EXHIBIT D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT RIMEL,

Plaintiff,

v. **Case No: 6:15-cv-2191-Orl-41KRS**

UBER TECHNOLOGIES, INC. and RASIER LLC,

Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT:

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION:	**DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STRIKE CLASS ACTION ALLEGATIONS (Doc. No. 23)**
FILED:	**April 1, 2016**

I. BACKGROUND.

Plaintiff, Robert Rimel, filed an Amended Class Action Complaint (Doc. No. 7) against Defendants, Uber Technologies, Inc. ("Uber") and Rasier, LLC ("Rasier"). He alleges that he began working as an uberX driver for Uber in November 2014. *Id.* at 5. He further alleges that Uber misclassifies its drivers as independent contractors rather than employees. *Id.* at 7. He alleges that, as a result of this misclassification, Uber drivers are not properly compensated. He alleges claims for Tortious Interference with Prospective Business Relations (Count I), Breach of Contract (Count II), Unjust Enrichment (Count III), Conversion (Count IV), Unfair Competition

(Count V), Fraud and Misrepresentation (Count VI), and violation of Florida State Labor Law (Count VII). *Id.* at 12-16. He seeks to represent a class comprised of all individuals who are currently or have worked for Defendants as drivers in the State of Florida. *Id.* at 9. The case is before the Court under its diversity jurisdiction because Rimel alleges that he is a resident of Florida, Uber is a citizen of Delaware and California, Raiser is a citizen of California and the amount in controversy exceeds $75,000. Doc. No. 7, at 4.

Defendants state that Uber is a technology company which acts as a conduit between riders looking for transportation and drivers looking for rides. Uber provides the technology through its smartphone application (the "Uber App"), which allows riders and drivers to connect based on their location. The Uber App is available to riders and drivers in over 100 cities across the country. Doc. No. 23-1, at 1-2. Defendants further state that Rasier is the entity that contracts with drivers in Florida, including Rimel, using the uberX platform. Doc. No. 23-1, at 1. Michael Colman, an Operations Specialist at the headquarters of Uber, avers that any driver who wishes to access the uberX platform to book passengers must first enter into the "Rasier Software Sublicense & Online Services Agreement" ("Services Agreement"). *Id.* at 2. The Services Agreements contain an arbitration provision and a waiver of the right to bring collective or class actions. Doc. No. 23-1, at 21-26 (June 21, 2014 Services Agreement); Doc. No. 28-4, at 15-20 (November 10, 2014 Services Agreement); Doc. No. 28-5, at 16-22 (December 11, 2015 Services Agreement).

Defendants filed the above-referenced motion seeking to compel Rimel to arbitrate his individual claims. The motion was supported by the Declaration of Michael Colman. Doc. No. 23-1. Rimel opposes the motion. Doc. No. 28. His response is supported by the Declaration of Brittany Weiner, one of his attorneys. Doc. No. 28-1. With leave of Court, Defendants filed a reply memorandum supported by a Supplemental Declaration of Michael Colman. Doc. Nos. 49,

49-1. Rimel filed a motion requesting leave to file a surreply to address eight legal arguments. Doc. No. 51. He requested leave to file evidence on his financial circumstances, but he did not request leave to file further evidence regarding his acceptance of various Services Agreements. *Id*. The Court granted in part and denied the motion to file a surreply, stating that it would consider the legal arguments set forth in the motion for leave to file the surreply. Doc. No. 54. Counsel for the parties subsequently filed a series of notices of supplemental authority, which also addressed in argument the application of additional cases to the present dispute. Doc. Nos. 31, 39, 40, 41, 59. The supplemental legal arguments were not authorized filings and, therefore, they will not be considered. I will, however, consider the new court decisions filed with these notices.

The motion is now ripe for resolution. It was referred to me for issuance of a Report and Recommendation.

II. LEGAL STANDARD.

The Federal Arbitration Act ("FAA") provides that a written arbitration agreement in any contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The FAA places arbitration agreements on equal footing with all other contracts and sets forth a clear presumption —'a national policy'—in favor of arbitration." *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

"Importantly, parties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable. The Supreme Court has upheld these so-called 'delegation provisions' as valid, and explained that they are severable from the underlying agreement to arbitrate." *Parnell*, 804 F.3d at 1146-47 (citing *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("*Rent-A-Center*"), and *Buckeye Check Cashing, Inc.*, 546 U.S. at 445)

(internal citations omitted). A presumption of arbitrability does not apply to agreements delegating authority over gateway issues. *See id.* "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* (citations omitted).

III. STATEMENT OF FACTS.

Michael Colman avers as follows:

To enter into a Services Agreement and gain access to the uberX platform, a driver must first log into the Uber App using a unique username and password selected by the driver. After completing the sign-up process, the driver is given an opportunity to review the Services Agreement by clicking a hyperlink presented on the screen with the Uber App. To advance past that screen, the driver has to click "YES, I AGREE" to the Services Agreement. After clicking "YES, I AGREE" to the Services Agreement, the driver must confirm acceptance a second time. *Id.* After clicking "YES, I AGREE" a second time, drivers are able to access the Uber App, and the Services Agreement is sent to the "Driver Portal," where the driver can access the agreement at any time. *Id.* at 3. When a driver agrees to a Services Agreement under the Uber App, an electronic receipt is generated including a date and timestamp indicating acceptance. *Id.*

When a new version of a Services Agreement is issued, a driver cannot gain access to the uberX platform unless he or she affirmatively accepts the new version of the Services Agreement in the manner discussed above. Doc. No. 49-1, at 1.

The Services Agreements provide that within 30 days after accepting the agreement, a driver can opt out of the arbitration provision of a Services Agreement. Doc. No. 23-1, at 25; Doc. No. 28-4, at 19; Doc. No. 28-5, at 22. Uber maintains business records reflecting the names of individuals who have elected to opt out of a particular arbitration provision. Doc. No. 23-1, at 2.

Uber also maintains databases that reflect the dates and times that drivers accepted Services Agreements. *Id.* at 3. These databases are automatically updated as drivers accept new or amended Services Agreements. *Id.* Colman has reviewed these Uber databases. They reflect that Rimel electronically accepted only the June 21, 2014 Services Agreement. Doc. No. 49-1, at 2; *accord* Doc. No. 23-1, at 29 (showing that Rimel accepted the June 21, 2014 Services Agreement on November 8, 2014). Colman has also reviewed Uber business records reflecting individuals who elected to opt out of a particular arbitration provision. Those records show that Rimel did not opt out of the arbitration provision in the June 21, 2014 Services Agreement within 30 days after his acceptance of that agreement. Doc. No. 23-1, at 4.

In the response to the motion, counsel for Rimel states that Rimel "accepted three Uber agreements: the June 21, 2014 Agreement, the November 8, 2014 Agreement [*sic*], and the December 11, 2015 Agreement," Doc. No. 28, at 2, but no evidence was submitted supporting that representation. Rimel did present evidence that he sent an email to "OPTOUT@UBER.COM" on December 16, 2015 stating, "I inten[d] to opt out of the arbitration provision[.]" Doc. No. 28-1, at 1; Doc. No. 28-2.

Colman avers that Rimel did not accept the December 11, 2015 Services Agreement, noting that Uber's business records reflect no activity by Rimel after August 2015. Doc. No. 49-1, at 2. Thus, the December 16, 2015 opt-out email was not sent within 30 days after Rimel accepted the June 21, 2014 Services Agreement. Doc. No. 23-1, at 4.

IV. ANALYSIS.

Defendants ask that the Court enforce the arbitration and waiver of class action provisions in the June 21, 2014 Services Agreement and dismiss this case so that Rimel can litigate his individual claims in arbitration. In response, Rimel argues that (1) the arbitration provision is not

applicable because he opted out of it, (2) the arbitration provision and its delegation clause are unconscionable, and (3) there is not clear and unmistakable evidence that the parties agreed to the delegation clause. I will begin first with the question of which arbitration provision(s) Rimel accepted. Thereafter, I will address Rimel's unconscionability arguments and then turn to the enforceability of the delegation provision. I will then address Defendants' argument that the Court should strike the class action allegations from the amended complaint, compel Rimel to submit his individual claims to arbitration and, thereafter, dismiss this case.

A. Rimel Accepted the Arbitration Provision in the June 21, 2014 Services Agreement But Not the Arbitration Provision Contained in the December 15, 2015 Services Agreement.

Pursuant to the FAA, a written arbitration provision in a "contract evidencing a transaction involving commerce" is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[A] party ordinarily will not be 'compelled to arbitrate unless that party has entered into an agreement to do so."' *World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc.*, 517 F.3d 1240, 1244 (11th Cir. 2008) (quoting *Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001)). Whether the parties have entered into an arbitration agreement is a question for resolution by the court, not by the arbitrator. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-300 (2010); *Lambert v. Austin Ind.*, 544 F.3d 1192, 1196 (11th Cir. 2008).

In the present case, the parties do not dispute that Rimel entered into the Arbitration Provision contained in the June 21, 2014 Services Agreement.[1] The Arbitration Provision in the

[1] The June 21, 2014 Services Agreement contains an arbitration provision (the "Arbitration Provision") that requires transportation providers, 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. The Arbitration Provision, in relevant part, provides as follows:

IMPORTANT: This arbitration provision will require you to resolve any claim that you may have against the Company [Rasier] 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. It also precludes you from participating in or recovering relief under any current or future class, collective, or representative action brought against the Company or Uber by someone else.

. . . .

This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates. . . .

Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship. . . .

You and the Company agree to resolve any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative action basis. . . .

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law . . . . In all cases where required by law, the Company will pay the arbitrator's and arbitration fees. If under applicable law the Company is not required 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. . . .

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 . . . within 30 days of the date this Agreement is

June 21, 2014 Services Agreement requires arbitration of the claims Rimel alleges in the amended complaint. Doc. No. 23-1, at 22.

The parties do dispute whether Rimel also accepted the arbitration provision contained in the December 11, 2015 Services Agreement. "The determination of whether a contract exists between the parties is governed . . . by state law." *Solymar Invs., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 991 (11th Cir. 2012). Rimel argues that California law should govern the December 15, 2015 Services Agreement because that agreement provides that it will be governed by California law. Doc. No. 28-5, at 15. However, the December 11, 2015 Services Agreement states that "[t]he choice of law provisions contained in this Section 15.1 do not apply to the arbitration clause contained in Section 15.3, such arbitration clause being governed by the Federal Arbitration Act." *Id.*

In diversity cases, such as this one, federal courts apply the choice of law rules of the forum state. *Suarez v. Uber Tech., Inc.*, No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)), *appeal docketed*, No. 16-13263 (11th Cir. June 6, 2016). Florida follows the *lex loci contractus* rule, which looks to the place where the contract was executed. *Lumbermens Mut. Cas. Co. v. August*, 530 So. 2d 293, 295 (Fla.1988). The undisputed evidence establishes that Rimel never executed the December 15, 2015 Services Agreement by checking "YES, I AGREE" in the manner described in the Statement of Facts above. Under Florida law, a contract is made when there is proof of offer, acceptance and consideration. *Pezold Air Charters v. Phoenix Corp.*, 192 F.R.D. 721, 725 (M.D.

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executed by you . . . .

Doc. No. 23-1, at 21-25 (bold typeface in original).

Fla. 2000). Because Rimel did not accept the December 11, 2015 Services Agreement and the arbitration provision contained therein, no contract was made.[2] Because Rimel did not enter into the December 11, 2015 Services Agreement and its arbitration provision, his attempt to opt out of that agreement and arbitration provision was not effective. *Cf. Bruster v. Uber Tech., Inc.*, No. 15-CV-2653, 2016 WL 2962403, at *3 (N.D. Ohio May 3, 2016) (finding that the plaintiff's opt out attempt was not successful because he did not validly accept the December 11, 2015 Services Agreement), *reconsideration denied*, Doc. No. 28 (N.D. Ohio Aug. 2, 2016).[3]

B. The Arbitration Provision is Not Unconscionable.

Rimel contends that the Arbitration Provision and its delegation clause are procedurally and substantively unconscionable. Because this is a challenge specifically to the Arbitration Provision and the delegation clause, it appears that this issue must be resolved by the Court rather than the arbitrator. *Buckeye Check Cashing, Inc.*, 546 U.S. at 445.

1. Florida Law Applies to the Arbitration Provision.

The "General" section of the June 21, 2014 Services Agreement provides that "[t]he interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction." Doc. No. 23-1, at 27. Nevertheless, the choice of California law in this agreement does not apply to the Arbitration Provision.

[2] Because Rimel has not presented evidence to support his assertion that he agreed to the December 11, 2015 Services Agreement and the arbitration provision contained therein, he has not sufficiently placed the formation of that agreement at issue and, therefore, a trial is not required under § 4 of the FAA. *See Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (11th Cir. 1995).

[3] Rimel's argument that the terms of the December 11, 2015 Services Agreement apply because that agreement states that is supersedes earlier agreements also fails. One party may not unilaterally modify the terms of an existing contract. *See, e.g., Kuhne v. Fla. Dept. of Corr.*, 745 F.3d 1091, 1096 (11th Cir. 2014). Moreover, the Arbitration Provision specifically states that it survives after the agreement terminates. Doc. No. 23-1, at 22.

"[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Rent-A-Center*, 561 U.S. at 70 (quoting *Buckeye Check Cashing, Inc.* 546 U.S. at 445) (internal quotation marks omitted). The terms of the June 21, 2014 Services Agreement support severability of the Arbitration Provision. Doc. No. 23-1, at 25 ("This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement.").

The California choice-of-law provision in the June 21, 2014 Services Agreement is not included in the Arbitration Provision. Accordingly, the Arbitration Provision, when severed from the other provisions in the agreement, has no choice-of-law provision. *Suarez*, 2016 WL 2348706, at *4 (citing, among other decisions, *Sena v. Uber Tech., Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, at *4-5 (D. Ariz. Apr. 7, 2016), *reconsideration denied*, Doc. No. 28 (D. Ariz. May 3, 2016)); *Varon v. Uber Tech., Inc.*, No. MJG-15-3560, 2016 WL 1752835, at *3 (D. Md. May 3, 2016), *reconsideration denied*, Doc. No. 32 (D. Md. July 20, 2016).

Therefore, Florida's *lex loci contractus* rule applies to determine the law governing the Arbitration Provision. Although the parties do not directly address the question of where Rimel accepted the June 21, 2014 Services Agreement and its Arbitration Provision, because he resides in Florida and worked as an uberX driver in Florida, the logical inference is that he accepted the agreement and the Arbitration Provision by clicking "Yes, I Agree" while he was in Florida. Therefore, Florida law applies to the Arbitration Provision.

2. Unconscionability.

"Under Florida law, '[b]efore a court may hold a contract unconscionable, it must find that it is *both* procedurally and substantively unconscionable.'" *Suarez*, 2016 WL 2348706, at *4 (emphasis in the original) (quoting *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278,

283-84 (Fla. 1st Dist. Ct. App. 2003)). "The test for procedural unconscionability examines the manner in which the contract was entered, and the court must determine whether the complaining party had a meaningful choice at the time of the contract." *Id.* (citing *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025 (Fla. 4th Dist. Ct. App. 2005), and *Gainesville Health Care Ctr., Inc.*, 857 So. 2d at 284)). "The substantive component focuses on the terms of the agreement itself in order to determine whether those terms are unreasonable and unfair." *Id.* (citing *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st Dist. Ct. App. 1999), and *Fonte*, 903 So. 2d at 1025).

a. Procedural Unconscionability.

The Arbitration Provision is not procedurally unconscionable because Rimel had the absolute right to opt out of the Arbitration Provision within 30 days after he accepted it on November 8, 2014. The opt-out clause was prominently displayed in bold typeface under the heading "**viii. Your Right to Opt Out Of Arbitration.**" Doc. No. 23-1, at 25. The mechanism for opting out of the Arbitration Provision was straightforward and simple to accomplish. All Rimel had to do within 30 days from the date he executed the June 21, 2014 Services Agreement was to either (1) send electronic mail to optout@uber.com, stating his name and intent to opt out of the Arbitration Provision or (2) send a signed and dated letter by U.S. Mail, other nationally recognized delivery service or by hand delivery to the stated address for Rasier stating his intent to opt out of the Arbitration Provision. *Id.* Finally, the opt-out clause also states that Rimel would not be subject to retaliation if he exercised his right to opt out of the Arbitration Provision. *Id.* "Even as the party with less bargaining power, [Rimel] had the ability to reject the Arbitration Provision without consequence to [his] relationship with Defendant[s]." *Suarez*, 2016 WL 2348705, at *4. Accordingly, the Arbitration Provision is not procedurally unconscionable.

b. Substantive Unconscionability.

Rimel argues that the Arbitration Provision is unfair because the prohibition against collective and class actions violates the National Labor Relations Act, citing *Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016). *Lewis* is not binding on this Court. The decision is also distinguishable because the arbitration clause at issue in that case was mandatory while the Arbitration Provision in this case permitted Rimel to opt out. Therefore, *Lewis* is not persuasive authority establishing that the Arbitration Provision at issue here is substantively unconscionable.

Rimel also asserts that the Arbitration Provision is unfair because the prohibition against private attorney general actions violates California public policy. As explained above, however, Florida law not California law governs in this case. Counsel have not cited a "private attorney general" provision in Florida law, similar to the provision under California law on which Rimel relies.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the United States Supreme Court held that a California rule providing that an arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures was preempted by the FAA. *Id.* at 337-38, 352. The Eleventh Circuit subsequently concluded that an arbitration provision containing a waiver of class actions, including private attorney general actions, was valid, albeit without addressing the arguments Rimel asserts under California law. *Kaspers v. Comcast Corp.*, 631 F. App'x 779, 784 (11th Cir. 2015) (unpublished decision cited as persuasive authority). The Florida Supreme Court has similarly held as follows: "In light of the United States Supreme Court's recent decision in *Concepcion*, we conclude that the FAA preempts invalidating the class action waiver in this case on the basis of the waiver being void as against public policy."

McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176, 1188 (Fla. 2013). All of these cases support a finding that Rimel's public policy argument based on waiver of private attorney general representative actions is preempted by the FAA under Florida law.

Finally, Rimel argues that the Arbitration Provision is substantively unconscionable because he "would be subject to hefty arbitration fees of a type he would not face in court because the arbitration fee provisions require costs to be shared." Doc. No. 28, at 15 (citing Doc. No. 23-1, at 21, 24).[4] He relies on the JAMS filing fee notice in support of this argument. *See* Doc. No. 28-6. Counsel for Defendants correctly notes, however, that the Arbitration Provision does not require the parties to use JAMS to arbitrate the dispute.[5]

Rimel has not met his burden of showing that fees he might incur during arbitration would be prohibitively expensive. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000). Moreover, he can raise objections to any fees he is required to pay to the arbitrator, who may resolve those issues when the amount to be paid is no longer speculative. *See Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1262 (11th Cir. 2003) ("Once the arbitrator has reached the issues of costs and fees, those items will no longer be speculative, and any issue presented thereby will be ripe for decision."). Accordingly, the possibility that Rimel will incur fees for arbitration

[4] The Arbitration Provision provides, in pertinent part, as follows:

> In all cases where required by law, the Company [Rasier] will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required 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.

Doc. No. 23-1, at 24.

[5] The Arbitration Provision permits the arbitrator to be selected by mutual agreement. If the parties cannot agree on an arbitrator, an arbitrator with JAMS will be selected. Doc. No. 23-1, at 23.

that exceed those he would incur in litigation in this Court does not render the Arbitration Provision substantively unconscionable.

C. The Delegation Provision.

The Arbitration Provision contains the following delegation provision:

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.**
>
> Such disputes include without limitation disputes arising out of or relating to interpretation or application of the Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Doc. No. 23-1, at 22. This type of provision had been described as "an agreement to arbitrate the 'gateway' question of 'whether [the arbitration agreement] covers a particular controversy.'" *In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1255 (11th Cir. 2012) (quoting *Rent-A-Center*, 561 U.S. at 68-69) (alteration in the original).

"Courts should enforce valid delegation provisions as long as there is 'clear and unmistakable' evidence the parties manifested their intent to arbitrate a gateway question." *Id.* (quoting *Rent-A-Center*, 561 U.S. at 69). Rimel contends that there is no clear and unmistakable evidence that the parties agreed to the delegation provision. Doc. No. 28, at 12-13.[6] He points

[6] Rimel also argues that the delegation clause was hidden in the Services Agreement. Doc. No. 28, at 16. This argument fails because the delegation clause is contained in the section of the Arbitration Provision that addresses "i. How This Arbitration Provision Applies[,]" and it immediately follows the admonition in bold typeface that "**This Arbitration Provision requires all such disputes to be resolved only by an arbitrator . . . and not by way of court or jury trial . . . .**" Doc. No. 23-1, at 22. Additionally, the undisputed evidence is that Rimel had the ability to review the June 21, 2014 Services Agreement through his Driver Portal for the full 30-day opt-out period, which gave him ample opportunity to read and fully consider the 5-page Arbitration Provision.

to the following language in the "General" section of the June 21, 2014 Services Agreement, which provides as follows:

> The interpretation of this Agreement shall be governed by California law, without regard to the choice or conflicts of law provisions of any jurisdiction, and any disputes, actions, claims or causes of action arising out of or in connection with this Agreement or the Uber Service or Software shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco, California.

Doc. No. 23-1, at 27. He argues that the delegation language in the Arbitration Provision placing all disputes in the control of the arbitrator, not the court, is incompatible with the parties' agreement, in the "General" section of the June 21, 2014 Services Agreement, committing disputes to the exclusive jurisdiction of courts in the City and County of San Francisco, Florida.

Careful reading of the June 21, 2014 Services Agreement shows that there is no inconsistency. The Arbitration Provision excludes from arbitration several categories of causes of action not applicable in this case. Doc. No. 23-1, at 22-23. The "General" provision establishes where the claims that are excluded from arbitration can be heard. The Arbitration Provision governs arbitrable claims, which include the following:

> [D]isputes arising out of or related to your relationship with the Company, including termination of the relationship. This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, trade secrets, unfair competition, compensation, breaks and rest periods, expense reimbursement, termination, . . . Fair Labor Standards Act, . . . and state statutes, if any, addressing the same or similar subject matters, and all other similar federal and state statutory and common law claims.

Doc. No. 23-1, at 22. The delegation provision in the Arbitration Provision is evidence of the parties' clear and unmistakable agreement that disputes not expressly excluded from arbitration will be decided by the arbitrator, not a court. *See Sena*, 2016 WL 1376445, at *3-4 (distinguishing *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185 (N.D. Cal. 2015)); *Varon*, 2016 WL 1752835, at *6.

D. The Class Action Waiver and Further Proceedings.

Defendants ask that the Court strike the class allegations from the amended complaint and compel Rimel to arbitrate his individual claims. It appears that the Court can resolve the issue of whether the class action waiver in the Arbitration Provision should be enforced, rather than deferring this issue to the arbitrator. *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005).

In *Jenkins*, the Eleventh Circuit upheld a class action waiver in an arbitration agreement. *Id.* at 877-78 (citing *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001)). In *Suarez*, the court found that waiver of collective and class action claims was enforceable and required the plaintiff to submit his individual claims to arbitration. *Suarez*, 2016 WL 2348706, at *5. Based on these authorities, Defendants' request that the Court strike Rimel's class action allegations is well taken.

When a court concludes that all of the claims raised in a plaintiff's complaint must be submitted to arbitration, the court may dismiss with prejudice the plaintiff's complaint. *Coffey v. Kellogg Brown & Root*, No. CIVA 1:08CV2911JOF, 2009 WL 2515649, at *15 (N.D. Ga. Aug. 13, 2009). For the reasons discussed herein, all of Rimel's individual claims are subject to arbitration. Therefore, dismissal of the case with prejudice after compelling arbitration of Rimel's individual claims is appropriate.

V. RECOMMENDATION.

It is **RESPECTFULLY RECOMMENDED** that the Court **GRANT** Defendants' Motion To Compel Arbitration And Strike Class Action Allegations (Doc. No. 23), **STRIKE** the class

action allegations from the amended complaint, **COMPEL** Rimel to submit his individual claims to arbitration and, thereafter, **DISMISS** this case with prejudice.

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections waives that party's right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Recommended in Orlando, Florida on August 4, 2016.

Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Party
Courtroom Deputy

2017 WL 1191384
United States District Court,
M.D. Florida.

Robert RIMEL, Plaintiff,
v.
UBER TECHNOLOGIES, INC.
and Rasier LLC, Defendant.

Case No: 6:15–cv–2191–Orl–41CEM
|
Signed 03/31/2017

Synopsis

Background: Driver brought putative class action against passenger transportation service that connected potential riders and drivers through smartphone application and its subsidiary, asserting state law claims for tortious interference with prospective business relations, breach of contract, unjust enrichment, conversion, unfair competition, fraudulent misrepresentation, and violations of Florida Minimum Wage Act. Transportation service and its subsidiary moved to compel arbitration and to strike class action allegations. The District Court, Karla R. Spaulding, United States Magistrate Judge, 2016 WL 6246812, recommended motion be granted.

Holdings: The District Court, Carlos E. Mendoza, J., held that:

[1] Florida law, rather than California law, applied to arbitration provision;

[2] even if California law applied, delegation clause was clear and unmistakable;

[3] even if California law applied, delegation clause was not substantively or procedurally unconscionable; and

[4] even if California law applied, arbitration provision was not substantively unconscionable.

Motion granted.

West Headnotes (23)

[1] **Federal Courts**
De novo review in general

De novo review requires independent consideration of factual issues based on the record.

Cases that cite this headnote

[2] **Commerce**
Arbitration

Federal Courts
Alternative dispute resolution

Federal Arbitration Act (FAA) governs the enforceability of arbitration provisions in contracts involving transactions in interstate commerce. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[3] **Alternative Dispute Resolution**
Right to Enforcement and Defenses in General

Under the Federal Arbitration Act (FAA), courts must rigorously enforce arbitration agreements according to their terms. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[4] **Alternative Dispute Resolution**
Contractual or consensual basis

Alternative Dispute Resolution
Validity

Arbitration under the Federal Arbitration Act (FAA) is ultimately a matter of consent, not coercion, and parties opposing arbitration can challenge the formation and validity of a contract containing an arbitration clause. 9 U.S.C.A. § 1 et seq.

Cases that cite this headnote

[5] **Alternative Dispute Resolution**

Contractual or consensual basis

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

Cases that cite this headnote

[6] **Alternative Dispute Resolution**

Arbitrability of dispute

In determining whether to compel arbitration, courts engage in a limited review to determine whether the dispute is arbitrable.

Cases that cite this headnote

[7] **Alternative Dispute Resolution**

Agreements to Arbitrate

Parties are generally free to structure their arbitration agreements as they see fit.

Cases that cite this headnote

[8] **Alternative Dispute Resolution**

Existence and validity of agreement

Parties may decide to delegate threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable.

Cases that cite this headnote

[9] **Alternative Dispute Resolution**

Existence and validity of agreement

When an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract as a whole, the federal courts may not review his claim because it has been committed to the power of the arbitrator.

Cases that cite this headnote

[10] **Alternative Dispute Resolution**

Existence and validity of agreement

Absent a challenge to a delegation provision itself, the federal courts must treat the delegation provision as valid and must enforce it, leaving any challenge to the validity of the agreement as a whole for the arbitrator.

Cases that cite this headnote

[11] **Alternative Dispute Resolution**

Evidence

Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.

Cases that cite this headnote

[12] **Alternative Dispute Resolution**

What law governs

Florida law, rather than California law, applied to arbitration provision in services agreement between driver and passenger transportation service that connected potential riders and drivers through smartphone application, although services agreement had California choice of law provision; arbitration provision was separate and distinct contract, isolated from other terms in services agreement, including California choice of law clause, California choice of law provision had no effect on court's determination of conscionability of arbitration provision, arbitration provision had no choice of law provision, and driver accepted service agreement and underlying arbitration provision in Florida.

Cases that cite this headnote

[13] **Alternative Dispute Resolution**

Severability

As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.

Cases that cite this headnote

[14] **Alternative Dispute Resolution**

Severability

The severability rule, that arbitration provision is severable from remainder of contract, is extended to delegation clauses within an arbitration provision; such clauses are considered additional, antecedent agreements that are severable from the remainder of the arbitration agreement.

Cases that cite this headnote

[15] Federal Courts

Conflict of Laws;Choice of Law

In diversity cases, federal courts apply the choice of law rules of the forum state.

Cases that cite this headnote

[16] Contracts

What law governs

In the absence of a choice of law provision, the "lex loci contractus doctrine" applies; under that doctrine, a contract is governed by the law of the state in which the contract is made or is to be performed.

Cases that cite this headnote

[17] Alternative Dispute Resolution

Existence and validity of agreement

Even if California law applied to arbitration provision, delegation clause in services agreement between driver and passenger transportation service that connected potential riders and drivers through smartphone application was clear and unmistakable; delegation clause clearly and unmistakably delegated questions of arbitrability to arbitrator, and there was no conflict between unambiguous language of delegation clause and forum selection clause, which required that any disputes arising out of agreement would be subject to exclusive jurisdiction of state and federal courts in San Francisco, because delegation clause was prefaced with except as otherwise provided language.

Cases that cite this headnote

[18] Alternative Dispute Resolution

Unconscionability

Even if California law applied to arbitration provision, delegation clause in services agreement between driver and passenger transportation service that connected potential riders and drivers through smartphone application was not substantively or procedurally unconscionable; arbitration provision provided that each party would pay fees for his own attorneys and transportation service would pay arbitrator's and arbitration fees, driver might not have had to bear any fees or expenses beyond what he would have had to pay to pursue action in court, driver could raise objections to any fees he was required to pay to arbitrator, driver had right to opt out of arbitration provision within 30 days after he accepted it, opt-out clause was prominently displayed in bold typeface, and mechanism for opting out was straightforward and simple to accomplish.

Cases that cite this headnote

[19] Alternative Dispute Resolution

Unconscionability

Under California law, an arbitration agreement may be substantively unconscionable if it requires the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.

Cases that cite this headnote

[20] Alternative Dispute Resolution

Unconscionability

The threshold inquiry in California's unconscionability analysis is whether the arbitration agreement is adhesive; an arbitration agreement is not adhesive if there is an opportunity to opt out of it.

Cases that cite this headnote

[21] Alternative Dispute Resolution

Unconscionability

Under California law, the existence of a meaningful right to opt-out of arbitration necessarily renders an arbitration clause, and a delegation clause specifically, procedurally conscionable as a matter of law.

Cases that cite this headnote

[22] Alternative Dispute Resolution

Unconscionability

Even if California law applied, arbitration provision in services agreement between driver and passenger transportation service that connected potential riders and drivers through smartphone application was not substantively unconscionable based on class-action waiver; arbitration provision's prohibition against class actions did not violate NLRA or Federal Arbitration Act (FAA) because driver could have easily opted out, driver was not required to arbitrate his claims as a condition of employment, and driver had absolute right to opt out of arbitration provision within 30 days from entering into agreement. 9 U.S.C.A. § 1 et seq.; National Labor Relations Act § 7, 29 U.S.C.A. § 157.

Cases that cite this headnote

[23] Alternative Dispute Resolution

Existence and validity of agreement

Even if California law applied to arbitration provision, issue of whether arbitration provision in services agreement between driver and passenger transportation service that connected potential riders and drivers through smartphone application violated California public policy was for arbitrator, rather than district court, to determine; under delegation clause, parties clearly and unmistakably agreed that arbitrator was to resolve all "disputes arising out of or relating to interpretation or application" of arbitration provision, "including the enforceability, revocability or validity" of arbitration provision.

Cases that cite this headnote

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ORDER

CARLOS E. MENDOZA, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE is before the Court on Defendant Uber Technologies, Inc. and Rasier LLC's Motion to Compel Arbitration and Strike Class Action Allegations ("Motion to Compel," Doc. 23). United States Magistrate Judge Karla R. Spaulding submitted a Report and Recommendation ("R&R," Doc. 61), in which she recommends that the Motion be granted. Plaintiff filed an Objection (Doc. 62), to which Defendants filed a Response (Doc. 66). After an independent *de novo* review of the record, the R&R will be adopted and confirmed.

I. FACTUAL BACKGROUND

Defendant Uber Technologies, Inc. ("Uber") is a Delaware corporation with its principal place of business in San Francisco, California. (Am. Compl., Doc. 7, ¶ 7).Uber is the creator of a passenger transportation service that connects riders and drivers through a cellular phone application (the "App"). (*Id.*; Colman Decl., Doc. 23–1, ¶ 3). When a rider uses the App to request transportation services, the customer's request is routed to an available Uber driver to pick up and transport the customer to their desired destination. (Doc. 7 ¶ 7; Doc. 23–1 ¶ 3). The customer then pays a fare through the App, and the Uber

driver is paid directly by Uber for eighty percent of the fare collected from the customer. (Doc. 7 ¶¶ 14, 29).

Defendant Rasier, LLC is a Delaware limited liability company and Uber's wholly-owned subsidiary. (*Id.* ¶ 8; Doc. 23–1 ¶ 2).[1] Rasier contracts with Uber drivers in Florida using the UberX platform. (Doc. 23–1 ¶ 2). Any individual who wishes to access the UberX platform must first enter into the Rasier Software Sublicense & Online Services Agreement (the "Services Agreement," Ex. C to Coleman Decl., Doc. 23–1). (*Id.* ¶ 5). To enter into the Services Agreement and gain access to the platform, the individual must first login to the App using a unique username and password. (*Id.* ¶ 6). After completing the sign-up process, they are able to review the Services Agreement by clicking a hyperlink presented on the screen within the App. (*Id.* ¶ 7). The individual is free to spend as much time as they wish reviewing the Services Agreement. (*Id.*).

[1] Rasier is Uber's equivalent for purposes of this action. Therefore, except where necessary, the Court refers to Uber and Rasier collectively as "Uber."

To advance past the screen with the hyperlink to the document, the individual is required to click "YES, I AGREE" to the Services Agreement. (*Id.*). After clicking "YES, I AGREE," they are prompted to confirm acceptance a second time. (*Id.*). After clicking "YES, I AGREE" a second time, the individual can access the App, and the Services Agreement is automatically and immediately in the individual's Driver Portal[2] where he or she can access it at any time. (*Id.* ¶ 8). When a new version of a Services Agreement is issued, an Uber driver cannot gain access to the UberX platform unless he or she affirmatively accepts the new version of the Services Agreement in the manner discussed above. (Colman's Supp. Decl., Doc. 49–1, ¶ 2).

[2] "The Driver Portal stores information (particular to each driver) regarding the services provided by that driver through Uber's various platforms." (Doc. 23–1 ¶ 12).

***2** The Services Agreement contains an arbitration provision ("Arbitration Provision") that requires Uber drivers to arbitrate, on an individual basis, all disputes arising out of or related to their relationship with Uber. (Doc. 23–1 at 22). Importantly, the Arbitration Provision contains a delegation clause ("Delegation Clause"), which purports to delegate any threshold arbitrability issues to an arbitrator. (*Id.*). If an Uber driver does not wish to arbitrate his or her claim against Uber, he or she can opt out of the Arbitration Provision within thirty days of accepting the Services Agreement. (*Id.* at 25).

In November 2014, Plaintiff Robert Rimel, a citizen of Orange County, Florida, became an UberX driver. (Doc. 7 ¶¶ 6, 16; Doc. 23–1 ¶ 10). He alleges that Uber exploits "hard-working drivers" like him who "are the lifeblood of the company" by: (1) deceiving drivers regarding the amount of money they can earn, (2) misappropriating tips that customers allocate to the drivers, and (3) misclassifying drivers as independent contractors rather than employees. (Doc. 7 ¶¶ 1–4, 14–43). Therefore, Plaintiff filed a putative class action against Uber asserting state law claims for: tortious interference with prospective business relations (Count I), breach of contract (Count II), unjust enrichment (Count III), conversion (Count IV), unfair competition (Count V), fraudulent misrepresentation (Count VI), and violations of the Florida Minimum Wage Act, Fla. Stat. § 448.110 (Count VII). (*Id.* ¶¶ 54–91).

Uber contends that Plaintiff's claims are subject to the Arbitration Provision contained in Uber's November 2014 Services Agreement. Therefore, Uber moves for the entry of an order dismissing this action, or alternatively, staying all proceedings unless and until Plaintiff fulfills his contractual obligation to arbitrate his individual claims. (Doc. 62 at 7–12). Additionally, Uber moves to strike Plaintiff's class action allegations from the Complaint. (*Id.* at 12–14). Plaintiff mounts several arguments in opposition to Uber's Motion to Compel.

Plaintiff does not dispute that he initially entered into Uber's November 2014 Services Agreement and that he failed to opt out of the Arbitration Provision within thirty days. Instead, Plaintiff argues that he entered into Uber's superseding Services Agreement on December 11, 2015, and that he exercised his right to opt out of the Arbitration Provision within thirty days. (Resp. to Mot. to Compel, Doc. 28, at 4–5). Plaintiff further argues that the Arbitration Provision is governed by California law and that: (1) the Delegation Clause is not clear and unmistakable; (2) the Arbitration Provision and Delegation Clause are procedurally and substantively unconscionable; and (3) the Arbitration Provision is unenforceable because the prohibition against private

attorney general actions violates California public policy. (*Id.* at 6–22).

Upon review of the record, the Magistrate Judge concluded that Plaintiff had accepted only the June 2014 Services Agreement and failed to opt out of the Arbitration Provision within thirty days. (R&R at 6–9). The Magistrate Judge further concluded that: (1) Florida law, not California law, applies to the Arbitration Provision (*id.* at 9–10); (2) the Arbitration Provision and the Delegation Clause are not unconscionable (*id.* at 10–14); (3) the terms of the Delegations Clause are clear and unmistakable (*id.* at 14–15); and (4) the class action waiver in the Arbitration Provision should be enforced (*id.* at 16). As such, the Magistrate Judge recommends that the Court grant Uber's Motion. (R&R at 16–17). Plaintiff objects to the Magistrate Judge's recommendation.

II. LEGAL STANDARDS

A. Objections to a Report and Recommendation

***3** **[1]** Pursuant to 28 U.S.C. § 636(b)(1), when a party makes a timely objection, the Court shall review *de novo* any portions of a magistrate judge's report and recommendation concerning specific proposed findings or recommendations to which an objection is made. *See also* Fed. R. Civ. P. 72(b)(3). *De novo* review "require[s] independent consideration of factual issues based on the record." *Jeffrey S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507, 513 (11th Cir. 1990). The district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

B. Motion to Compel Arbitration

[2] **[3]** **[4]** **[5]** **[6]** In general, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs the enforceability of arbitration provisions in contracts involving transactions in interstate commerce. *Hill v. Rent–A–Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005). Under the FAA, "courts must rigorously enforce arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.*, —— U.S. ——, 133 S.Ct. 2304, 2309, 186 L.Ed.2d 417 (2013) (quotation omitted). Arbitration agreements are presumptively valid and enforceable. *See* 9 U.S.C. § 2. However, arbitration under the FAA is ultimately "a matter of consent, not coercion," *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and parties opposing arbitration can challenge the formation and validity of a contract containing an arbitration clause. It is well-settled, however, that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quotation omitted). Therefore, in determining whether to compel arbitration, courts engage in a limited review to determine whether the dispute is arbitrable. *Senti v. Sanger Works Factory, Inc.*, No. 6:06–cv–1903–Orl–22DAB, 2007 WL 1174076, at *4–5 (M.D. Fla. Apr. 18, 2007).

[7] **[8]** **[9]** **[10]** **[11]** Importantly, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479, 109 S.Ct. 1248. Parties may decide, for instance, to delegate "threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable." *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015). "The Supreme Court has upheld these so-called delegation provisions as valid, and explained that they are severable from the underlying agreement to arbitrate." *Id.*(internal quotations and citation omitted). "When an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract *as a whole*, the federal courts may not review his claim because it has been committed to the power of the arbitrator." *Id.* "[A]bsent a challenge to the delegation provision itself, the federal courts must treat the delegation provision as valid...and must enforce it..., leaving any challenge to the validity of the [a]greement as a whole for the arbitrator." *Id.* at 1146–47 (quotation omitted). Courts should not, however, "assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 1147 (quotation omitted).

III. ANALYSIS

In his Objection, Plaintiff does not challenge the Magistrate Judge's finding that the Arbitration Provision and Delegation Clause are enforceable under Florida Law.[3] Instead, Plaintiff contends that the Delegation Clause and the Arbitration Provision are unenforceable under California law and that the Magistrate Judge erred

by not applying the California choice of law provision contained in the Services Agreement.

3 Plaintiff also does not challenge the Magistrate Judge's finding that he only accepted the June 21, 2014 Services Agreement.

A. The Arbitration Provision is governed by Florida Law

***4** **[12]** In the R&R, the Magistrate Judge found that under the rules of severability Florida law applies to the Arbitration Provision because the Arbitration Provision is a separate and distinct contract, isolated from other terms in the Services Agreement, including the California choice of law clause. (*See* Doc. 61 at 9–10). Plaintiff contends that the Magistrate Judge's "decision hinged on an erroneous interpretation and misapplication of the severability rule." (Doc. 2 at 3). In support, Plaintiff cites a slew of cases in which courts purportedly applied the law supplied by an agreement's choice of law clause to evaluate the enforceability of an arbitration provision in a separate section of the same agreement. (*Id.* at 10–12 & n.4). The Court is unpersuaded.

[13] **[14]** The Magistrate correctly found that Florida law applies to the Arbitration Provision. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). Likewise, the severability rule is extended to delegation clauses within an arbitration provision. *Rent–A–Center W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). Such clauses are considered additional, antecedent agreements that are severable from the remainder of the arbitration agreement. *Id.*

Applying Supreme Court jurisprudence to the facts of this case, the Court finds that the Arbitration Provision is severable from the Service Agreement. Indeed, the severability of the Arbitration Provision is reflected in the integration clause, which states: "This Arbitration Provision is the full and complete agreement relating to the formal resolution of disputes arising out of this Agreement." (Doc. 23–1 at 25). Therefore, the Service Agreement's California choice of law provision has no effect on the Court's determination of the conscionability of the Arbitration Provision, and the Arbitration Provision has no choice of law provision.

[15] **[16]** As the Magistrate Judge noted, in diversity cases, such as this one, federal courts apply the choice of law rules of the forum state. *Suarez v. Uber Tech., Inc.*, No. 8:16-cv-166-T-30MAP, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016). In the absence of a choice of law provision, the *lex loci contractus* doctrine applies. *Fioretti v. Mass. Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995). Under that doctrine, a contract is governed by the law of the state in which the contract is made or is to be performed. *Id.* Plaintiff does not dispute that he accepted Uber's Services Agreement and the underlying Arbitration Provision in Florida. Therefore, the Magistrate Judge correctly found that Florida law applies to the Arbitration Provision.

Although Plaintiff finds this application of the severability rule "absurd" and "nonsensical" numerous courts have reached the same conclusion. *See Zawada v. Uber Techs., Inc.*, No. 16-CV-11334, 2016 WL 7439198, at *6 (E.D. Mich. Dec. 27, 2016); *Micheletti v. Uber Techs., Inc.*, No. 15-1001 (RCL), —— F.Supp.3d ——, ——, 2016 WL 5793799, at *4 (W.D. Tex. Oct. 3, 2016); *Bruster v. Uber Techs., Inc.*, 188 F.Supp.3d 658, 663–64 (N.D. Ohio 2016); *Suarez*, 2016 WL 2348706, at *4; *Varon v. Uber Techs., Inc.*, No. MJG-15-3650, 2016 WL 1752835, *3 (D. Md. May 3, 2016); *Sena v. Uber Techs., Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 1376445, *4 (D. Ariz. Apr. 7, 2016). Despite Plaintiff's arguments to the contrary, the cases he cited in his Objection do not undermine the Court's decision to analyze the Arbitration Provision as an agreement severable and independent from the Services Agreement. Indeed, none of Plaintiff's cases address the effect of the express integration clause contained in the Arbitration Provision or the specific choice of law issue currently before the Court. Accordingly, the Court finds that Florida law applies to the Arbitration Provision, not California law.

***5** Plaintiff does not challenge the Magistrate Judge's finding that the Arbitration Provision and its Delegation Clause are valid and enforceable under Florida Law. Finding no clear error, the Magistrate Judge's recommendation to grant Uber's Motion to Compel is due to be adopted and confirmed. *See Macort v. Prem, Inc.*, 208 Fed.Appx. 781, 784 (11th Cir. 2006) (explaining that in the absence of specific objections, "a district court need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the

record in order to accept the recommendation" (quotation omitted)). Although the R&R is due to be adopted and confirmed, for reasons provided below, the Court notes that its decision would not be altered even if California law did apply.

B. The Delegation Provision is clear and unmistakable under California Law

The Delegation Clause contained in the Services Agreement provides:

> Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action.

(Doc. 23–1 at 22 (bolding omitted)).

[17] Plaintiff first argues that the Delegation Clause is not clear and unmistakable because it conflicts is with the Services Agreement's forum-selection clause, which requires that " '*any* disputes, actions, claims or causes of action arising out of or in connection with this Agreement... *shall* be subject to the *exclusive jurisdiction* of the state and federal *courts*' in San Francisco." (Doc. 62 at 16 (quoting Doc. 23–1 at 27)). In support, Plaintiff relies heavily on *Mohamed v. Uber Technologies, Inc.*, 109 F.Supp.3d 1185 (N.D. Cal. 2015), in which a California district court held that similar language rendered a delegation provision unclear and mistakable. However, the district court's determination has been reversed by the Ninth Circuit Court of Appeals. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016).

The Ninth Circuit concluded that the conflicts the district court identified were "artificial" because "[t]he clause describing the scope of the arbitration provision is prefaced with '[e]xcept as it otherwise provides,' which eliminated the inconsistency [with] the general delegation provision." *Id.* at 1209. The Ninth Circuit reasoned:

> [N]o matter how broad the arbitration clause, it may be necessary to file an action in court to enforce an arbitration agreement, or to obtain a judgment enforcing an arbitration award, and the parties may need to invoke the jurisdiction of a court to obtain other remedies. It is apparent that the venue provision here was intended for these purposes, and to identify the venue for any other claims that were not covered by the arbitration agreement.

Id. (quoting *Dream Theater, Inc. v. Dream Theater*, 124 Cal.App.4th 547, 556, 21 Cal.Rptr.3d 322 (2004)).

Courts examining identical or substantially similar Service Agreements have consistently reached the same conclusion. *See*, *e.g.*, *Mumin v. Uber Techs., Inc.*, No. 15-CV-6143 (NGG) (JO), —— F.Supp.3d ——, ——, 2017 WL 934703, at *9 (E.D.N.Y. Mar. 8, 2017); *Congdon v. Uber Techs., Inc.*, No. 4:16–cv–02499–YGR, Doc. 65, at 5, —— F.Supp.3d ——, 2016 WL 7157854 (N.D. Cal. Dec. 8, 2016); *Micheletti*, —— F.Supp.3d at ——, 2016 WL 5793799, at *4; *Suarez*, 2016 WL 2348706, at *4; *Varon*, 2016 WL 1752835, at *6; *Sena*, 2012 WL 1376445, at *3–4. Accordingly, the Court therefore finds no conflict between the unambiguous language of the Delegation Clause and the Service Agreement's forum selection clause. The Delegation Clause clearly and unmistakably delegates questions of arbitrability to the arbitrator.

C. The Delegation Clause is not unconscionable under California law.

***6** **[18]** **[19]** Plaintiff argues that the Delegation Clause is substantively unconscionable because "it would subject Rimel to hefty fees of a type he would not face in court." (Doc. 62 at 17). This argument lacks merit. An arbitration agreement may be substantively unconscionable if it "require[s] the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 110–11, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Cal. 2000), *abrogated in part on another grounds by AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–340, 131

S.Ct. 1740, 179 L.Ed.2d 742 (2011); *see also Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights).

Here, Plaintiff offers no evidence to buttress his conclusory assertion that arbitration would subject him to "hefty fees of a type he would not face in court." (Doc. 62 at 17). The Arbitration Provision provides that "[e]ach party will pay the fees for his...own attorneys" but that "[Defendants] will pay the Arbitrator's and arbitration fees." (Doc. 23–1 at 24). Therefore, Plaintiff may not have to bear any fees or expenses beyond what he would have had to pay to pursue this action in court. Moreover, as the Magistrate Judge noted, Plaintiff can raise objections to any fees he is required to pay to the arbitrator, who may resolve those issues when the amount to be paid is no longer speculative. Accordingly, Plaintiff's argument that the Delegation Clause is substantively unconscionable lacks merit.

Plaintiff also contends that the Delegation Clause is procedurally unconscionable because it is "hidden in Uber's prolix" Service Agreement. (Doc. 62 at 17 (quotation omitted)). In support of his contention, Plaintiff relies exclusively on the reversed district court case in *Mohamed*. This argument also lacks merit.

[20] **[21]** "[T]he threshold inquiry in California's unconscionability analysis is whether the arbitration agreement is adhesive." *Mohamed*, 848 F.3d at 1211 (quotation omitted). "[A]n arbitration agreement is not adhesive if there is an opportunity to opt out of it." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006). "[T]he existence of a meaningful right to opt-out of arbitration necessarily renders the arbitration clause (and the delegation clause specifically) procedurally conscionable as a matter of law." *Mohamed*, 848 F.3d at 1210 (quotation omitted). Here, Plaintiff had the absolute right to opt out of the Arbitration Provision within thirty days after he accepted it on November 8, 2014. In fact, the opt-out clause was prominently displayed in bold typeface in the Services Agreement, and the mechanism for opting out was straightforward and simple to accomplish. (*See* Doc. 23–1 at 25). Accordingly, the Court finds that the Service Agreement is not adhesive or procedurally unconscionable as a matter of law.

D. The Arbitration Provision is not unconscionable.

[22] Plaintiff argues that the Arbitration Provision is unconscionable because it runs afoul of the National Labor Relations Act ("NLRA") and FAA by requiring drivers to resolve all disputes in arbitration "on an individual basis" only and not by way of "class, collective, or representative action." (Doc. 62 at 22 (quotation omitted)). Plaintiff's argument is premised on the Seventh Circuit's holding in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016),[4] which held that an arbitration provision that precludes collective arbitration or collective action in any other forum violates an employee's statutory right to engage in concerted activity under Sections 7 and 8 of the NLRA and is also unenforceable under the FAA.[5]

4 EPIC Systems filed a Petition for Certiorari with the United States Supreme Court, which was granted on January 13, 2017. *See Epic Sys. Corp. v. Lewis*, —— U.S. ——, 137 S.Ct. 809, 196 L.Ed.2d 595 (2017).

5 Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 enforces Section 7 by deeming that it "shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* at § 158(a)(1).

***7** The Second, Fifth, and Eighth Circuits have rejected the rationale behind the *Lewis*decision. *See Patterson v. Raymours Furniture Co.*, 659 Fed.Appx. 40, 43 (2d Cir. 2016) (collecting cases). The Ninth Circuit is the only other court of appeals to hold that class waivers may violate the NLRA. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016) (holding that mandatory waiver of concerted actions as a condition of employment is impermissible). The Ninth Circuit has held, however, that an opt-out right prevents any NLRA violation because it renders the waiver voluntary. *See Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1075–76 (9th Cir. 2014) (explaining that there is no "basis for concluding that [the defendant] interfered with or restrained [the plaintiff] 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"); *see also Morris*, 834 F.3d at 982 n.4.

Notably, in *Lewis*, the arbitration agreement did not include an opt-out clause, and the Seventh Circuit expressly declined to decide the effect of an opt-out clause on the enforceability of a class action waiver. Consequently, in cases where Uber moved to enforce similar arbitration agreements containing an opt-out clause, numerous district courts have distinguished *Lewis*, concluding that the arbitration provision's prohibition against class actions did not violate the NLRA because the plaintiff could have easily opted out. *See*, *e.g.*, *Kai Peng v. Uber Techs., Inc.*, No. 16-CV-545 (PKC) (RER), 2017 WL 722007, at *17 (E.D.N.Y. Feb. 23, 2017); *Singh v. Uber Techs. Inc.*, No. 16-3044 (FLW), —— F.Supp.3d ——, ——, 2017 WL 396545, at *10 (D.N.J. Jan. 30, 2017); *Scroggins v. Uber Techs., Inc.*, No. 1:16–cv–01419 2017 WL 373299, at *2 (S.D. Ind. Jan. 26, 2017); *Zawada*, 2016 WL 7439198, at *10; *Bruster v. Uber Techs., Inc.*, No. 15-CV-2653, 2016 WL 4086786, at *2 (N.D. Ohio Aug. 2, 2016).

Like the plaintiffs in the cases cited above, Plaintiff was not required to arbitrate his claims as a condition of employment. He had an absolute right to opt out of the Arbitration Provision within thirty days from entering into the Services Agreement. Therefore, the Magistrate Judge correctly found that *Lewis* is distinguishable and that the Arbitration Provision is not substantively unconscionable based on the class-action waiver.

E. The Court May Not Decide Whether the Arbitration Provision Violates California Public Policy.

[23] Finally, Plaintiff argues that because the Arbitration Provision contains a waiver of claims under California's Labor Code Private Attorneys General Act of 2004 ("PAGA") it is unenforceable on public policy grounds. This argument also fails. Under the Delegation Clause, the parties clearly and unmistakably agreed that an arbitrator must resolve all "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." (Doc. 23–1 at 22 (explaining that "[a]ll such matters shall be decided by an [a]rbitrator and not by a court or judge")).

Accordingly, if California law applied, which it does not, all of Plaintiff's challenges to the terms of the Arbitration Provision, including PAGA waivers, would have to be "adjudicated in the first instance by an arbitrator and not in court." *See Mohamed*, 848 F.3d at 1212 (holding that that district court erred by address a plaintiff's challenges to the enforceability and severability of the PAGA waiver in the 2014 Agreement because those challenges "fall to the arbitrator to decide"); *see also Micheletti*, —— F.Supp.3d at ——, 2016 WL 5793799, at *7.

IV. CONCLUSION

***8** Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. The Report and Recommendation (Doc. 61) is **ADOPTED** and **CONFIRMED** and made a part of this Order**.**

2. Defendants' Motion to Compel and Strike Class Action Allegations (Doc. 23) is **GRANTED**.

3. The parties shall proceed to arbitration within **thirty days** of this Order. This action shall be **STAYED** until such time as the parties' arbitration proceedings have been completed.

4. On or before **July 14, 2017**, and **every ninety days** thereafter, the parties shall file a status report as to the status of the arbitration. Additionally, within **ten days** of the termination of the arbitration proceedings, the parties shall notify the Court.

5. The Clerk is **DIRECTED** to administratively close the file, subject to the right of any party to apply to reopen the action upon good cause shown.

DONE and **ORDERED** in Orlando, Florida on March 31, 2017.

All Citations

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