EXHIBIT C

2017 WL 878712
United States District Court,
S.D. Florida,
Miami Division.

Jean Edner LAMOUR, Plaintiff,
v.
UBER TECHNOLOGIES, INC., Defendant.

CASE NO. 1:16-CIV-21449-MARTINEZ/GOODMAN
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Signed 03/01/2017

Attorneys and Law Firms

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CORRECTED[1] REPORT AND RECOMMENDATIONS ON DEFENDANT'S *RENEWED* MOTION TO COMPEL ARBITRATION AND STRIKE CLASS/ COLLECTIVE ACTION ALLEGATIONS

1 This corrected Report and Recommendations adds in a word (i.e., "not") which was inadvertently omitted from page 3 of the Report.

Jonathan Goodman, UNITED STATES MAGISTRATE JUDGE

***1** Acoustic guitar–based band America warned listeners: "Don't cross the river if you can't swim the tide."[2] This musical advice could be the soundtrack for the legal drama generated by Defendant Uber Technologies, Inc.'s ("Uber") renewed motion to compel arbitration in this proposed national collective action under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, ("FLSA") filed by Plaintiff Jean Edner Lamour ("Lamour" or "Plaintiff"). At bottom, Lamour's opposition to Uber's motion advances an argument which faces a mounting tide of adverse decisions rejecting the primary argument advanced against enforcement of the arbitration provision at issue.

2 AMERICA, *Don't Cross the River, on* HOMECOMING (Warner Bros. 1972).

Lamour contends that Uber misclassified him and other Uber drivers as independent contractors, rather than employees. He challenges several aspects of the agreements at issue as being unfair, inequitable and/or unlawful, but his primary challenge is to the collective action waiver. Lamour says the waiver is incurably unenforceable because it allegedly violates the National Labor Relations Act's ("NLRA") provision conferring upon employees the right to engage in collective action.

Lamour asserts myriad challenges to the agreements and, for all practical purposes, brands their provisions as inequitable. In fact, at the multi–hour hearing on Uber's renewed motion to compel, Plaintiff's counsel explained that he viewed the arbitration language and the circumstances surrounding their presentation to Lamour and other drivers as unfair. But these equitable–type arguments, even if they may well facially appear worthy of consideration, have consistently been rejected by both Congress and the federal courts, including the United States Supreme Court. Indeed, as explained below, the Federal Arbitration Act was enacted to reverse judicial hostility toward arbitration and it reflects a liberal federal policy favoring arbitration agreements.

Many of the battles which Lamour is waging by advancing the view that arbitration and their included collective action waivers are, in effect, unfair contracts of adhesion, have already been lost in substantially analogous situations. The United States Supreme Court has unequivocally announced that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25 (1983).

In addition, Lamour relies on a Seventh Circuit case, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, ––– S. Ct. ––––, No. 16–285, 2017 WL 125664 (U.S. Jan. 17, 2017), for his NLRA argument. This Seventh Circuit case has largely (though not completely) been rejected by several other appellate courts (and out–of–circuit district courts) which have considered the

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theory. Moreover, and perhaps more importantly, that Seventh Circuit case **did not consider the impact of an opt–out clause**.

If the agreements at issue did not contain an opt–out clause, then the Undersigned would be evaluating the agreements with a different lens. However, the agreements here *do* contain opt–out clauses. If I concluded that the opt–out clauses here were a ruse or were purposefully ineffective and did not provide the drivers with a real and meaningful opportunity to avoid the arbitration provision, then I would be looking at the agreements under a microscope with a different legal adjustment and magnification. But there is no doubt that some Uber drivers actually took advantage of the opt–out provisions. In fact, Plaintiff's counsel here is simultaneously representing a collective action FLSA lawsuit against Uber on behalf of the opt–out drivers. So we know that the opt–out clause can be effective if the drivers take the time to read it or, after having reviewed the clause, choose to invoke it.

***2** On the other hand, the result here might not be any different in the absence of an opt–clause clause. Many courts, including district courts in this Circuit, have upheld arbitration provisions without opt–out clauses in FLSA lawsuits in which the NLRA argument has been advanced.

Plaintiff's argument about the NLRB's rejection of the collective action waiver and the Seventh Circuit's adoption of that view in *Lewis* hinges upon the fundamental view that the right being waived is a substantive, rather than a procedural, right. But the Eleventh Circuit Court of Appeals has unequivocally held that an agreement to waive the right to a collective action under the FLSA involves merely a *procedural* right, and is therefore enforceable under the Federal Arbitration Act. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014). Plaintiff therefore has a significant legal hurdle to clear to demonstrate that *Lewis* should be the law in the Eleventh Circuit.

In addition, *Lewis* expressly noted it did not need to resolve differences of opinion in cases from other circuits because it was "undisputed" that assent to the arbitration provision "was a condition of continued employment." 823 F.3d at 1155. But the arbitration provision here was *not* a condition of continued employment because it had an opt–out clause and drivers who opted out were still permitted to be Uber drivers.

In his proposed Report and Recommendations, Plaintiff invokes lyrics from The Rolling Stones' song "You Can't Always Get What You Want" to support his position opposing the renewed motion to compel arbitration and strike class/collective action allegations. Specifically, Lamour emphasizes the lyrics "You can't always get what you want, but if you try sometimes, well you might find, you get what you need." [3] Plaintiff urges the Court to give Uber what he says it *needs*: "clarity regarding the illegality of the collective action waivers it seeks to enforce, a lesson in judicial estoppel, and freedom from the legal and arbitral morass into which Uber attempts to lead the parties and the Court." [ECF No. 107, p. 5].

3 ROLLING STONES, *You Can't Always Get What You Want, on* LET IT BLEED (London 1969).

Uber does not cite any lyrics from any Rolling Stones song in its proposed Report and Recommendations. But if it had, then it might have opted for "(I Can't Get No) Satisfaction" [4] when describing Plaintiff's efforts to demonstrate why the arbitration provision here should not be enforced. That song, which gave the Stones their first hit in the United States, contains the lyric "I can't get no satisfaction, I can't get no satisfaction, 'cause I try and I try and I try and I try, I can't get no, I can't get no"—and it accurately (albeit informally) explains the fate of Plaintiff's opposition here in this Report and Recommendations.

4 ROLLING STONES, (I Can't Get No) Satisfaction, *on* OUT OF OUR HEADS (1965 Decca).

Musical references aside, the Undersigned **respectfully recommends** for the reasons outlined in greater detail below that United States District Judge Jose E. Martinez **grant** Uber's renewed motion to compel and strike the collective action allegations. Specifically, I recommend that Judge Martinez stay the case until the arbitrator resolves Lamour's individual claims and strike the collective action allegations.

***3** Before beginning the more–detailed analysis following the introduction–summary listed above, the Undersigned will first highlight a procedural point:

In response to Uber's renewed motion, Lamour never advanced the argument that an agreement to arbitrate did not exist or that he did not have the ability to opt–out or that he did not accept the agreement (or agreements) containing the arbitration provision, the collective action waiver and the opt–out provision. To be sure, he did assert the argument that two agreements are at issue, that Uber did not identify under which agreement its motion seeks relief and that the agreements are not the same. But he did not in his response contend that he did not accept the agreements.

But in his proposed Report and Recommendations, Lamour for the first time raises the argument that he did not accept the agreements by contending that the examples of the screenshots attached to a declaration supporting Uber's amended motion refer to a different agreement. Similarly, Lamour's proposed Report and Recommendations also asserts for the first time the theory that the "electronic receipts" Uber obtained do not "identify Plaintiff in any verifiable fashion." [ECF No. 107].

The Undersigned will not consider arguments raised for the first time in a proposed Report and Recommendations. *See generally Holland v.* Gee, 677 F.3d 1047, 1066 (11th Cir. 2012) ("the law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed") (quotations omitted); *Little v. T–Mobile USA, Inc.*, 691 F.3d 1302, (11th Cir. 2012) (same); *Herring v. Sec., Dept. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (arguments presented for the first time in a reply brief are not properly before a reviewing court). By raising an argument for the first time in a proposed Report and Recommendations, Plaintiff is, in effect, submitting an unauthorized memorandum. *Cf. Burger v. Hartley*, No. 11–62037, 2012 WL 12837901, at *1 (S.D. Fla. Aug. 30, 2012) (striking unauthorized sur–reply because party is not entitled to a sur–reply as of right and party failed to seek leave of court as required by Local Rule 7.1); *La Gorge Palace Condo Ass'n, Inc. v. QBE Ins. Corp.*, 733 F. Supp. 2d 1332, 1334 (S.D. Fla. 2010) (striking unauthorized sur–reply and stating that the "Local Rules, Rule 7.1, do not provide for a sur–reply as of right.").

Therefore, the Undersigned will not consider Plaintiff's new theory that he did not accept the agreements or that the documents submitted by Uber do not evidence his acceptance of the provisions. I will, however, consider the arguments which Plaintiff did in fact actually assert earlier—that the language is confusing and ambiguous, that multiple agreements are at issue, and that there are meaningful, substantive differences between the agreements.

I. Procedural Background

On April 22, 2016, Lamour filed this lawsuit. [ECF No. 1]. In his current *Second Amended Complaint* ("SAC") [ECF No. 54], Lamour, who used Uber's ride–share app (the "Uber App") to connect with riders, alleges Uber misclassified him and similarly–situated persons as independent contractors, rather than as employees. [ECF No. 54, ¶¶ 12–13]. Plaintiff alleges: (1) he was not paid minimum wage (Count I); (2) he was not paid overtime for hours worked in excess of 40 hours per week (Count II); and (3) he was not paid gratuities or "tips" (Count III). Plaintiff asserts that each such alleged omission amounts to a violation of the FLSA. Further, Plaintiff seeks to assert each of these claims as a "collective action" on behalf of allegedly similarly–situated drivers nationwide who used the Uber App and who, like himself, did **not** timely opt–out of their agreements to arbitrate such disputes on an individual basis. [ECF No. 54, ¶ 19].

***4** In its *Renewed Motion to Compel Arbitration and Strike Collective Allegations* [ECF No. 75], Uber moves to compel arbitration pursuant to the parties' agreement to arbitrate disputes (the "Arbitration Provision"). Uber further asserts that Plaintiff's collective allegations should be stricken because the Arbitration Provision limits arbitration to Plaintiff's individual claims and does not permit others to join in Plaintiff's arbitration through a collective action procedure.

Plaintiff argues this Court should not enforce the parties' Arbitration Provision because the class/collective action waiver it contains purportedly violates the NLRA.

But as a necessary pre–condition to his NLRA argument, Plaintiff asserts that he is an "employee" subject to the NLRA and that the Court, rather than an arbitrator, should resolve this disputed issue. Plaintiff concedes that non–employees, such as independent contractors, may not invoke the NLRA theory. Finally, Plaintiff briefly argues that the Arbitration Provision's delegation clause, referring threshold issues such as the "employee" question to an arbitrator, is not "clear and unmistakable," and that

both the delegation clause and the Arbitration Provision in which it is contained are both procedurally and substantively unconscionable under Florida law. Lamour also argues that the judicial estoppel doctrine prevents Uber from invoking the delegation clause because he says that Uber previously argued, in another case, that the Court, and not an arbitrator, should decide whether the collective action waiver is enforceable.

II. The Parties' Agreement to Arbitrate

Lamour signed up to use the Uber App to connect with potential riders using the "uberX" product so he could transport those riders for a fare. [ECF No. 75–1, Declaration of Michael Colman ("Colman Dec."), ¶¶ 8–9 & 12)]. To access the uberX product to accept ride requests from prospective riders, Plaintiff was first required to electronically accept certain agreements. [ECF No. 75–1, ¶¶ 8–10].

On October 11, 2014, Lamour accepted the Rasier Software Sublicense Agreement, dated June 21, 2014. [ECF No. 75–1, ¶ 12]. Subsequently, on June 27, 2015, Plaintiff accepted a revised version of that agreement dated November 10, 2014. [ECF No. 75–1, ¶ 12]. The material terms of the June 2014 and the November 2014 agreements (collectively "Services Agreements") do not differ and Plaintiff's covered claims arose during time periods governed by one or both of these versions of the Services Agreements. Further, although Plaintiff's Services Agreements were between him and Raiser, LLC, a subsidiary of Uber, the Arbitration Provision clearly sets forth that Uber is an intended beneficiary of that specific Arbitration Provision. [5]

5 Plaintiff does not challenge Uber's standing as a third–party beneficiary of the Arbitration Provision. Rather, he claims that there is language *outside of the Arbitration Provision* regarding third–party beneficiaries in general which renders the agreement ambiguous and substantively unconscionable. As set forth below, the Court rejects Plaintiff's arguments.

When Plaintiff logged into the Uber App using his unique username and password, he had the opportunity to review each Services Agreement by clicking a hyperlink within the Uber App. [ECF No. 75–1, ¶ 9]. To advance past the screen with the hyperlink to the Services Agreement, Plaintiff had to confirm that he had first reviewed and accepted the Services Agreement by clicking "YES, I AGREE." [ECF No. 75–1, ¶ 9]. After clicking "YES, I AGREE," he was prompted to confirm his review and acceptance of the Services Agreement *a second time.* [ECF No. 75–1, ¶ 9].

***5** Plaintiff could spend as much time as he wished reviewing the agreements on his smartphone or other electronic devices. [ECF No. 75–1, ¶¶ 9, 10]. After Lamour confirmed his acceptance for a second time, the Services Agreements were immediately sent to Plaintiff's driver portal, where he could access the agreements to review at his leisure, either online on any device or by printing a copy. [ECF No. 75–1, ¶¶ 10, 14].

Each Services Agreement contains an arbitration agreement (the "Arbitration Provision") which broadly requires transportation providers like Plaintiff, ***if they do not opt out***, to arbitrate ***all*** disputes (with certain exceptions not relevant here) arising out of or related to the agreement or their relationship with Uber, including disputes alleging breach of contract, wage and hour claims, unfair competition, or any other claims brought under similar state and federal statutes. [ECF No. 75–1, ¶¶ 10, 14].

The Arbitration Provision further provides that Plaintiff must pursue any claims in arbitration "**on an individual basis only, and not on a class, collective ... basis.**" [ECF No. 75–1, Ex. C, p. 17, Ex. D p. 17 (emphasis in original)]. The Arbitration Provision also states that, "**[t]he Arbitrator shall have no authority to consider or resolve any claim or issue any relief on any basis other than an individual basis.**" [ECF No. 75–1, Ex. C, p. 17, Ex. D p. 17 (emphasis in original)].

Finally, after twice confirming his review and acceptance of the Services Agreements, Plaintiff was provided an additional 30 days to opt–out of the Arbitration Provision, which could be accomplished by emailing to "optout @uber.com":

> **Your Right To Opt Out Of Arbitration.**
>
> **Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision.... Should you not opt out of this Arbitration Provision within the 30–day period,**

> **you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt–out of coverage under this Arbitration Provision.**

[ECF No. 75–1, ¶ 12, Ex. C, Ex. D (bold emphasis in original, underlined emphasis added)]. Each of the versions of the Services Agreement contained a similar Arbitration Provision and right to opt–out of arbitration. [ECF No. 75–1, ¶ 12, Ex. C, Ex. D]. Plaintiff *did not* opt out of any Arbitration Provision at any time. [ECF No. 75–1, ¶ 13].

The Services Agreements also contain cautionary notices that advised Plaintiff (and other Uber drivers) of the ramifications of agreeing to arbitration and of choosing not to opt–out, and of certain pending litigation against Defendants.

> This arbitration provision will require you to resolve any claim that you may have against the Company or Uber on an individual basis pursuant to the terms of the Agreement unless you choose to opt out of the arbitration provision. This provision will **preclude you** from bringing any **class, collective, or representative action** against the Company or Uber.

[ECF No. 75–1, Ex. C, Ex. D (emphasis supplied)]. [6]

6 Plaintiff notes that he accepted two separate versions of agreements containing arbitration provisions. Though repeatedly conceding that the relevant language of the two agreements is nearly identical, he argues that Uber's failure to "pick one" undermines his obligation to abide by either (or both). [ECF No. 88, pp. 2–3 (citing *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325 (11th Cir. 2016))]. Unlike this case, *Bazemore* did not involve undisputed evidence that the plaintiff accepted ***two*** arbitration agreements but, rather, the lack of evidence of ***any*** arbitration agreement: "JSC has presented no competent evidence as to what, if any, terms plaintiff agreed to when ordering her credit card. In particular, it has presented no competent evidence that she entered into any relevant arbitration agreement." 827 F.3d at 1331.

Further, the earlier June 2014 agreement expressly provides that the Arbitration Provision survives termination. This provision is supported by Florida law. "The duty to arbitrate does not end when a contract is terminated as long as the dispute concerns matters arising under the contract." *Jones v. TT of Longwood, Inc.*, No. 06–cv–651, 2006 WL 2682836, at *1 (M.D. Fla. Sept. 18, 2006). Thus, to the extent Plaintiff's FLSA claims span both agreements, he may indeed be bound to arbitrate by ***both*** agreements. But this is entirely academic for purposes of this motion. The purported differences in the agreements do not matter for purposes of ruling on the motion to compel arbitration.

III. Applicable Legal Standards under the Federal Arbitration Act

***6** The Federal Arbitration Act ("FAA") explicitly states that arbitration agreements are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Where a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," that party "may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

The U.S. Supreme Court and Eleventh Circuit have held that mass arbitration "interferes with fundamental attributes of arbitration" promoted by the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 348 (2011) (state law mandating availability of a class procedure "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (reiterating the point); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1337 (11th Cir. 2014) (enforcing collective action waiver and holding "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low–value claims") (quoting *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005)).

And in *Stolt–Nielsen S.A. v. Animalfeeds International Corporation*, 130 S. Ct. 1758, 1774 (2010), the Supreme

Court reiterated the long–standing policy that parties may agree on the specific issues they wish to arbitrate and the "rules under which an arbitration will proceed." Thus, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes." *Walthour,* 745 F.3d at 1330–31 (quoting *Italian Colors Rest.*, 133 S. Ct. at 2309); *see also Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205, 1207 (11th Cir. 2011). And, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24–25.

"[T]he FAA requires a court to either stay or dismiss a lawsuit and to compel arbitration upon a showing that (a) the plaintiff entered into a written arbitration agreement that is enforceable 'under ordinary state–law' contract principles and (b) the claims before the court fall within the scope of that agreement." *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008). "The burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220, 227 (1987). Arbitration agreements shall be enforced according to their terms "unless the FAA's mandate has been 'overridden by a contrary congressional command.' " *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 98 (2012) (quoting *Shearson/American Express Inc.*, 482 U.S. at 226).

The threshold question here is whether the Arbitration Provision, which contains a delegation clause requiring that the validity and enforceability of the agreement itself be resolved by an arbitrator, strips this Court of the authority to determine the Arbitration Provision's validity or enforceability. *See Italian Colors Rest.,* 133 S. Ct. at 2309 (noting that the text of the FAA "reflects the overarching principle that arbitration is a matter of contract" and "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes") (internal citations and quotations omitted).

***7** In *Rent–A–Center, West, Inc. v. Jackson,* where an employee challenged the validity of an arbitration agreement as a whole rather than specifically challenging the validity of the delegation clause in the agreement, the Supreme Court held that under the FAA the Court "must [treat a delegation clause] as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." 130 S. Ct. 2772, 2779 (2010); *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147–48 (11th Cir. 2015) (same).

Uber also asks this Court to enforce the collective action waiver in the Arbitration Agreement, to strike the collective action allegations raised by Plaintiff, and compel Plaintiff to submit his individual claims to arbitration under the Arbitration Provision.

The **Court** can decide, in the first instance, whether the parties agreed to limit the parties to arbitration by their collective action/class action waiver because it relates to the enforcement of the *terms* of their agreement to arbitrate. *Italian Colors Rest.,* 133 S. Ct. at 2309 (courts determine terms of the parties' arbitration agreements including terms that specify with whom the parties choose to arbitrate their disputes).

In his attempt to avoid the Class Action Waiver,[7] Plaintiff contends that Sections 7 and 8 of the NLRA create an illegality defense and allows him to avoid the terms of his Class Action Waiver. This defense is not premised upon any terms of the parties' agreement and thus is closely akin to unconscionability defenses which the parties agreed to delegate to an arbitrator. In any event, the procedural and factual wrinkles that might arise should the Court agree with Plaintiff's NLRA argument are academic because, as explained below, the Court finds that argument unconvincing.

7 Technically, the issue here is not a **class action** procedure under Federal Rule of Civil Procedure 23. Instead, it relates to a *collective action* under the FLSA. The two procedures have similarities, but they are also significantly different. In a Rule 23 class action, all class members are bound unless they affirmatively opt–out (following Court certification of the class). But in an FLSA collective action, eligible litigants are not part of the action unless they specifically and affirmatively opt in to the proceeding.

IV. Analysis

Lamour contends that the judicial estoppel doctrine should be used against Uber. The Undersigned disagrees.

Plaintiff's principal argument is that Uber is "judicially estopped" from arguing that his defenses have been

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delegated to an arbitrator by agreement because Uber successfully argued that the **Court** should strike similar class allegations in a similar case, *Marc v. Uber Technologies, Inc.*, et al., Case No. 2:16–cv–00579–UA–MRM. While the Court notes that the *Marc* Court was not asked to consider, and did not consider, the NLRA § 7 defense at issue here, "judicial estoppel" is unlikely in any event. That doctrine typically requires divergent *sworn statements of fact.* *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (2002) (" 'it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding' ") (quoting *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001)).

However, the under–oath requirement is not an "inflexible" factor and the Eleventh Circuit recently cited a case where the doctrine was used and the earlier inconsistent representation was in a consent decree, rather than in an under–oath scenario. *Ward v. AMS Servicing, LLC,* 606 Fed.Appx. 506, 510 (11th Cir. 2015) (citing *New Hampshire v. Maine,* 532 U.S. 742, 749–50 (2001)).

***8** Lamour's judicial estoppel argument does not involve sworn statements in the other case and it does not involve statements made in a consent decree. So it does not fit into the traditional factors used by the Eleventh Circuit when evaluating a judicial estoppel argument. Nevertheless, the absence of an under–oath scenario is a factor to consider.

Moreover, judicial estoppel is an equitable doctrine "invoked at a court's discretion." *Burnes*, 291 F.3d at 1285. Trial courts are given "sufficient flexibility" to consider the doctrine and should give "due consideration to all of the circumstances of a particular case when considering" whether to apply the doctrine. *Id.* at 1285–86. Because Uber has urged courts to allow an **arbitrator** to make these threshold decisions in many other cases, the Undersigned does not conclude that Uber has been playing "fast and loose with the courts" or that it has undermined the integrity of the judicial process. Therefore, I do not accept the judicial estoppel argument in this case.

Shifting now toward the actual substantive issues concerning the enforceability of the arbitration provision, the following factors frame the evaluation here: (1) Plaintiff accepted multiple agreements containing essentially identical Arbitration Provisions; (2) upon accepting those agreements, he was (a) afforded the ***choice*** to opt out of his agreement to arbitrate without consequence and (b) notified that his decision not to opt out would affect his ability to bring or participate in class or collective actions filed against Uber; (3) Plaintiff declined, on each occasion, to exercise his right to opt–out of the Arbitration Provision and, instead, now seeks to represent a class of persons who, like himself, elected not to opt out of their agreement to arbitrate; (4) Plaintiff's FLSA claims fall squarely within the parties' Arbitration Provision, and (5) the Arbitration Provision contains a "delegation clause" in which the parties agreed to delegate threshold issues of arbitrability to the arbitrator. [8]

[8] The parties agree that the court should determine "with whom" the parties agreed to arbitrate and thus address Uber's motion to strike collective allegations based upon Uber's contention that it did not agree to arbitrate with a **class** of drivers but only agreed to arbitrate with Plaintiff, individually. Plaintiff contends the Court should go further and consider his illegality defense under the NLRA, including the ultimate issue of whether he was misclassified as an independent contractor. I will discuss that issue in section IV, subsection C, *infra.*

By the date of oral argument before the Undersigned, the Ninth Circuit Court of Appeals and at least nine District Court Judges (including several in Florida) have (1) enforced identical (or nearly identical) arbitration agreements; (2) stricken similar attempts to assert collective claims; and (3) referred plaintiffs' affirmative defenses to arbitrability to the arbitrator.

In the month following the January 26, 2017 oral argument, at least four additional District Court decisions, including another in Florida, have also enforced similar Arbitration Provisions. [9] And Florida's intermediate appellate court in this District held that Uber drivers are independent contractors and not employees under Florida law. [10] As one District Court noted in a recent decision:

> ***9** Similar cases between Uber and its drivers have been filed in numerous courts across the country. Significantly, every federal district court with the exception of one in the Northern District of California has granted Defendants' motions to compel arbitration for plaintiffs who did not opt–out of the Arbitration

Provision. The rogue California district court recently was reversed by the Ninth Circuit in *Mohamed v. Uber Technologies, Inc.*, 2016 WL 4651409 (9th Cir. 2016).

Scroggins v. Uber Techs., Inc., No. 1:16–cv–01419 2017 WL 373299, at *2 n.4 (S.D. Ind. Jan. 26, 2017) (also noting that *Lewis* expressly declined to decide the effect of an opt–out clause on the enforceability of a class action waiver). The Undersigned now joins that rising tide of authority.

9 *Richemond v. Uber Techs., Inc.* 1:16–cv–23267–DPG (S.D. Fla. Jan. 27, 2017) (noting that Uber driver did not take advantage of opt–out provision and concluding that he "agreed to arbitrate arbitrability"); *Singh v. Uber Techs., Inc.*, No. 3:16–cv–03044–FLW–DEA, ECF No. 15 (D.N.J. Jan. 30, 2017); *Gunn v. Uber Techs., Inc.*, No. 1:16–cv–01668, 2017 WL 386816 (S.D. Ind. Jan. 27, 2017); *Scroggins v. Uber Techs., Inc.*, No. 1:16–cv–01419, 2017 WL 373299 (S.D. Ind. Jan. 26, 2017). In addition, one Florida district court denied a plaintiff's motion to certify interlocutory appeal on the issue of whether class action waivers in arbitration agreements are enforceable under the NLRA. *Levison v. Mastec, Inc.*, No. 8:15–cv–1547, 2016 WL 4491868, at *1 (M.D. Fla. Feb. 3, 2016). In that case, the district court rejected the plaintiffs' argument that the issue is one of first impression for the Eleventh Circuit and that "there is no controlling law."

10 *Darrin E. McGillis v. Fla Dep't of Econ. Opportunity & Rasier LLC, d/b/a UBER*, No. 3D15–2758, 2017 WL 438423 (Fla. 3d DCA Feb. 1, 2017).

A. The NLRA Does Not Confer a Non–Waivable *Substantive* Right to Class or Collective Procedures.

Lamour argues that this Court should not enforce his acceptance of the optional Arbitration Provision because the class action waiver is unenforceable under the NLRA. Plaintiff's argument is premised on the Seventh Circuit's holding in *Lewis*, 823 F.3d 1147, and the NLRB's decision in *On Assignment Staffing*, 362 NLRB 189, 2015 WL 5113231 (Aug. 27, 2015).

1. This Court Must Adhere to *Walthour*'s Holding that the Right to Maintain a Collective Action under the FLSA Is a Purely *Procedural* Right that Can Be Waived in an Arbitration Agreement.

In *Walthour*, the Eleventh Circuit held that an arbitration agreement which allows an individual to obtain the substantive relief provided by an employment statute like the FLSA but specifies that individual arbitration is the only procedural mechanism for obtaining relief, merely waives a *procedural* right—and is therefore enforceable. *Walthour,* 745 F.3d at 1334–37. As the *Walthour* Court explained, "the text of FLSA § 16(b) does not set forth a non–waivable substantive right to a collective action." *Id.* at 1135 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)); *see also Stanfield v. Fly Low, Inc.*, No. 15–20224–CIV, 2015 WL 4647902, at *3 (S.D. Fla. Aug. 5, 2015) (noting that enforcement of collective action waiver follows the FAA and is not contrary to the FLSA).

Thus, *Walthour* expressly and definitively ruled that the FLSA creates only a procedural right (i.e., not a substantive right) to pursue a collective action. *Walthour,* 745 F.3d at 1337 (distinguishing cases involving a waiver of *substantive* rights because "[i]n this case, we address only the waiver of a litigation mechanism, i.e., the right to bring a collective action on behalf of others.") (citing *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding, in a case involving FLSA claims, that an arbitration agreement with a class action waiver was not unconscionable and reasoning that "prohibition of class actions and discovery limitations are consistent with the goals of 'simplicity, informality, and expedition.' ")).

***10** To avoid *Walthour* (and *Caley*), Plaintiff would have this Court hold that the NLRA converts the purely procedural right under the FLSA to a collective action into a substantive right under the NLRA. However, the NLRA does not itself expressly confer any right to a collective action under the FLSA, the NLRA, or any other law. *Lewis* describes this right as substantive, not procedural, but *Lewis* is a non–binding, out–of–circuit case which expressly conflicts with the Eleventh Circuit's holding in *Walthour.*

Plaintiff argues that *Walthour* is distinguishable and inapposite because it did not "involve[ ] the question of whether a collective action waiver violates a clear *substantive* right conferred by Section 7 of the NLRA or, alternatively, whether the NLRB's interpretation that Section 7 creates such a non–waivable *substantive* right

is entitled to *Chevron* deference."[11] [ECF No. 88, p. 17 n. 14 (emphasis added)]. But the Eleventh Circuit's unambiguous determination that FLSA collective actions are a purely *procedural* mechanism conflicts with Plaintiff's contention that they are substantive rights. And Plaintiff's argument likewise overlooks that *Walthour* specifically cited, with approval, the Fifth Circuit's decision in *D. R. Horton, Inc. v. NLRB,* "determining that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA." *Walthour*, 745 F.3d at 1332 (citing *D.R. Horton v. NLRB*, 37 F.3d at 362). *Walthour*'s clear holding that collective claims are purely procedural rights which may be waived, and its express approval of the Fifth Circuit's *D.R. Horton* opinion, are unquestionably binding.

11 *Chevron* deference is an important principle of administrative law which holds that courts should defer to agency interpretations of statutes mandating administrative agencies to take some action unless they are unreasonable. The doctrine was established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

If the Undersigned were to strictly follow *Chevron* deference, then the NLRB's decision in, for example, *In re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) would be adopted. But the Fifth Circuit, in *D. R. Horton, Inc. v. NLRB*, rejected the NLRB's holding that the employer had violated the NLRA by requiring its employees to sign an arbitration agreement that, among other things, prohibited an employee from pursuing claims in a collective or class action. 737 F.3d 344 (5th Cir. 2013). In doing so, the appellate court noted that "deference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption ... of major policy decisions properly made by Congress." *Id.* at 356 (citation omitted).

The Court also emphasized that it does not defer to the Board's "remedial preferences" where such preferences "potentially trench upon federal statutes and policies unrelated to the NLRA." *Id.* (citations omitted). The Court then held that the NLRA is not "the only relevant authority" because "the FAA has equal importance." *Id.* at 357.

The Undersigned's decision to not use *Chevron* deference toward the NLRB's decision is also based, in part, on *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1054 (8th Cir. 2013), where the Court held that the Board's decision "carries little persuasive authority" and is entitled to "no deference" in the circumstances presented because the Board has "no special competence or experience in interpreting the Federal Arbitration Act."

***11** Moreover, even if *Walthour* is not strictly controlling because it did not directly and expressly involve a Section 7 NLRA defense, this Court is bound to give priority to the Eleventh Circuit's clear holdings that the right to bring a collective action is procedural, not substantive, and thus may be waived in an arbitration agreement.

2. Despite *Walthour*, the Majority View Is that the NLRA Does Not Confer a Substantive Right to Class or Collective Procedures.

As noted in *Walthour,* "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *Walthour*, 745 F.3d at 1332 (quoting *D.R. Horton v. NLRB*, 737 F.3d at 357 n. 8). The Undersigned will not follow *Lewis* and notes that the rationale behind the decision has been "overwhelmingly rejected by courts throughout the country," *Diaz v. Mich. Logistics, Inc.*, 167 F. Supp. 3d 375, 382 (E.D.N.Y. 2016), including the Second, Fifth, and Eighth Circuits.[12] In addition, numerous district courts, including several in Florida, have also rejected Plaintiff's argument that the NLRA prohibits class waivers (or collective actions waivers) in arbitration.[13]

12 *Patterson,* 659 Fed.Appx. 40 (2d Cir. 2016); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (citing *Owen* with approval and declining to follow the NLRB's decision in *In Re D. R. Horton*); *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 358; *Owen*, 702 F.3d at 1053–55. Since *Lewis*, the Eighth Circuit reiterated its rejection of *In Re D. R. Horton*. *See Cellular Sales of Mo. v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016). Additionally, the Ninth Circuit has held that there is no NLRA violation where, like here, there is an opportunity to opt–out of an arbitration provision. *See Morris v. Ernst & Young, LLP,* 834 F.3d 975, 982 n.4 (9th Cir. 2016), *cert. granted* ––– S. Ct. ––––, No. 16–300, 2017 WL 125665 (Jan. 13, 2017); *Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072, 1076 (9th Cir. 2014).

The issue of whether a mandatory, pre–dispute agreement to arbitrate on an individual basis is

enforceable is now before the Supreme Court, which has granted certiorari in *Lewis* (2017 WL 125664), *Morris* (2017 WL 125665), and *Murphy Oil USA, Inc. v. National Labor Relations Bd.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* ––– S. Ct. ––––, No. 16–307, 2017 WL 125666 (Jan. 13, 2017). At the oral argument, I asked the parties if they wanted me to stay the motion to compel arbitration pending a decision by the United States Supreme Court. They both rejected the suggestion.

13 *See Rimel v. Uber Tech. Inc.,* No. 6:15–cv–2191, 2016 WL 6246812, at *6 (M.D. Fla. Aug. 4, 2016); *Levison v. Mastec, Inc.,* No. 8:15–cv–1547, 2015 WL 5021645, at *2 (M.D. Fla. Aug. 25, 2015); *Steingruber v. Family Dollar Stores of Fla, Inc.*, No. 3:15–cv–199, 2015 WL 10818618, at *4 (M.D. Fla. Aug. 13, 2015); *De Oliveira v. Citicorp N. Am., Inc.*, Case No. 8:12–cv–251–5–26TGW, 2012 WL 1831230, at *2 (M.D. Fla. May 18, 2012) (declining to follow NLRB's decision in *In re D.R. Horton* in favor of "Eleventh Circuit precedent as announced by the *Caley* court"); *Pollard v. ETS PC, Inc.*, 186 F. Supp. 3d 1166 (D. Colo. 2016); *Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1260–1262 (D. Kan. Mar. 31, 2016); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 841–45 (N.D. Cal. 2012); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1046–49 (N.D. Cal. 2012); *Hickey v. Brinker Int'l Payroll Co.*, L.P., No. 1:13–cv–00951, 2014 WL 622883, at *2 (D. Colo. Feb. 18, 2014); *Carey v. 24 Hour Fitness USA, Inc.*, No. H–10–3009, 2012 WL 4754726, at *1–2 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, No. 12–mc–58, 2012 WL 3550496, at *2–4 (E.D. Pa. Aug. 17, 2012); *Spears v. Mid–Am. Waffles, Inc.*, No. 11–2273–CM 2012, WL 2568157, at *2 (D. Kan. July 2, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11–Civ–2308, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 327 P.3d 129, 137–43 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Zawada v. Uber Techs., Inc.,* No. 16–cv–11334, 2016 U.S. Dist. LEXIS 178582, at *28, 2016 WL 7439198 (E.D. Mich. Dec. 27, 2016) (finding arbitration provision not invalid or substantively unconscionable based on the class–action waiver).

B. Even if the NLRA Barred *Mandatory* Class and Collective Action Waivers, the Unchallenged Opt–Out Provision Renders the Arbitration Agreement *Voluntary*.

***12** Plaintiff does not contest that he had 30 days within which to opt–out of the arbitration agreement but failed to do so. Nor does he challenge that his decision to submit to arbitration was voluntary. Indeed, he attempted to join another driver, who did exercise his right to opt–out of arbitration in this action initially (though he has now filed a separate collective action on behalf of those opt–out drivers).

Five Circuits have squarely addressed whether and when a class and collective action waiver may violate the NLRA, and none have held that a class waiver in a voluntary arbitration agreement—e.g., one with an opt–out clause—violates the NLRA. Although the Seventh Circuit found an NLRA violation in *Lewis*, there was no opt–out provision in the arbitration agreement at issue and *Lewis* expressly declined to consider the impact of an opt–out clause.

Thus, post–*Lewis,* multiple District Courts *within* the Seventh Circuit have enforced a nearly identical version of the Arbitration Provision. *Scroggins* 2017 WL 373299, at *2; *Cf. Lee,* 2016 WL 5417215, at *6 n. 9 (explaining that the arbitration provision in *Lewis* did not include a delegation clause, so the threshold question of the enforceability of the arbitration provision was an issue for the court, rather than the arbitrator). The only other Circuit to hold that class waivers may violate the NLRA (i.e., the Ninth Circuit) has repeatedly held that an opt–out right prevents any NLRA violation because it renders the waiver voluntary. *See Morris*, 834 F.3d at 982 n. 4; *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014) (explaining that there is no "basis for concluding that Bloomingdale's interfered with or restrained Johnmohammadi in the exercise of her right to file a class action" because "[i]f she wanted to retain that right, nothing stopped her from opting out of the arbitration agreement").

In contrast, the only authority squarely supporting a contrary view is an NLRB decision, *On Assignment Staffing*, 362 NLRB No. 189 (Aug. 27, 2015), which was summarily reversed by the Fifth Circuit. *On Assignment Staffing Servs., Inc.*, No. 15–60642, 2016 WL 3685206, at *1 (5th Cir. 2016) (granting the employer's petition for summary reversal); *See Morris*, 834 F.3d at 982 n. 4 (decided after, and with notice of, the Board's contrary decision in *On Assignment*, and rejecting the Board's analysis). Because there is overwhelming appellate court precedent against the *On Assignment* decision, it is not

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entitled to deference by this Court, nor will I deem it persuasive authority.

C. The Decision of whether Plaintiff Is an Employee, Subject to Section 7 of the NLRA, Must Be Left to the Arbitrator Pursuant to the Arbitration Provision's Delegation Clause.

Whether Plaintiff is even covered by the NLRA (i.e., whether he was an employee rather than an independent contractor) is identical to the ultimate issue underpinning his FLSA misclassification claims. Nevertheless, the parties disagree as to whether this issue should be resolved by the Court or must be determined by an arbitrator.

The parties' Arbitration Provision contains a "delegation clause" providing that "disputes arising out of or relating to the interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision" will be decided by an Arbitrator, not a court. [ECF No. 75–1, Ex. C, p. 12]. After the briefing and argument of Uber's Motion, a sister District Court specifically held that the threshold issue of whether a driver is an employee subject to the NLRA, or an independent contractor exempt from the NLRA, must be decided by the arbitrator pursuant to the parties' delegation clause.

> ***13** [P]ursuant to the Arbitration Provision, the Arbitrator is responsible for deciding the threshold issue of whether Richemond's relationship with Uber is that of an employee or an independent contractor.

Richemond v. Uber Techs., Inc. 1:16–cv–23267–DPG, ECF No. 21, p. 8 (S.D. Fla. Jan. 27, 2017).

Similarly, in *Moon v. Breathless, Inc.*, the Court held that an **arbitrator** must decide employee/independent contractor status under New Jersey Wage statutes because "challenges to the legality of an agreement that contains an arbitration provision, as opposed to challenges to the arbitration provision itself, are decided by the arbitrator." No. 15–06297, 2016 U.S. Dist. LEXIS 99132, at *9, 2016 WL 4072331 (D.N.J. July 29, 2016). Plaintiff has cited no contrary authority. Instead, Plaintiff cites only the lower court's decision in *Mohamed*, which did not apply the NLRA or the FAA and, in any event, was reversed with the delegation clause enforced by the Ninth Circuit.

Therefore, even if Section 7 barred a collective action waiver in a voluntary arbitration agreement, the Court would still compel Plaintiff to arbitrate (and sustain) his claim of employment status ***before*** he can claim, as a defense to arbitration, that the NLRA invalidates the class and collective action waiver he voluntarily accepted.

D. The Delegation Clause Is Clear and Unmistakable.

The parties' delegation clause provides "disputes arising out of or relating to the interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision" will be decided by an arbitrator, not a court. [ECF No. 75–1, Ex. C, p. 12]. Every court to consider this delegation clause has held it as "clear and unmistakable" evidence that the parties agreed to submit disputes between the parties to arbitration. *See, e.g.*, *Richemond*, 1:16–cv–23267–DPG, ECF No. 21, p. 7 ("[T]his Court finds that there is 'clear and unmistakable evidence' that Richemond 'agreed to arbitrate arbitrability.' " (citing *Parnell*, 804 F.3d at 1147)); *Mohamed*, ––– F.3d ––––, 2016 WL 7470557, at *3 (9th Cir. Dec. 21, 2016) ("The 2014 [Uber] Agreement clearly and unmistakably delegated the question of arbitrability to the arbitrator under all circumstances.").

Lamour argues that the delegation clause is ambiguous by resorting to *other* provisions of the Arbitration Provision and the Services Agreements.[14] However, controlling precedent requires that the Court analyze the delegation clause without reference to other provisions *outside* the Arbitration Provision. *Parnell*, 804 F.3d at 1148 ("Because the Loan Agreement contains a delegation provision, we only retain jurisdiction to review a challenge to that particular provision."). Further, Plaintiff acknowledges that his arguments closely track and rely almost exclusively upon the lower court's decision in *Mohamed*, which was reversed on those same issues. Rejecting the same arguments, the Ninth Circuit concluded that the supposed conflicts between the delegation clause and other provisions in the Services Agreements were "artificial." *Mohamed*, ––– F.3d ––––, 2016 WL 7470557, at *4; *see also Singh v. Uber Techs., Inc.*, No. 3:16–cv–03044–FLW–DEA, ECF No. 15, p. 11 (D.N.J. Jan. 30, 2017) ("First, courts that have reviewed

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the Raiser Agreement's Arbitration Provision rejected identical arguments made by Plaintiff here, reasoning that an ambiguity cannot be created by comparing the language of the arbitration provision to other provisions contained in the Raiser Agreement.").

14 For example, Lamour notes that other sections provide that "claims for workers compensation" are exempt from arbitration and argues that the term is ambiguous and that "an unsophisticated driver such as Plaintiff might reasonably interpret 'worker's compensation' to mean what a worker is compensated (i.e., what a driver gets paid) and therefore believe that any claims related to what a driver is paid are excluded from arbitration." [ECF No. 107, p. 7].

***14** Likewise, the Undersigned found similar claims of ambiguity unavailing in *Collado v. J. & G. Transport, Inc.,* No. 14–80467, 2015 WL 1478609, at *5 (S.D. Fla. Mar. 31, 2015). Accordingly, Plaintiff's defenses based upon the NLRA and state law claims of unconscionability must be delegated to the arbitrator under the "clear and unmistakable" delegation clause. *Parnell,* 804 F.3d at 1148.

E. Plaintiff Fails to Carry his Burden of Proving Unconscionability.

Even if this Court had to resolve Plaintiff's unconscionability defenses, under Florida law, "[b]efore a court may hold a contract unconscionable, it must find that it is *both* procedurally *and* substantively unconscionable." *Collado,* 2015 WL 1478609, at *4; *Golden v. Mobil Oil Corp.,* 882 F.2d 490, 493 (11th Cir. 1989); *Patricoff v. Home Team Pest Def., LLC,* No. 605–cv–1769–ORL, 605–cv–1770–ORL, 2006 WL 890094, at *1 (M.D. Fla. Apr. 3, 2006) (quoting *Gainesville Health Care Ctr., Inc. v. Weston,* 857 So. 2d 278, 283–84 (Fla. 1st DCA 2003)). Further "Florida courts recognize that the term 'unconscionable' as it relates to contracts generally means 'shocking to the conscience,' 'monstrously harsh,' or 'to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " *Patricoff,* 2006 WL 890094, at *1 (quoting *Gainesville Health Care,* 857 So. 2d at 283–84). Plaintiff has not met this heavy burden.

1. There Is No *Procedural* Unconscionability Because Plaintiff Had the Unfettered Right to Opt–Out of the Arbitration Provision.

Despite having the burden of proving that the Arbitration Provision is unconscionable, Plaintiff offered no record evidence in support his argument that the Arbitration Provision is procedurally unconscionable. Instead, the undisputed facts are that (1) Plaintiff had 30 days to opt out of the Arbitration Provision; (2) the opt–out mechanism was conspicuously highlighted in the contract; and (3) opting out would have had no adverse effect on the other terms of Plaintiff's agreement with Defendants.

Under similar circumstances, courts have held such a worker is "free not to arbitrate," and, in declining that opportunity, the worker makes the choice to arbitrate his or her potential claims. *Richemond,* 1:16–cv–23267–DPG, ECF No. 21, p. 8 (finding no procedural unconscionability because the plaintiff "had the absolute right to opt out of the Arbitration Provision") (citing *Suarez v. Uber,* No. 8:16–cv–166–T–30, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) ("[T]here is no procedural unconscionability because Plaintiffs had the absolute right to opt out of the Arbitration Provision.")). Accordingly, because the Arbitration Provision was freely accepted by Plaintiff when he had sufficient time to consider it and the unfettered right to reject it, there can be no finding of procedural unconscionability and no finding of unconscionability under Florida law.

The lack of any evidence of *procedural* unconscionability ends the inquiry under Florida law. *Owings v. T–Mobile USA, Inc.,* 978 F. Supp. 2d 1215, 1224 (MD. Fla. 2013) (finding that opportunity to opt–out eliminated any *procedural* unconscionability issue and obviated need to consider *substantive* unconscionability under Florida law); *Suarez,* 2016 WL 2348706, at *4; *Collado,* 2015 WL 1478609, at *5 (lacking proof of *substantive* unconscionability moots issue of *procedural* unconscionability, as both must be established).

2. The Contingent and Speculative Risk of Some Cost–Sharing Cannot Render the Arbitration Provision Substantively Unconscionable.

***15** Even if the Court were obligated to consider Plaintiff's substantive unconscionability argument, Plaintiff's arguments regarding the perceived costs of arbitration fail to show substantive unconscionability. *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258 (11th Cir. 2003).[15] Under *Green Tree Financial Corp.–Alabama v. Randolph*, 531 U.S. 79, 94 (2000), and *Musnick,* 325 F.3d at 1258, it is Plaintiff's burden to demonstrate that he is "likely to bear such [arbitration] costs." However, Plaintiff submits no Declaration or other evidence of the cost of *individual* arbitration, the likelihood he will incur such costs, or his inability to pay such costs. Instead, Plaintiff submits documents purporting to show the cost of a nationwide class action—a proceeding he has contractually agreed not to bring in arbitration.

15 In addition, Plaintiff has not attempted to show that the supposedly unconscionable cost provision could not be severed and the remainder of the Arbitration Provision enforced, as expressly agreed by the parties. [ECF No. 75–1, Ex. C, p.15 ("in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable.")]. *See also In re Checking Account Overdraft Litig.*, MDL No. 2036, 685 F.3d 1269, 1283 (11th Cir. 2012) (applying South Carolina law) (invalidating the cost–and–fee–shifting provision would not impair enforcement of remainder of arbitration agreement where parties' intent to treat cost–shifting as severable was clear).

Further, Plaintiff has not even attempted to show that he could not afford to pay the costs if the costs of a nationwide class action applied to his individual claim. Nor does Plaintiff try to show he is *likely to bear* any such costs because language deferring cost–splitting to law as determined by the arbitrator is insufficient by itself to demonstrate ***a likelihood*** that Plaintiff will incur such costs.

> Second, and more important, the arbitration agreement's provision that arbitrator and arbitration fees "will be apportioned between the parties by the Arbitrator in accordance with ... applicable law" (Dkt. 8–2 at 2) is not informative as to the likely allocation of arbitration fees.... The DRP's virtual silence as to the ultimate cost allocation renders Plaintiffs' estimate of likely costs too speculative to sustain their burden under *Green Tree.*

Delano v. Mastec, Inc., No. 10–cv–320, 2010 WL 4809081, at *6 (M.D. Fla. Nov. 18, 2010). *Green Tree* is dispositive: "The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.' " 531 U.S. at 91. The Court went further and specified the necessity to offer evidence that such costs, in whatever amount they may be, will be *incurred* by the party challenging arbitration:

> Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, ***that party must show the likelihood of incurring such costs***. Randolph did not meet that burden.

531 U.S. at 92 (emphasis supplied).

Lamour has not addressed the likelihood that he will incur any costs. This is because he cannot: the fee–splitting provision in the Arbitration Provision provides that Uber agrees to pay all arbitration fees where required by law.[16] Accordingly, the cost–splitting deferral provision *prevents* a legally impermissible fee–splitting arrangement from arising. *Richemond,* 1:16–cv–23267–DPG, ECF No. 21, p. 7 (citing *Rimel v. Uber Techs., Inc.*, No. 6:15–cv–2191, 2016 WL 6246812, at *6 (M.D. Fla. Aug. 4, 2016)); *see also Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1125–26 (11th Cir. 2010) (finding, under Georgia law, agreement was not unconscionable where plaintiff could have sought recovery of fees and costs in arbitration, even though he elected not to do so).

16 "Where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company does not have to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties or as otherwise required by applicable law. Any disputes in that regard will be resolved by the Arbitrator." [ECF No. 75–1, Ex. C, p. 14].

***16** In *Musnick,* the Eleventh Circuit held that the risk that plaintiff would incur prohibitive costs under a "loser–pays" attorneys' fees provision was necessarily speculative in a pre–arbitration judicial proceeding because whether

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the plaintiff would incur attorneys' fees "depend[ed] entirely on whether he prevails in arbitration. If he does, he will incur no fees.... Obviously, he will not have been deprived of any statutory right or remedy by the mandatory arbitration." *Musnick,* 325 F.3d at 1261. Under *Musnick*, Plaintiff's appropriate remedy is not to challenge the arbitration agreement—it is to challenge any actual assessment of fees and costs when, and if, it occurs. *Id.* at 1261. [17]

17 Plaintiff also challenges language in the Arbitration Provision providing grounds for potential appeal of the arbitration award. [ECF No. 88, pp. 24–25 (citing *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008)). In fact, *Hall Street* held that the provision was not enforceable under §§ 10 and 11 of the FAA but remanded for a determination of whether the provision might yet be enforced under some authority other than the FAA (such as Federal Rule of Civil Procedure 16 or applicable state law). There is simply nothing in *Hall Street* to suggest that such a provision is unconscionable or even *universally* unenforceable, much less that it voids the entire arbitration agreement within which it is contained.

CONCLUSION

As noted earlier in the Report and Recommendations, Lamour relied upon lyrics from The Rolling Stones to enhance his argument. For purposes of musical symmetry, the Undersigned will end this Report with another Stones lyric. Given the rising tide of judicial opinions rejecting both the NLRB's position and the *Lewis* Court's adoption of that administrative position, it might be appropriate to categorize the results of Plaintiff's arguments as "All I hear is doom and gloom, and all is darkness in my room." [18]

18 ROLLING STONES, *Doom and Gloom, on* GRRR! (Universal Music 2012).

The Undersigned respectfully recommends that Judge Martinez grant Uber's motion by striking the collective action allegations and staying the case pending an arbitrator's resolution of Lamour's individual claim.

OBJECTIONS

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with United States District Judge Jose E. Martinez. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected–to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3–1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, Miami, Florida, on March 1, 2017.

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UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 16-21449-CIV-MARTINEZ-GOODMAN

JEAN EDNER LAMOUR, an individual,

Plaintiff,

vs.

UBER TECHNOLOGIES, INC., a Delaware corporation,

Defendant.

_______________________________________/

ORDER ADOPTING MAGISTRATE JUDGE GOODMAN'S REPORT AND RECOMMENDATION

THE MATTER was referred to the Honorable Jonathan Goodman, United States Magistrate Judge, for a Report and Recommendation on Defendant's Renewed Motion to Compel Arbitration and Strike Class Action Allegations (the "Motion") [ECF No. 75]. Magistrate Judge Goodman filed a Corrected Report and Recommendation [ECF No. 110], recommending that the Motion be granted and that this action be stayed pending the arbitrator's resolution of Plaintiff's individual claims. The Court has reviewed the entire file and record and has made a *de novo* review of the issues that the objections [ECF No. 124] to the Magistrate Judge's Report and Recommendation present. After careful consideration, it is hereby:

ADJUDGED that United States Magistrate Judge Goodman's Corrected Report and Recommendation [ECF No. 110] is **AFFIRMED** and **ADOPTED**.

Accordingly, it is:

ADJUDGED that

1. Defendant's Renewed Motion to Compel Arbitration and Strike Class Action Allegations [ECF No. 75] is **GRANTED**.

2. Plaintiff's collective action allegations are **STRICKEN**. This case is **STAYED**

pending the arbitrator's resolution of Plaintiff's individual claims. Plaintiff's incorporated motion for reconsideration/renewed request to stay the case pending certain decisions before the U.S. Supreme Court [ECF No. 124] is **DENIED**.

3. The Clerk is directed to **DENY ANY PENDING MOTIONS AS MOOT**, and **ADMINISTRATIVELY CLOSE** this case pending arbitration proceedings. This shall not affect the substantive rights of the parties.

4. The parties may move to lift the stay and reopen this matter at the conclusion of those proceedings.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of August, 2017.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Goodman
All Counsel of Record