S.G.E. MANAGEMENT, L.L.C.; STREAM GAS & ELECTRIC, LIMITED, DOING BUSINESS AS STREAM ENERGY; STREAM S.P.E. G.P., L.L.C; STREAM S.P.E., LIMITED; IGNITE HOLDINGS, LIMITED, FORMERLY KNOWN AS IGNITE ENERGY, LIMITED, DOING BUSINESS AS IGNITE, DOING BUSINESS AS IGNITE POWERED BY STREAM ENERGY; CHRIS DOMHOFF; ROB SNYDER; PIERRE KOSHAKJI; DOUGLAS WITT; STEVE FLORES; MICHAEL TACKER; DONNY ANDERSON; STEVE FISHER; RANDY HEDGE; LOGAN STOUT; PRESLEY SWAGERTY,

Defendants–Appellees.

On Petition for Review from the United States District Court for the Western District of Texas, Austin Division, Case No. 1:15-CV-00422

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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 Rule 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.

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STATEMENT REGARDING ORAL ARGUMENT

The Court should dismiss this appeal without hearing argument. Months after compelling arbitration, the district court granted Plaintiff-Appellant Jernard Griggs's request to voluntarily dismiss his case. It did so without prejudice. As a result, this Court lacks jurisdiction to hear this appeal. But even if jurisdiction existed, Griggs's arguments for avoiding arbitration contravene the Supreme Court's and this Court's precedent. On this record, oral argument is not necessary.

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INTRODUCTION

Plaintiff-Appellant Jernard Griggs's opening brief spins a fanciful tale depicting Defendants-Appellees as the Galactic Empire. The copycat script might make George Lucas cringe. But the brief itself is unworthy of this Court's attention. For all the imaginative details he invents, Griggs skips over the most important one of all: appellate jurisdiction.

Griggs sought an order from the district court voluntarily dismissing his case because he did not want to arbitrate—as required by the court's earlier order compelling arbitration, the parties' arbitration agreement, and the Federal Arbitration Act ("FAA"). At Griggs's request, the court dismissed his case *without prejudice*. Rather than proceed to arbitration, Griggs appealed. This appeal must be dismissed for lack of appellate jurisdiction, however, because the orders compelling arbitration and dismissing his case without prejudice are not appealable under 28 U.S.C. § 1291 or § 1292.

Even if Griggs could overcome this fatal jurisdictional defect, his arguments for avoiding arbitration can just as easily be dismissed.

First, Congress enacted the FAA to implement a strong federal policy in favor of arbitration, and it did not expressly or impliedly exempt claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Griggs argues for the first time on appeal that his RICO claims are not arbitrable. He never made this

argument below, so it is waived. But even if it weren't, Griggs cannot state a claim under RICO because his pyramid-scheme allegations are actionable as fraud under the securities laws, and the Private Securities Litigation Act ("PSLRA") precludes such conduct from forming the basis of a RICO claim. And even if the PSLRA did not apply, the Supreme Court (like this Court) has made clear that RICO claims are arbitrable.

Second, the Supreme Court has made equally clear that a challenge to the contract as a whole—as opposed to the arbitration agreement itself—must be resolved by the arbitrator, not the court. Griggs insists the arbitration agreement is unenforceable because the parties' broader contract was procured through fraud—a challenge to the contract, not the agreement to arbitrate. His argument runs headlong into contrary Supreme Court precedent.

Finally, the arbitration agreement at issue here is enforceable by and against all of the parties named in this suit. Griggs attempts to carve his claims against the individual defendants out of the district court's order compelling arbitration by alleging that they were non-signatories to the agreement. He is wrong on both the facts and the law. Griggs, the corporate defendants, and the individual defendants are all bound by the same arbitration agreement. Each may compel—or be compelled to attend—arbitration under state-law contract principles of estoppel, third-party beneficiary status, or agency.

On the merits, Griggs's arguments for avoiding arbitration shrink under scrutiny. But the simplest route to resolving this appeal is by spotlighting jurisdiction. Because appellate jurisdiction is absent, this Court should roll credits on Griggs's appeal before it even begins.

STATEMENT OF JURISDICTION

This Court lacks subject matter jurisdiction. After granting Defendants-Appellees' motion to compel arbitration, the district court entered an order staying the proceedings pending arbitration. Dkt. 20. That was not an appealable interlocutory order under 28 U.S.C. § 1292. *See* Dkt. 27 (Griggs's Response to the Court's Show Cause Order). Griggs later urged the court to dismiss his suit instead. *See* Dkt. 27. The district did so "without prejudice." Dkt. 28. But "a Rule 41(a) dismissal without prejudice is not deemed to be a 'final decision' for the purposes of" 28 U.S.C. § 1291. *Marshall v. Kansas City Southern Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004). Because there is neither an appealable interlocutory order under 28 U.S.C. § 1292 nor an appealable final judgment under 28 U.S.C. § 1291, this appeal must be dismissed for lack of jurisdiction.

ISSUES PRESENTED

1. Does this Court have jurisdiction to hear Griggs's appeal of the district court's order compelling arbitration and its subsequent order granting his request for voluntary dismissal without prejudice?

2. The parties' agreement requires arbitration of "any claim" involving Stream's multilevel marketing program. Griggs sued the defendants under RICO for allegedly operating a pyramid scheme (even though the PSLRA precludes his RICO claims), and he is seeking to avoid arbitration by arguing that (a) RICO claims are not arbitrable (they are), (b) he was fraudulently induced to sign his contract (an issue for the arbitrator to decide), and (c) the individual defendants signed the agreement before it was updated (although they may enforce the updated version under state-law contract principles). Did the district court err by compelling arbitration?

STATEMENT OF THE CASE

Stream Energy is the fourth largest retail electric provider in Texas. It has nearly two million energy customers nationwide, and it markets its services primarily through its wholly owned subsidiary, Ignite. Stream Energy and Ignite employ a multilevel marketing program that allows individuals to become Independent Associates ("IAs") and earn compensation for selling Stream's energy services and for sponsoring other IAs who sell energy. Individuals may become an IA by purchasing an Ignite Services Program ("Program").

To purchase a Program, an IA must enter into a three-part agreement that consists of (1) the IA Compensation Plan, (2) the Policies and Procedures, and (3) the Terms and Conditions (together, the "Agreement"). The Agreement provides

that, to the extent that its parts conflict with one another, the terms of the Policies and Procedures control. ROA 153. The Policies and Procedures state:

> [A]ny claim, dispute or other difference between two or more IAs or between any IA(s) and Ignite, or its affiliates, or any other claim or dispute of any kind arising under or in any way related to these Policies and Procedures or any other part of the Independent Associate Agreement, will be exclusively resolved by binding arbitration.

ROA 153–54.

Although Stream may modify the Agreement by posting notice thirty days in advance, an amendment "shall not apply to (1) a dispute arising prior to the effective date of such amendment; or (2) an IA who declines to accept such amendment by discontinuing his or her Ignite business and status as an IA following the effective date of any such amendment." *Id*.

Griggs enrolled as an IA and accepted the terms of the Agreement on March 22, 2012. Br. 6. After quitting, Griggs filed suit under RICO's civil action provision against Ignite and various other entities and people associated with Stream Gas and Electric, Ltd. (collectively, "Stream"), including certain individuals who have been particularly successful as IAs (the "IA Defendants"). Griggs alleges that, despite Stream's unquestioned success as a retail electric company and the fact that IAs receive compensation only in connection with bona fide energy sales, the Stream operates an illegal pyramid scheme. Dkt. 1.

Stream moved to compel arbitration based on the Agreement's arbitration provision. Dkt. 3. The magistrate judge recommended that the motion be granted. Dkt. 17. The district court agreed and stayed the litigation pending arbitration. Dkt. 18, 20. About six months later, after the parties advised the court that Griggs had not yet submitted the case to arbitration, Dkt. 25, the district court ordered Griggs to show cause why the case should not be dismissed for want of prosecution. Dkt. 26. Griggs responded that the case *should* be dismissed. Dkt. 27.

The district court entered a "final judgment" dismissing the case *without prejudice* on June 30, 2017. Dkt. 28. Griggs filed a notice of appeal on July 26, 2017. Dkt. 29.

SUMMARY OF THE ARGUMENT

The Court should dismiss this appeal for lack of appellate jurisdiction because the district court's dismissal of Griggs's case without prejudice is not appealable. If the Court reaches the merits, it should affirm the district court's order compelling arbitration, as the plain text of the Agreement refers to arbitration *all* Stream-related disputes between IAs (like Griggs), other IAs (like the IA defendants), and/or Stream—including Griggs's deeply flawed claim that Stream's multi-billion dollar energy business is an illegal scheme.

I. This Court has no jurisdiction over Griggs's appeal. A voluntary dismissal without prejudice is neither an appealable interlocutory order nor a final

decision for purposes of 28 U.S.C. § 1292 and § 1291. Griggs attempts to use his own voluntary dismissal of his claims as an end-run around the finality requirement, but established precedent forecloses his flagrant attempt to expand this Court's jurisdiction. Because the district court's decision is not final, and thus not appealable, this Court should dismiss Griggs's appeal.

II. On the merits, Griggs expressly agreed to arbitrate "any claim, dispute or other difference . . . between two or more IAs or between any IA(s) and Ignite or its affiliates, or any other claim or dispute of any kind arising under or in any way related to" the Agreement. ROA 153–154. He also agreed that "the arbitrator will have the sole power to decide any question about the arbitrability of any claim, dispute or other difference between the parties." *Id*. Thus, the plain text of the parties' arbitration agreement supports the district court's decision to compel arbitration.

Griggs seeks to avoid that plain text by asserting that the Agreement is part of Stream's alleged RICO scheme and, according to him, RICO claims are not arbitrable. But the mere assertion of RICO claims does not unlock a secret passageway to avoiding arbitration. Griggs never made this argument below, and for good reason. Even if RICO claims were exempt from arbitration, Griggs cannot state a claim under RICO because his pyramid-scheme allegations are barred by the PSLRA. And even if he could plead RICO claims, the Supreme Court and this Court

have repeatedly stated that such claims are arbitrable. Griggs's (waived) arguments aimed at shielding his legally defective RICO claims from arbitration are complete nonstarters.

III. Griggs separately argues that arbitration is inappropriate because Stream's alleged RICO scheme fraudulently induced him to sign the Agreement. According to Griggs, the Agreement and its (severable) arbitration provision are therefore unenforceable. But Griggs's challenge is to the Agreement as a whole, not the arbitration provision specifically. As the district court correctly held, the arbitrator (not the court) must resolve this issue.

IV. Finally, Griggs asserts that the IA Defendants cannot compel arbitration because they are not signatories to the Agreement that Griggs accepted. This argument, too, falls short. Griggs's claims against the IA Defendants are subject to arbitration under the plain terms of the Agreement. And the IA Defendants may enforce, and are bound by, the Agreement's arbitration provision, both explicitly and under common law principles of estoppel, third-party beneficiary status, and agency.

ARGUMENT

Griggs's convoluted critiques of the Agreement cannot distract from the district court's straightforward—and correct—decision to compel arbitration in this case. Nor can they breathe life into this Court's lack of jurisdiction. This appeal

should be dismissed. If it isn't, the district court's order compelling arbitration should be affirmed.

RICO claims are not exempt from arbitration—and Griggs's claims fail as a matter of law because the PSLRA forecloses Griggs's use of RICO to prosecute his pyramid-scheme allegations. Griggs's challenge to the Agreement as a whole must be resolved by the arbitrator. And well-established contract principles make clear that the IA Defendants may enforce, and are bound by, the Agreement's arbitration provision.

I. The Court Does Not Have Jurisdiction To Hear This Appeal

This appeal should be dismissed for lack of jurisdiction. Sections 1291 and 1292 give this Court jurisdiction over appeals from final decisions of the district court, 28 U.S.C. § 1291, and certain interlocutory decisions, *id.* § 1292. Neither statutory provision applies here. The district court initially granted Stream's motion to compel arbitration and stayed the proceedings pending arbitration. That was a non-appealable interlocutory decision. Dkt. 17 at 15. At Griggs's request, however, the court later dismissed Griggs's claims without prejudice. Dkt. 27, 28. In this circuit, Griggs's voluntary dismissal (without prejudice) is not a final decision and does not create appellate jurisdiction.

Although this Court may "review orders denying the compulsion of arbitration," it "do[es] not have jurisdiction to review interlocutory orders

compelling arbitration." *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 303 (5th Cir. 2016) (emphasis added) (citing 9 U.S.C. §§ 16(b)(1), 16(b)(3)). The difference between how this Court treats orders *compelling* arbitration and orders *denying* arbitration parallels the FAA's purpose to "move the parties to an arbitrable dispute out of court and into the arbitration as quickly and easily as possible." *Al Rushaid*, 814 F.3d at 303 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). In particular, the prohibition against appeals of orders compelling arbitration reflects Congress's decision "to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Id.* (internal quotation marks omitted). As a result, as even Griggs recognized, the district court's stay pending arbitration (Dkt. 20) was not appealable. *See* Dkt. 27 (Griggs's Response to the Court's Show Cause Order); *see also* 28 U.S.C. § 1292.

Nor did the district court's decision *become* appealable simply because the court granted Griggs's request, under Federal Rule of Civil Procedure 41(a), for a voluntary dismissal without prejudice. Dkt. 27, 28. The "settled rule in the Fifth Circuit" is that "a Rule 41(a) dismissal without prejudice is not deemed to be a 'final decision' for the purposes of § 1291." *Marshall*, 378 F.3d at 499 (quoting *Swope v. Columbian Chems. Co.*, 281 F.3d 185, 192 (5th Cir. 2002)). When a court "grants a party's request for voluntary dismissal, he 'gets what he seeks, i.e., a dismissal

without an adjudication on the merits.'" *Id.* (quoting *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302 (5th Cir. 1978)).

The voluntary-dismissal rule prevents exactly what Griggs seeks to do here: "use voluntary dismissal *without* prejudice as an end-run around the final judgment rule to convert an otherwise non-final—and thus non-appealable—ruling into a final decision appealable under § 1291." *Id.*; *see also Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712–13, 582 U.S. __ (2017) (explaining that an appeal of a voluntarily dismissal "subverts the final-judgment rule and the process Congress has established for refining that rule and for determining when nonfinal orders may be immediately appealed"). Griggs cannot delay arbitration even longer by using voluntary dismissal as a loophole to the FAA.

The district court's order staying this case pending arbitration could not be appealed. Nor can its dismissal of Griggs's RICO claims without prejudice. As a result, this Court does not have jurisdiction under section 1291 (because there is no final judgment) or under section 1292 (because the district court's interlocutory order was not immediately appealable). This appeal should be dismissed.

II. Griggs's Claims Are Not Cognizable Under RICO But, Even If They Were, RICO Claims Are Arbitrable

Griggs's appeal should be dismissed for lack of appellate jurisdiction. If this Court reaches the merits, however, it should affirm the district court's decision compelling arbitration. That decision, which this Court reviews *de novo*, *Afram*

Carriers, Inc. v. Moeykens, 145 F.3d 298, 301 (5th Cir. 1998), reflects a straightforward—and correct—application of federal law.

The issues here are simple: Did the parties agree to arbitrate Griggs's claims, and is arbitration of these claims legally permitted? The answer to both questions undoubtedly is yes. The Agreement provides a clear and unequivocal promise to arbitrate "any claim, dispute, or other difference between two or more IAs or between any IA(s) and Ignite" that is "in any way related to" the Agreement. That provision is valid and enforceable, encompasses Griggs's allegations about Stream's multilevel marketing program, and applies to all parties named in this suit.

Griggs largely ignores the substantial body of law that establishes the strong "federal policy favoring arbitration" and the entrenched principle that "any doubts concerning the scope of arbitration issues . . . be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24–25; *Volt. Info. Sci. Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475–76 (1989). But those principles compel arbitration here.

A. Griggs's RICO Claims Are Subject to Arbitration

This Court determines the arbitrability of a dispute based on a two-step inquiry. First, to determine whether the parties agreed to arbitrate, 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 agreement.[1] *Graves v. BP America, Inc.*, 568 F.3d 221, 222 (5th Cir. 2009). Second, the court asks whether "any legal constraints foreclose arbitration of [the] claims." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Griggs accepted the Agreement in March 2012. The Agreement's arbitration provision provides that Griggs, Stream, and the IA Defendants must arbitrate "any claim, dispute or other difference between two or more IAs or between any IA(s) and Ignite, or its affiliates, or any other claim or dispute of any kind arising under or in any way related to" Stream's multilevel marketing program. ROA 153–154.

This Court need not decide whether Griggs's allegations are "related to" the Agreement, because the arbitration clause makes clear that "the arbitrator will have the sole power to decide any question about the arbitrability of any claim, dispute or other difference between the parties." *Id*. "On its face, the Agreement provides that the parties have agreed to arbitrate arbitrability," even going so far as to incorporate rules from the American Arbitration Association as an "unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator." Dkt. 17 at 7 (quoting *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)). Thus, Griggs unequivocally agreed to submit to the arbitrator

[1] The Court reviews the district court's interpretation of a contract *de novo*. *EOG Res., Inc. v. Chesapeake Energy Corp.*, 605 F.3d 260, 264 (5th Cir. 2010).

any question about whether his claims are arbitrable. Whether the arbitration clause covers Griggs's specific claims is *itself* a question to be arbitrated.

Moreover, if the Court did reach the question, there is no doubt that Griggs's claims fall within the ambit of the arbitration provision. Griggs's core allegation is that the Defendants-Appellees' use of IAs to sell energy, and the compensation plan that IAs sign up for, constitutes an illegal pyramid scheme under RICO. Compl. ¶ 11. His claim involves a "dispute or other difference" between "two or more IAs" and "Ignite or its affiliate[]," Stream. It is also "related to" the Agreement because it attacks the legality of the compensation structure that the Agreement implements. Under the plain text of the Agreement, Griggs's claims are subject to arbitration.

B. Griggs's RICO Claims Are Foreclosed by the PSLRA

The centerpiece of Griggs's appeal is his contention that RICO claims cannot be arbitrated. This argument is dead on arrival. To begin with, Griggs waived this point because he never presented it to the district court. But the argument would have offered him no relief, in any event. Under this Court's clear precedent, Griggs has no RICO claims because his pyramid-scheme allegations are "actionable" as securities fraud and, as a result, are precluded by the PSLRA from being pursued under RICO. Moreover, even if the PSLRA did not bar Griggs's putative RICO claims, the Supreme Court and this Court have clearly held that RICO claims *are* subject to arbitration.

1. Griggs insists that civil RICO claims are not arbitrable because arbitration cannot adequately vindicate the claims of the victims of the alleged racket. Br. 16–17. This argument is waived, because "[t]he general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal." *Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010). Griggs never raised this argument below—and for good reason.

2. The argument has a fatal flaw: Griggs cannot legally state a RICO claim. Under the PSLRA, "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation" of RICO. 18 U.S.C. § 1964(c). This Court has clearly established that allegations that a company operates an illegal pyramid scheme are actionable as securities fraud. *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 475–85 (5th Cir. 1974) (finding a "pyramid promotion enterprise" "within the ambit of the term security, as employed by the Securities Act of 1933 and the Securities Exchange Act of 1943"); *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980) (same).

Not surprisingly, courts routinely dismiss RICO claims that are founded on conduct that is actionable as securities fraud, regardless of whether the plaintiff actually pleads securities fraud. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 279 (2d Cir. 2011); *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999). And RICO claims premised on pyramid-scheme

allegations, in particular, have been held to be barred by the PSLRA. *See Martinez v. MXI Corp*., 2016 WL 951430, at *8 (D. Nev. Mar. 9, 2016) ("[I]nvestments in pyramid schemes are securities as a result of the nature of pyramid schemes, rather than the specifics of any agreements. As a consequence, the PSLRA is the correct vehicle for a challenge based on the operation of a pyramid scheme rather than RICO."). Griggs's RICO claims would not have survived even a cursory review at the pleading stage.

3. But even if the PSLRA did not apply, and Griggs could state a claim under RICO, his argument that RICO claims are categorically exempt from arbitration runs directly counter to the Supreme Court's and this Court's precedent.

Indeed, the Supreme Court has instructed that there is "no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 243 (1987). This Court has essentially said the same thing. *Grynberg v. BP P.L.C.*, 855 F. Supp. 2d 625, 650 (S.D. Tex. 2012), *aff'd*, 527 F. App'x 278 (5th Cir. 2013). Griggs cannot avoid arbitration by merely asserting (legally defective) RICO claims. Yet that is exactly what he is trying to do. His argument flouts the considered judgment of the Supreme Court, this Court, and Congress.

III. Griggs's Fraudulent Inducement Claims Concern the Entire Contract and Must Be Resolved by the Arbitrator

Griggs raises two challenges to the Agreement itself, neither of which are specifically aimed at the arbitration provision. He argues that he can avoid arbitration because (1) the entire contract was allegedly procured by fraud; and (2) the entire contract is allegedly unenforceable for want of consideration.

But questions about the validity of the contract as a whole are for the arbitrator, not the court, to decide. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *see also Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("[W]hen parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court."); *Overstreet v. Contigroup Cos.*, 462 F.3d 409, 411 n.1 (5th Cir. 2006) ("Validity of a contract as a whole is to be determined by the arbitrators, and federal courts are limited to reviewing the arbitration clause itself."); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647–48 (Tex. 2009) ("a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator").

Prima Paint allows courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself," but not "fraud in the inducement of the contract generally." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) ("[I]n passing upon a § 3 application for a stay while the parties arbitrate, a

federal court may consider only issues relating to the making and performance of the agreement to arbitrate."). Both the Supreme Court and this Court have made clear that "an argument that fraud induced a contract is not equivalent to an argument that there was 'fraud in the inducement of the arbitration clause itself.'" *Lefoldt for Natchez Reg'l Med. Center Liquidation Trust v. Horne, L.L.P.*, 853 F.3d 804, 817 (5th Cir. 2017) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010)).

This Court has rightfully interpreted *Prima Paint* to require specific arguments directed at the arbitration agreement before a court can determine the validity of the agreement. *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987) ("If he is contending that Johnston's alleged misrepresentations fraudulently induced him to enter into the contracts with Dean Witter, that issue is arbitrable. If he is claiming, on the other hand, that the fraudulent inducement focused specifically on the arbitration provision, the court may first address the issue.").

Griggs makes no attempt to separate the arbitration provision from the rest of the Agreement. Indeed, his brief takes the exact opposite position: "Griggs alleges that the Ignite contract, including the revised arbitration provisions, is no more than a sham designed to perpetuate a fraud through an illegal pyramid scheme." Br. 11; *id.* at 15, n. 36 ("Once the agreement is dead because it was birthed from fraud, its arbitration provision is dead as well."). Similarly, in his opposition to Defendants-Appellees' motion to compel arbitration, Griggs stated that "[n]ow is the time to

challenge the entire agreement." ROA 281; Br. 17. The district court properly held that, "[b]ecause Griggs's challenge is to his entire contract with Ignite, it must be resolved by the arbitrator." ROA 306.

Lawrence v. Comprehensive Business Services is directly on point. 833 F.2d 1159 (5th Cir. 1987). The plaintiffs in that case argued that they were not bound by an arbitration clause in an illegal contract. *Id.* at 1162. They claimed that the entire agreement must rise or fall together because the alleged illegality "pervades the entire contract" and because the illegal provision "is so basic and so interwoven with the other contract terms." *Id.* This Court disagreed, noting that "the fraud in the inducement alleged in *Prima Paint* was just as pervasive as the illegality asserted in this case." *Id.* As in this case, the plaintiffs' argument in *Lawrence* "presume[d] that the contract [was] illegal . . . . The flaw in the argument is that the legality of the contract has not yet been decided." *Id.* That merits question, this Court held, is for the arbitrator alone. *Id.*

Ignoring this Court's precedent, Griggs cites *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563 (6th Cir. 1990)—an old, and obviously stale, case decided by the Sixth Circuit—which held that a court should not order arbitration if a plaintiff affirmatively pleads that an entire contract, including its arbitration provision, was procured by a fraudulent scheme. Br. 19–20. *C.B.S. Employees* did not even survive subsequent Sixth Circuit scrutiny.

Arnold v. Arnold Corp.-Printed Communications for Business, 920 F.2d 1269, 1278 (6th Cir. 1990) (holding that the only relevant question is whether plaintiff alleged "a well-founded claim of fraud in the inducement of the arbitration clause itself, standing apart from the whole agreement, that would provide grounds for the revocation of the agreement to arbitrate").[2]

More importantly, Griggs's reading of *C.B.S. Employees* cannot be squared with the Supreme Court's clear commands in *Prima Paint*, 388 U.S. at 403–04, and *Buckeye Check Cashing*, 546 U.S. at 449—both of which were decided later in time. In *Buckeye*, for example, the Supreme Court held that as a matter of "substantive federal arbitration law" established by the FAA, arbitration clauses are severable from contracts, and therefore survive even if the contract itself is later found to be void or voidable. *Buckeye Check Cashing*, 546 U.S. 440 at 444–45. The severability of arbitration provisions bars courts from adjudicating a claim that "the contract as a whole (*including its arbitration provision*) is rendered invalid" by fraud. *Id.* (emphasis added). This was true, the Court added, even if a party challenged the contract based on "fraud, misrepresentation, breach of contract, breach of fiduciary

[2] This Circuit cited *C.B.S. Employees* in a later case, but impliedly rejected its conclusion—anticipating *Buckeye*—by holding that when a fraud allegation "relates to the entire agreement, then the Federal Arbitration Act requires that the fraud claim should be decided by the arbitrator." *R.M. Perez & Assocs., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) (citing *C.B.S.*), *overruled on other grounds by Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752, 759 (5th Cir. 1999).

duty," or some other theory that "would render the contract void or voidable." *Id.* at 446.

Griggs also argues that "the agreement itself offered him no consideration, a thought consistent with the notion that the arbitration agreement was part and parcel of defendants' deceit, fraud and trickery to operate a pyramid scheme." Br. 18. This argument is meritless. "[B]ilateral promises to arbitrate" constitute adequate consideration for an arbitration agreement. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005). Moreover, the right to sell Stream energy also provides consideration, affording Griggs a legal right that he otherwise would not have. *See id.* ("Further, when an arbitration clause is part of a larger, underlying contract, the remainder of the contract may suffice as consideration for the arbitration clause."); *Bryant v. Cady*, 445 S.W.3d 815, 820 (Tex. App.—Texarkana 2014, no pet.). The district court correctly found adequate consideration for the parties' agreement to arbitrate.

IV. The IA Defendants Can Enforce the Arbitration Agreement

Finally, Griggs argues that the IA Defendants, as non-signatories to Griggs's contract, are "immune to arbitration." Br. 14. The district court disagreed, correctly concluding that (1) the non-signatory IA Defendants could compel arbitration based on the arbitration provision in Griggs's contract, and (2) even if they could not, equitable estoppel requires arbitration because Griggs alleges substantially

interdependent and concerted misconduct by the signatory and non-signatory defendants. This Court reviews the Agreement *de novo*, but it reviews the district court's application of equitable estoppel for an abuse of discretion. *Auto Parts Mfg. Miss., Inc. v. King Constr. of Hou., LLC*, 782 F.3d 186, 196 (5th Cir. 2015).

A. Griggs Is Bound by the Agreement to Arbitrate Disputes With the IA Defendants

Griggs argues that the IA Defendants are non-signatories to his Agreement and at least two IA Defendants are instead bound by a version of the arbitration agreement that this Court found unenforceable in a separate case in 2010. Br. 24 (citing *Torres v. S.G.E. Mgmt., L.L.C.*, 397 F. App'x at 63, 64 (5th Cir. 2010)). Griggs's arguments are misplaced for two reasons.

First, the IA Defendants, as Griggs admits, "are just IAs with a special title, required to sign the same agreements as IAs." Br. 27. And the arbitration agreement expressly applies to claims or disputes "between two or more IAs." ROA at 153–54. Under Texas law, the IA Defendants are considered parties to Griggs's Agreement and may rely on that Agreement to compel arbitration. *See In re Rubiola*, 334 S.W.3d 220, 225 (Tex. 2011) ("Because the arbitration agreement expressly provides that certain non-signatories are considered parties, we conclude that such parties may compel arbitration under the agreement.").

Second, even though the IA Defendants' original contracts with Stream differed slightly from the Agreement that Griggs later signed, Stream officially

amended all of its preexisting IA contracts—including those of the IA Defendants—well before Griggs enrolled in the Program. As a result, Griggs and the IA Defendants are subject to the exact same Agreement—and the same arbitration clause.

B. Under Texas State Law, the IA Defendants May Compel Arbitration

Even if the IA Defendants were not direct parties to the Agreement that Griggs executed, Griggs's claims against them would be arbitrable under "traditional principles" of Texas contract law. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009); *Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014). The Texas Supreme Court has explained that non-signatories may enforce and be bound by arbitration agreements under contract principles like estoppel, third-party beneficiary status, and agency. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005).

The district court's conclusion that Griggs and the IA Defendants are estopped from trying to avoid arbitration is well supported by the record. Other contract principles—like third-party beneficiary status and agency—also apply to bind Griggs and the IA Defendants to the agreement to arbitrate. This Court can easily affirm the district court's decision to apply equitable estoppel because it was not an abuse of discretion. But the Court may also consider other contract principles and

"affirm the district court's judgment on any basis supported by the record." *In re Complaint of Settoon Towing, LLC*, 720 F.3d 268, 280 (5th Cir. 2013).

1. Griggs and the IA Defendants Are Equitably Estopped from Attempting to Avoid Arbitration

Griggs claims that his claims against the IA Defendants are not arbitrable because the IA Defendants' arbitration agreements were determined to be illusory in *Torres*. Br. 27 (citing *Torres*, 397 F. App'x at 64). That is not the case. Both Griggs and the IA Defendants must arbitrate any and all claims related to Stream's multilevel marketing program; they are precluded from arguing otherwise under the doctrine of equitable estoppel.[3]

Under Texas law, equitable estoppel may be invoked to "compel arbitration when a non-signatory defendant has a 'close relationship' with one of the signatories and the claims are 'intimately founded in and intertwined with the underlying contract obligations.'" *Hays v. HCA Holdings, Inc.*, 838 F.3d 605, 610 (5th Cir. 2016) (citing *In re Merrill Lynch Trust Co.,* 235 S.W.3d 185, 193-94 (Tex. 2007)). "When each of a signatory's claims against a nonsignatory makes reference to or

[3] The doctrine of "direct benefits" estoppel also applies. *USHealth Group, Inc. v. South*, 636 Fed. App'x. 194 (5th Cir. 2015) ("Direct benefits estoppel is meant to prevent a non-signatory plaintiff who is seeking or has reaped the benefits of a contract 'from simultaneously attempting to avoid the contract's burdens, such as the obligation to arbitrate disputes.'" (citing *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d at 741)). The "fact" that the IA Defendants have benefitted from Griggs's contract is a key component of his complaint. Compl. ¶ 7 ("The appointed Presidential Directors made millions upon the backs of those whom they promised much[.]"). Should the IA Defendants ever sue Griggs for any dispute related to Stream and seek to avoid arbitration, Griggs could argue that they are estopped from doing so.

presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement." *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (claim arose from contract where plaintiff's "damages, [and] lost profits, were only for the economic loss caused by Bell's failure to perform").

In his complaint, Griggs alleges that the IA Defendants have a "close relationship" with Stream and Ignite, signatories to the contract. Compl. ¶ 5 ("The Presidential Directors were the top salespersons for both Stream and Ignite, those at the very top of the Pyramid."). Griggs also accuses the IA Defendants of making false representations to promote Stream. *Id*. ¶ 9 ("The Presidential Directors have and are leading sheep to slaughter through their false promises of an opportunity to make money when each one of their representations is false.").

Courts employ intertwined-claims estoppel to prevent "strategic pleading that seeks to avoid arbitration." *Hays*, 838 F.3d at 610; *Cotton Commercial USA, Inc. v. Clear Creek Ind. Sch. Dist*., 387 S.W.3d 99, 105 (Tex. Ct. App. 2012). By suing the IA Defendants, Griggs is engaging in the strategic pleading that the intertwined-claims theory was designed to prohibit. *Hays*, 838 F.3d at 613. The district court did not abuse its discretion by finding that Griggs and the IA Defendants are estopped from avoiding arbitration.

2. The IA Defendants May Compel Arbitration as Third-Party Beneficiaries of the Agreement

The IA Defendants may also enforce the arbitration provision as third-party beneficiaries of Griggs's Agreement. "To be a third-party beneficiary, the contracting parties to the contract must have specifically 'intended to secure some benefit' for that third party." *Hale-Mills Constr. Ltd. v. Willacy Cty.*, 2016 WL 192133, at *4 (Tex. App. Jan. 14, 2016) (citing *MCI Telecomm. Corp. v. Tex. Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999)).

Griggs alleges that the IA Defendants are the intended beneficiaries of Stream's alleged pyramid scheme. *See* Compl. ¶ 6. ("[T]hose at the very top are intended to and will make the vast proportion of the money revenue generated by the pyramid."); *id.* ¶ 9 ("All the while, Ignite made significant revenues, much of which it paid to its Presidential Directors for recruiting Stream customers[.]"). As the intended beneficiaries of the Agreement (who are also expressly referenced in the Agreement as other "IAs"), the IA Defendants may enforce Griggs's agreement to arbitrate the Stream-related claims he asserts against them.

3. The IA Defendants Are Bound to Arbitrate Under Traditional Agency Principles

Finally, Griggs and the IA Defendants are bound by the terms of the arbitration agreement under traditional principles of agency law. "When an agreement between two parties clearly provides for the substance of a dispute to be

arbitrated, one cannot avoid it by simply pleading that a nonsignatory agent or affiliate was pulling the strings." *In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 210 (Tex. 2007)*; see also In re Merrill Lynch Trust Co.,* 235 S.W.3d at 190 (because plaintiff's claims against employee were "in substance" claims against the employer, plaintiff must arbitrate pursuant to agreement with employer).

Griggs alleges that the IA Defendants "were the top salespersons for both Stream and Ignite, those at the very top of the Pyramid." Compl. ¶ 5; *see also id.* ¶¶ 36, 40, 42, 44 (alleging that each IA Defendant was "at the top of the Pyramid and, by definition, he was one of the first individuals to sell the Services Program"). He also accuses the IA Defendants of acting to promote the alleged pyramid scheme. *See* Compl. ¶¶ 67 (IA Defendants "give well-scripted presentations . . . that encourage others to invest in the [Ignite] Services Program"); *id.* ¶ 304 (Presidential Directors "use their income to attend Ignite Events, to conduct conference calls and maintain websites, all to attract new investors to purchase the Services Program and to join the Ignite Pyramid"). Griggs's theory implicates agency. As alleged agents of Stream, the IA Defendants can force Griggs to arbitrate his claims under the Agreement that he executed with Stream.

CONCLUSION

This Court should dismiss Griggs's appeal for lack of appellate jurisdiction. If the Court reaches the merits, it should affirm the district court's order granting Defendants-Appellees' motion to compel arbitration.

Dated: February 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on February 14, 2018, and has been served on all counsel who have consented to electronic service.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,486 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts exempted from under Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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No. 17-50655 Jernard Griggs v. S.G.E. Management, L.L.C., et al
USDC No. 1:15-CV-422

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