No. 11-16933

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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ADKNOWLEDGE, INC., d/b/a Super Rewards and KITN MEDIA USA, INC., d/b/a Super Rewards,
Appellants - Defendants,

v.

REBECCA SWIFT, on behalf of herself & all others similarly situated,

Respondent - Plaintiff.

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APPEAL FROM THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Hon. Elizabeth D. Laporte, United States Magistrate Judge)
No. 4:09-CV-05443 EDL

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# REPLY BRIEF OF APPELLANTS ADKNOWLEDGE, INC. AND KITN MEDIA USA, INC.

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## I. INTRODUCTION

Citing lower-court opinions, Rebecca Swift's brief ("Opposition") focuses on whether her dispute with Adknowledge is "intertwined" with the YoVille Agreement containing the mandatory arbitration clause. But even when there is no intertwinement under Swift's definition, courts consistently enforce an arbitration clause on a nonsignatory's behalf when the plaintiff alleges substantially interdependent and concerted misconduct. Swift's case is built entirely on her claim that Adknowledge acted in concert with Zynga, and so this Court should likewise enforce the arbitration clause.

Under either Delaware or California law, Swift's allegations are intertwined with the Agreement. Swift bases her claims entirely on her transactions for virtual currency—transactions that the YoVille Agreement governs. Swift alleges that Zynga and Adknowledge together misled her in connection with these transactions. So without the Agreement, there would be no virtual currency transactions. And without the transactions there would be no claim.

The Court should also reverse because Adknowledge is a third-party beneficiary. Swift's Opposition does not respond to Adknowledge's argument that the YoVille Agreement indicates a clear intent to benefit Adknowledge.

On waiver, Swift claims that Adknowledge knew a long time ago that it had a right to compel arbitration and waived by litigating this case. Adknowledge could not have insisted upon arbitration until after the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, , 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), and then Adknowledge immediately joined in a motion to compel arbitration.

Adknowledge respectfully requests that this Court reverse the district court's Order and compel arbitration of Swift's claims against it.

## II. ARGUMENT

### A. The weight of authority favors adoption of the "substantially interdependent and concerted misconduct" standard.

#### 1. Courts adopting the "intertwined claims" test still compel arbitration when there is "substantially interdependent and concerted misconduct".

Swift admits that she "was required to accept the terms of the Arbitration Agreement when signing up to play Zynga games." Opposition at 13. Swift claims that in order to enforce the arbitration clause in the Agreement, Adknowledge must show both (a) that "the issues [Adknowledge] is seeking to resolve in arbitration are intertwined with the agreement", and (b) a "close relationship between the entities involved." Opposition at 12 (citing *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices and Products Liab. Litig.*, 2011 U.S. Dist. LEXIS 143490 at *27-28

(C.D. Cal. Dec. 13, 2011). But courts find "intertwinement" when the plaintiff alleges "substantially interdependent and concerted misconduct" as Swift does in her complaint.

Arguing that this Court should not expressly adopt the "substantially interdependent and concerted misconduct" standard, Swift cites just one Ninth Circuit authority: *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1047 (9th Cir. 2009). *Mundi* followed and cited favorably the Fourth Circuit case, *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392 (4th Cir. 2005). But in *Brantley*, the court explained that with "the intertwined claims test" a signatory is estopped from avoiding arbitration in two alternative circumstances. *Brantley*, 424 F.3d at 395-96. The first is when the signatory must "rely on the terms of the written agreement" to assert its claims against the nonsignatory. *Id*. The second is when the signatory "raises allegations of … substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Id*. at 396. That second scenario applies here.

*Brantley* presents an either–or test: estoppel applies when the nonsignatory shows either of "two different circumstances." *Brantley*, 424 F.3d at 396, citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th

Cir. 1999). *Brantley* analyzed both circumstances and found against estoppel for a reason that does not apply here. In *Brantley*, the plaintiff's claim did "not raise allegations of collusion or misconduct … necessary to satisfy the second means of obtaining equitable estoppel." *Id*. at 396. This case is distinguished. Swift's complaint is loaded with allegations of collusion and misconduct. *See, e.g.,* ER 128 (Dkt. No. 13 at ¶ 14) ("Defendants have acted in concert . . . to deceive [consumers]"), ER 131 (Dkt. No. 13 at ¶ 30) ("Defendants . . . conspired . . . to commit the acts complained of herein").

The finding in this Court's *Mundi* decision is similar. The *Mundi* court observed that "[a]s in *Brantley*, Mundi's claim is based solely on [the nonsignatory]'s actions, and there are no allegations of collusion or of misconduct by Wells Fargo, the signatory to the arbitration agreement." *Mundi*, 555 F.3d at 1047. In contrast, Swift's complaint repeatedly alleges that Adknowledge acted in collusion with Zynga to create deceptive advertising campaigns that defrauded Swift and others. *See, e.g.,* ER 140 (Dkt. No. 13 at ¶ 66) ("Defendants engaged in these unfair and/or deceptive acts and practices with the intent that they result, and which did result, in completed, false, and misleading integrated special offer transactions alleged herein.")

And the district court cases in this circuit following *Mundi* suggest that, as in *Brantley*, the test presents an either–or question. The nonsignatory is entitled to arbitration when the plaintiff alleges substantial and concerted misconduct between a signatory and the nonsignatory. For example, Swift relies on *Toyota*, a district court case that cites *Mundi*. *Toyota*, 2011 U.S. Dist. LEXIS 143490 at *23. Swift argues that *Toyota* "cit[es] and explain[s] *Mundi*". Opposition at 12. But *Toyota* applies the "either–or" analysis just like the *Brantley* court did.

While explaining *Mundi*, the *Toyota* court noted that there are "two types of contexts" in which a nonsignatory could "compel arbitration of claims asserted by a party to an arbitration agreement." *Toyota*, 2011 U.S. Dist. LEXIS at *23. The second context occurs when "the signatory of an arbitration agreement raises allegations of 'substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" *Id.* (citing *Mundi* and *Hawkins v. KPMG LLP*, 423 F.Supp.2d 1038, 1050 (N.D. Cal. 2006).

The *Toyota* court applied two tests separately and without overlap. *Toyota*, 2011 U.S. Dist. LEXIS at *27-35. Indeed, the court focused on the plaintiff's allegations in the complaint, noting that "[n]one of the cited

portions … concern substantially interdependent and concerted misconduct or collusion between Toyota and its dealerships." *Id*. at *34. The *Toyota* court's analysis—which Swift concedes is an explanation of this Court's holding in *Mundi*—supports arbitration when a signatory plaintiff alleges "substantially interdependent and concerted misconduct" on the part of the nonsignatory defendant and another signatory.

Swift also cites *Chastain v. Union Sec. Life Ins. Co.*, 502 F.Supp. 2d 1072, (C.D. Cal. 2007), which likewise applied the either–or test and followed *Brantley*. *Id*. at 1080. *Chastain* distinguished between "the intertwined-claims theory" and "Brantley's second circumstance, that Plaintiff has alleged 'substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" *Id*. at 1080-81. *Chastain* did not find substantially interdependent misconduct because the plaintiff made only one allegation regarding joint conduct, and did "not assert that the joint marketing was fraudulent." *Id*. at 1081.

But Swift's complaint is chock full of allegations that Zynga and Adknowledge worked together in a conspiracy to defraud Swift and others:

- "Defendants have acted in concert to create and develop ISOTs reasonably calculated to deceive persons of ordinary prudence and

comprehension, and have used the mails and interstate communication wires in furtherance of their scheme." ER 128 (Dkt. No. 13 at ¶ 14) .

- "… this somewhat complicated structure was specifically created in an attempt to shield Defendants from liability as a result of the deceptive and misleading ISOTs that they developed and created …" ER 127 (Dkt. No. 13 at ¶ 10).

- "Zynga attempted to induce [Swift] to earn virtual in-game currency by accepting ISOTs with Zynga and its business partners, including [Adknowledge]. The Plaintiff was misled by the ISOTs created, developed, and promulgated by the Defendants …" ER 130 (Dkt. No. 13 at ¶ 25).

- "Defendants [defined as Zynga and Adknowledge] and other unnamed third parties conspired and combined among themselves to commit the acts complained of herein ..." ER 131 (Dkt. No. 13 at ¶ 30).

Swift claims Zynga and Adknowledge jointly presented a "false" and "misleading" offer to her. ER 140 (Dkt. No. 13 at ¶ 66). All of Swift's authority supports enforcement of the mandatory arbitration clause in the Agreement because she alleges collusion among Zynga and Adknowledge.

### 2. Since Swift's case is built on allegations of collusion between Adknowledge and Zynga, she is estopped from asserting otherwise on this appeal.

Swift's case is based entirely on her claim that Zynga and Adknowledge worked together. Without using Zynga's YoVille game—in which she accepted the arbitration provision in the YoVille Agreement—

Swift could not have made any allegations against Adknowledge. ER 132-134. Her claims are all based on offers that Adknowledge allegedly created together with Zynga, and Swift accessed through YoVille under the Agreement at issue. *Id*. Swift alleges that Zynga and Adknowledge acted in concert (ER 128 (Dkt. No. 13 at ¶ 14)), worked together to create misleading offers (ER 127 (Dkt. No. 13 at ¶ 10)), and engaged in a conspiracy (ER 131 (Dkt. No. 13 at ¶ 30)).

Swift cannot escape her own pleading—and her complaint rests entirely on her allegations that Adknowledge and Zynga engaged in joint activities that harmed her. So she relies on the district court's conclusion that in discovery Adknowledge revealed that it is Zynga's "independent contractor" and not "Zynga's agent." Opposition at 11. Relying on this fact, Swift cites *HCC Life Ins. Co. v. Managed Benefit Adm'rs LLC*, 2008 U.S. Dist. LEXIS 46443 (E.D. Cal. June 11, 2008) to argue that arbitration is not appropriate here. But HCC dealt with a narrow issue—whether a nonsignatory had a "preexisting agency relationship" with a signatory that permitted it to compel arbitration. *Id*. at *7. *HCC* did not address a fact pattern involving allegations of substantially interdependent and concerted misconduct, and thus does not apply.

Nor is the issue, as Swift argues, whether Adknowledge can prove that it had a close relationship with Zynga. Opposition at 16-17. The issue is whether Swift *alleges* substantially interdependent and concerted misconduct. Since she made the allegation, never amended it, and the district court relied on it in denying Adknowledge's motion to dismiss, Swift must live with her allegation and proceed to arbitration.

Swift also cites *Just Film, Inc. v. Merch. Servs.*, 2011 U.S. Dist. LEXIS 96613 (N.D. Cal. Aug. 29, 2011). In that case, several nonsignatories sought to compel arbitration based on equitable estoppel. *Just Film*, 2011 U.S. Dist. LEXIS 96613 at *19-20. The court relied on amended allegations in the most recent version of the complaint to deny the nonsignatories' request. *Id*. at *23-24. But *Just Film* is distinguished from this case for two reasons. First, unlike *Just Film*, the lower court in this case relied on Swift's conspiracy allegations when it denied Adknowledge's motion to dismiss for failure to state a claim. Having posited those facts and convinced the court to rely on them, Swift is now estopped from reversing course. Second, unlike the plaintiff in *Just Film*, Swift has not amended her complaint to strike the conspiracy allegations. So this Court should rely on her most recent

complaint—like the court did in *Just Film*—and hold Swift to her claims of substantially interdependent and concerted misconduct.

**B. Delaware law applies in this case and mandates arbitration.**

Swift acknowledges that "the [YoVille Agreement] contains a Delaware choice-of-law provision, and a court must typically abide by the law of the forum chosen." Opposition at 20 (citing *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) (citing *Ticknor v. Choice Hotels, Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001)). But Swift argues that "assuming that Delaware law applies in the present case is putting the cart before the horse." Swift also suggests that California law should apply because Zynga amended the Agreement—albeit after Swift accepted it—to provide for California law.

But this Court's recent decision in *Allianz Global Risk U.S. Ins. Co. v. GE*, 2012 U.S. App. LEXIS 4496, (9th Cir. Mar. 5, 2012) suggests that the contract's governing-law provision applies. In *Allianz*, this Court reviewed a district court's order granting Allianz's motion to compel arbitration. Allianz sued to recover the amount it paid for repairs of a turbine that General Electric Co. sold to Allianz's insured. *Id.* at *1-2. GE appealed, arguing that Allianz, as a nonsignatory, could not enforce the contract between GE and

the insured that contained an arbitration clause. *Id.* at *2. The *Allianz* court held that "under the Supreme Court's decision in *Arthur Andersen v. Carlisle,* 556 U.S. 624, 129 S.Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009), the district court should have applied state law, not federal common law". *Id.* at *2. In *Arthur Andersen*, the Supreme Court held that state-law principles allow an arbitration clause to be enforced by nonparties through estoppel and third-party beneficiary theories. *Arthur Andersen*, 129 S. Ct. at 1902 (2009).

In this case, Delaware law applies because Swift's allegations are based on events occurring between April and July 2009. During that period, Swift's use of Zynga games was governed by the first two versions of the YoVille Agreement. ER 38-56, 57-77. Both versions provide for Delaware governing law. ER 54-55, 74. The contract with California governing law was not in force when the alleged events occurred. Accordingly, the California choice-of-law provision in the third YoVille Agreement, which did not come into force until August 2009 (ER 78-85), does not apply to this case.

Delaware law mandates arbitration. In *Wilcox & Fetzer, Ltd. v. Corbett & Wilcox*, 2006 Del. Ch. LEXIS 155 (Del. Ch. Aug. 22, 2006), the Delaware court granted a nonsignatory's motion to compel arbitration because the complaint alleged "concerted wrongdoing" by a signatory and a

nonsignatory. *Id*. at *18. The court held that equitable estoppel applied because the plaintiff's common-law trade name claim was "intertwined with or touche[d] on" an agreement containing an arbitration provision. *Id*. at *19. The court held this was true even though the plaintiff's common law claim was not based on the agreement. *Id*. at *13-14. So while Swift argues that she is not suing Adknowledge for breach of the Agreement, her claims are nonetheless intertwined with or touch on the Agreement. Accordingly, this Court should reach the same result as Delaware's *Wilcox* and reverse.

### C. California law, if applicable, also supports arbitration because Swift's claims against Adknowledge are intertwined with the YoVille Agreement.

Even if this Court were to apply California law, it should reach the same conclusion the *Wilcox* court reached and require that this case proceed to arbitration. Like federal law, California law favors the arbitration of disputes. *Rowe v. Exline*, 153 Cal. App. 4th 1276, 1282 (2007). And California's public policy is to resolve any doubts in favor of deferring to arbitration proceedings. *Id*. (citing *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 97 (2000)). "Furthermore, the notion of estoppel is familiar to California law, and California's concern for equity is just as strong as that of federal law." *Rowe*, 153 Cal. App. 4th at 1288; *see also, e.g., Long*

*Beach v. Mansell*, 3 Cal. 3d 462, 488 (1970) (discussing the "venerable doctrine of equitable estoppel").

In *Rowe*, the plaintiff sued Initiatek, Inc. and two of its shareholders. 153 Cal. App. 4th at 1279. Rowe's claim arose out of an agreement that he signed with Initiatek including an arbitration clause governed by California law. *Id*. at 1280. Rowe brought four causes of action against all three defendants. One claim was for breach of contract asserting that the nonsignatory shareholders were alter egos of Initiatek. *Id*. The others were violations of the California Corporations Code. *Id*. at 1280-81.

All three defendants moved to compel arbitration and to stay the litigation. *Id*. at 1281. Rowe argued that only Initiatek, the signatory, could enforce the agreement. *Id*. The trial court sided with him, finding that "Rowe was obligated under the Agreement to arbitrate his claims against Initiatek, but he never signed a contract requiring him to arbitrate his claims against [the shareholders]." *Id*. at 1281-82.

But the California Court of Appeal reversed, reasoning that "'[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants "for claims that are 'based on the same facts and are inherently inseparable'

from arbitrable claims against signatory defendants.'" *Rowe* at 1287 (citing *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory*, 140 Cal. App. 4th 828, 832-833 (2006)). The Court of Appeals noted that Rowe sued the nonsignatory shareholders "under the alter ego theory, as though they were one and the same with the corporation that signed the Agreement." *Id.*

This case is similar to *Rowe*. Swift sues Adknowledge for claims that are based on the same facts and are inherently inseparable from arbitrable claims against Zynga. The district court confirmed this by compelling arbitration on the same claims against Zynga that Adknowledge seeks to compel here. And like Rowe, Swift sued Zynga and Adknowledge under a joint-liability theory—as though Adknowledge was one and the same with Zynga, the corporation that signed the Agreement. If this Court decides to follow California law, then it should compel arbitration for the same reason that the California court did in *Rowe*.

Similarly, in *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.*, 186 Cal. App. 4th 696, 715 (2010), the court held that equitable estoppel applied when "the claims the plaintiff assert[ed] against the nonsignatory [were] dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the

arbitration clause." *Id*. Swift's allegations regarding her transactions with YoCash, that Adknowledge allegedly participated in, cannot be separated from the YoVille Agreement that governs those transactions. Swift's claims are linked to the YoVille Agreement, and she is equitably estopped from denying arbitration of her claims against Adknowledge.

Swift argues that because she did not allege breach of contract, Adknowledge cannot enforce the arbitration clause. Opposition at 13-15. But Swift's claims against Adknowledge and Zynga are identical—and the trial court found sufficient intertwinement between those claims and the YoVille Agreement to compel arbitration on Zynga's behalf. *See* ER 8, lines 12-22 (finding Swift agreed to the terms of service including the agreement to arbitrate). The trial court implicitly rejected Swift's argument that her claims against Zynga were exempted from the arbitration clause even though she was not suing Zynga under the contract. *Id*. That finding is consistent with California law, and equally applies to Adknowledge. *See Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 418 n. 12 (1985)("claims framed in tort are subject to contractual arbitration provisions when they arise out of the contractual relationship between the parties"); *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th 262 (2005) (granting nonsignatory's motion to

compel arbitration and noting "that the claims are cast in tort rather than contract does not avoid the arbitration clause.")

As the district court held, Swift's claims against Zynga are governed by the arbitration clause in the YoVille Agreement. Her claims against Adknowledge are identical, and inherently inseparable from Swift's arbitrable claims against the signatory defendant, Zynga. Under the law of either Delaware or California, Swift's claims are linked to the YoVille Agreement, and she is equitably estopped from denying arbitration of her claims against Adknowledge.

### D. Adknowledge is a third-party beneficiary because the YoVille Agreement indicates an intent to benefit Adknowledge.

In its opening brief, Adknowledge provided a four-page discussion of *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 Del. Ch. LEXIS 2, *21 (Del. Ch. Jan. 5, 2009). Opening Brief at 27-31. *Carder* applied Delaware law—which governs the YoVille Agreement—and concluded that "[d]emonstrating that a party is a third-party beneficiary requires proof of three elements: (1) an intent between the contracting parties to benefit a third party through the contract; (2) an intent that the benefit serve as a gift or in satisfaction of a preexisting obligation to the third party; and (3) a showing that benefiting the third party was a material aspect to the parties in

entering into the contract." *Id.* Adknowledge provided a detailed analysis of why each of those three elements has been met in this case.

Swift's Opposition ignores *Carder*. Instead, Swift cites the non-Delaware case *Amisil Holdings, Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 837 (N.D. Cal. 2007) as the sole support for her conclusion that Adknowledge is not a third-party beneficiary. Swift notes that *Amisil* held that an arbitration provision must be interpreted to determine whether a claim should be arbitrated. Opposition at 18. Swift argues that the YoVille "Arbitration Agreement is noticeably silent concerning its applicability to third parties and shows no intention to benefit third parties". *Id.* at 19.

But the *Amisil* court compelled arbitration not because the arbitration clause mentioned third parties, but because the arbitration clause was broad. *Amisil*, 622 F.Supp.2d at 838. The clause in Amisil required arbitration with respect to "any controversy or claim arising out of *or relating to*" the Agreement. *Id.* (emphasis original). The *Amisil* court found that all of the claims against the nonsignatory individuals fell within the broad scope of the arbitration clause. *Id.* The court concluded that "under agency principles, the claims against the individual defendants should be arbitrated." *Id.* at 839.

The analysis in this case leads to an identical result. Swift agreed to a broad clause in the Agreement requiring "that any suit, action or proceeding arising out of *or relating to* these Terms of Use . . . shall be resolved solely by binding arbitration before a sole arbitrator under the rules and regulations of the AAA." ER 55, 74 (emphasis added).

Swift executed a contract with a broad arbitration provision. She claims she believed that Adknowledge was Zynga's agent, and the district court relied on that allegation in denying a motion to dismiss. Under *Amisil*, Swift's claims against Adknowledge should be sent to an arbitrator.

### E. Adknowledge did not waive its arbitration right because it did not have the right until the Court decided *Concepcion.*

Swift argues Adknowledge waived its right to arbitration by litigating this case until "nearly eighteen months after Swift filed her suit". Opposition at 24 (emphasis omitted). But the district court held that "Zynga did not waive its right to compel arbitration by waiting until the Supreme Court's decision in *Concepcion*." *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 914 (N.D. Cal. 2011). This Court should similarly reject Swift's reiteration of that argument against Adknowledge.

"A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2)

acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Hoffman Const. Co. of Oregon v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 798 (9th Cir. 1992) (quoting *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986)). None of these factors are present here.

The first *Hoffman* factor involves knowledge of an existing right to compel arbitration. Adknowledge had no knowledge of an existing right to compel arbitration until after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) . Swift makes conclusory statements about Adknowledge's alleged belief: she claims that "Adknowledge certainly thought it had a right to compel [arbitration]", that it litigated "[i]nstead of asserting the right that it believed it had", and that it was aware of a "perceived right" to arbitrate. Opposition at 23-24. But there is no evidence that Adknowledge had any such knowledge before *Concepcion.*

Since Adknowledge was unaware of any existing pre-*Concepcion* right to arbitration, it could not have acted inconsistently with regard to that right (the second *Hoffman* factor) or caused prejudice resulting from acting inconsistently (the third factor). Post-*Concepcion* courts analyzing waiver

based on Swift's argument agree. *See, e.g., Estrella v. Freedom Fin. Network, LLC*), 2012 U.S. Dist. LEXIS 7947 at *10-11 (N.D. Cal. Jan. 24, 2012) ("In its Arbitration Order, the Court rejected plaintiffs' waiver argument … because it found that the Supreme Court's ruling in *Concepcion* had changed the legal landscape such that the Freedom Defendants had not acted inconsistently with a known right to compel arbitration … when they failed to so move [to compel] throughout the prior two years of litigation.")

Swift also argues that *Concepcion* does not apply because "in this case, there is no class action waiver in the first Arbitration Agreement." Opposition at 26 (emphasis omitted). But an arbitration agreement is, by definition, a class action waiver. In *Concepcion*, the Court held that an arbitration clause will always be enforced according to its terms. *Concepcion*, 131 S. Ct. at 1748 (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.* , 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). And "classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with" federal law. *Id.* "[P]arties cannot be compelled to submit their dispute to class arbitration." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* , 130 S. Ct. 1758, 1776, 176 L. Ed. 2d 605 (2010). Since an arbitration clause will always be

enforced, and class arbitration cannot be compelled, it necessarily follows that an arbitration clause is the same as a class-action waiver. Thus, the fact that there was no express class-action waiver in the YoVille Agreement is not germane to the analysis in this case because the arbitration clause itself operated as the waiver.

## III. CONCLUSION

Swift's claims are based completely on her allegations that Adknowledge and Zynga acted in concert. Because she alleges substantially interdependent and concerted misconduct by Adknowledge and Zynga, equitable estoppel requires arbitration of her claims. This Court should apply Delaware law, which leaves no doubt that arbitration is appropriate. But even California requires arbitration when the plaintiff alleges substantially interdependent and concerted misconduct. Swift fails to address Adknowledge's third-party beneficiary argument, essentially conceding it. Finally, Adknowledge could not have waived its arbitration right before *Concepcion*. The arbitration right did not exist until after the Supreme Court changed the law, and Adknowledge joined a motion to compel immediately after the decision.

Adknowledge respectfully requests that this Court reverse the decision below and order that Swift's case against Adknowledge proceed to arbitration.

DATED this 9th day of April, 2012.

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**CERTIFICATE OF COMPLIANCE**

**Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1**

**for Case No. 11-16933**

I CERTIFY THAT:

The attached brief is proportionately spaced, has a typeface of 14 points or more and contains 4,410 words.

DATED this 9th day of April, 2012.

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**CERTIFICATE OF SERVICE**

**Pursuant to Circuit Rule 25-5(f)**

**for Case No. 11-16933**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 9, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 9th day of April, 2012.

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