CASE LAW

2005 WL 2373440
Only the Westlaw citation is currently available.
United States District Court,
W.D. Tennessee, Western Division.

Tracy GOREA, on behalf of himself and all others similarly situated Plaintiffs,
v.
THE GILLETTE COMPANY, Defendant.

No. 05-2425 MP.
|
Sept. 26, 2005.

Attorneys and Law Firms

Arthur E. Horne, III, Murray B. Wells, Horne Gilluly & Wells, PLLC, Frank L. Watson, III, William F. Burns, Watson Burns, LLC, Memphis, TN, for Plaintiffs.

Robb S. Harvey, Waller Lansden Dortch & Davis, Nashville, TN, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO STAY ALL PROCEEDINGS

PHAM, Magistrate J.

***1** Before the court is Defendant The Gillette Company's ("Gillette) Motion to Stay All Proceedings Pending Litigation Decision By The Judicial Panel on Multidistrict Litigation to Transfer Action, filed July 26, 2005 (dkt # 8). Plaintiff Tracy Gorea filed his response in opposition on August 5, 2005. Gillette filed a reply on August 12, 2005. For the following reasons, the motion is GRANTED.

I. BACKGROUND

On June 9, 2005, Gorea filed a complaint against Gillette, alleging that Gillette violated Tennessee common law and provisions of the Tennessee Consumer Protection Act, and a Motion for Class Certification. On the same day, a plaintiff ("Massachusetts plaintiff") in a related action against Gillette pending before the United States District Court for the District of Massachusetts, filed a Motion for Transfer and Coordination or Consolidation ("motion for transfer") with the Judicial Panel on Multidistrict Litigation ("JPMDL"). The JPMDL has scheduled a hearing on the motion for transfer for September 29, 2005.

In its motion, Gillette asks the court to stay all proceedings in Gorea's case while the parties await the JPMDL's decision on the motion to transfer. Gillette argues that proceeding with the litigation in this district would frustrate the policies that underlie 28 U.S.C. § 1407. Gorea does not oppose a temporary stay of discovery, but contends that Gillette should be required to respond to his complaint and motion for class certification, and that the court should rule on the issue of class certification before a stay of litigation.

II. ANALYSIS

A district court's power to stay proceedings "is incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. American Water Works & Elec. Co.,* 299 U.S. 249, 254 (1936). When considering a motion to stay a lawsuit, the court must "weigh competing interests and maintain an even balance." *Id.* at 255-56.

As this case was filed originally in federal court, this motion does not present the court with the more common issue of whether the court should rule on a pending motion to remand before it considers whether to stay the litigation until the JPMDL rules on a motion to consolidate and transfer. *See, e.g., Sherwood v. Microsoft Corp.,* 91 F.Supp.2d 1196, 1199 (M.D.Tenn.2000); *Farkas v. Bridgestone/Firestone, Inc.,* 113 F.Supp.2d 1107, 1115 (W.D.Ky.2000); *Weinke v. Microsoft Corp.,* 84 F.Supp.2d 989, 990 (E.D.Wisc.2000); *D's Pet Supplies, Inc. v. Microsoft Corp.,* No. 99-76056, 2000 U.S. Dist. LEXIS 16482, at *3 (E.D.Mich. Feb. 7, 2000) (unpublished); *Villarreal v. Chrysler Corp.,* No. C-95-4414, 1996 WL 116832, at *1 (N.D.Cal. Mar.12, 1996) (unpublished). Thus, the question of federal jurisdiction-and whether the court has jurisdiction to issue a stay-is not before the court.

The court finds that the requested stay is necessary and appropriate under the circumstances, for the same reasons stated in this court's order in a similar case pending in this district, *Holley Moore et al. v. The Gillette Company,* No. 05-1153, Order Granting Defendant's Motion to Stay and

Denying Gorea's Motion to Consolidate and to Appoint Interim Class Counsel (W.D.Tenn. Sept. 9, 2005) (Todd, C.J.). Although Gorea argues that, unlike the plaintiff in *Moore,* he opposes the motion to transfer, this argument is inconsistent with the record, which indicates that no such objection has been timely filed with the JPMDL, and thus Gorea has apparently acquiesced to the motion to transfer. *See* R.P.J.P .M.L. 7.2(c) ("Within twenty days after filing of a motion, all other parties shall file a response thereto. Failure of a party to respond to a motion shall be treated as that party's acquiescence to the action requested in the motion."). In any event, even if Gorea had in fact properly opposed the motion to transfer, the court nevertheless concludes that a stay is warranted in this case. Any prejudice to Gorea resulting from a stay would be minimal, whereas without a stay, the burden on Gillette of having to respond to the complaint and motion for class certification, as well as having to potentially engage in limited discovery on class certification issues, would be significant. Moreover, the court would have to use judicial resources in making rulings on the motion for class certification and related class discovery disputes in a case over which it might ultimately lose jurisdiction.

III. CONCLUSION

***2** For the reasons above, the Defendant's Motion to Stay All Proceedings Pending Litigation Decision By The Judicial Panel on Multidistrict Litigation to Transfer Action is GRANTED. All proceedings in this action are hereby STAYED until the JPMDL rules on the motion to transfer.

If the JPMDL rules that the instant action shall be transferred out of this district, the conduct of further proceedings shall be determined by the transferee court. If the motion to transfer this action is denied, Gillette shall have twenty (20) days to respond to the complaint.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2373440

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2016 WL 9526468
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

Carlos GUARISMA, Plaintiff,
v.
MICROSOFT CORPORATION, Defendant.

CASE NO. 15-24326-CIV-ALTONAGA/O'Sullivan
|
Signed 02/08/2016

Attorneys and Law Firms

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Brian Michael Ercole, Morgan Lewis, Bockius, Brian C. Frontino, Stroock & Stroock & LaVan LLP, Miami, FL, for Defendant.

ORDER

CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** came before the Court upon Plaintiff, Carlos Guarisma's ("Plaintiff['s]") Motion to Lift Stay ("Motion") [ECF No. 18], filed on January 6, 2016. The Court previously stayed this case pending a ruling by the U.S. Supreme Court in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015) ("*Spokeo*"). (*See* Dec. 28, 2015 Order [ECF No. 17]). Defendant, Microsoft Corporation ("Defendant") filed its Opposition ... ("Response") [ECF No. 21] on January 25, 2016; Plaintiff filed a Reply ... ("Reply") [ECF No. 23] on February 4, 2016. The Court has carefully considered the parties' submissions, the record, and applicable law.

Plaintiff argues the Court both cannot and should not enter a stay in this case. (*See generally* Mot.). Neither argument is persuasive. As to the Court's authority, Plaintiff argues binding Eleventh Circuit precedent prevents the Court from staying this case pending the outcome of *Spokeo*. (*See id.* 2–5). To support this argument, Plaintiff cites two criminal cases regarding stays of execution. (*See id.* (discussing *Gissendaner v. Ga. Dep't of Corr.*, 779 F.3d 1275 (11th Cir. 2015); *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297 (11th Cir. 2007))). Defendant argues these criminal execution cases are inapposite and do not strip the Court of its clear discretion to stay civil cases in the name of docket management and judicial economy. (*See* Resp. 7–8); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009).

While the Court is bound by applicable Eleventh Circuit precedent, Plaintiff does not cite, nor has the Court independently found, an Eleventh Circuit case applying either *Gissendaner* or *Schwab* to the civil context—or indeed to any context beyond a stay of execution. In the absence of clearer guidance, multiple district courts have granted stays pending the outcome of *Spokeo* (*see* Resp. 10 (collecting cases)), and multiple district courts have denied such stays (*see* Mot. 2 n.1 (collecting cases)). This demonstrates there is no controlling authority precluding use of the Court's well-established discretion to enter a stay to preserve the parties' resources and for judicial economy. [1]

1 Neither Plaintiff's comparison of the number of citations each party has provided, nor the assertion a "majority" of district courts nationwide have refused to enter stays (Reply 2), alters the Court's analysis of whether there exists binding Eleventh Circuit precedent on this issue.

Implicitly conceding the Court has discretion to enter a stay, Plaintiff also argues the Court *should* not do so because: 1) a stay merely delays discovery which will occur regardless of the outcome of *Spokeo*; 2) Defendant is not prejudiced by allowing this case to proceed; and 3) Plaintiff is prejudiced by a stay. (*See* Mot. 5–9). The Court disagrees.

First, the discovery Plaintiff seeks is not necessarily inevitable. Plaintiff argues delaying discovery is pointless because "*Spokeo* cannot affect the underlying substantive law of this case, only possibly its venue." (Mot. 6). Therefore, even if *Spokeo* removes the Court's subject matter jurisdiction over this case, Plaintiff will simply re-file in Florida state court and conduct discovery then. (*See id.*). Defendant argues *Spokeo* could preclude a state

action as well, because Florida courts look to federal law regarding the injury requirement of a federal cause of action, as Plaintiff would bring in Florida court too.[2] (*See* Resp. 12 (citing *Solares v. City of Miami*, 166 So. 3d 887, 889 (Fla. 3d DCA 2015))). Because *Spokeo* could also impact a state suit and preclude the need for discovery altogether, this argument fails to persuade.

2 In his Reply, Plaintiff argues if this occurs, he will simply file his case in Washington state court. (*See* Reply 6 n.5). Plaintiff fails to inform the Court whether Washington state law differs from Florida law in this respect.

***2** Second, Defendant may be prejudiced by allowing the case to proceed. Plaintiff argues Defendant would not be exposed to unnecessary costs if discovery proceeds in the interim because *Spokeo* will be decided before the Court's deadlines for class certification and substantive motion practice. (*See* Mot. 6–9). Beyond the fact any discovery expense might be unnecessary, Defendant argues the parties (and Court) would incur additional costs without a stay because Defendant would be filing its expected motion to compel arbitration.[3] (*See* Resp. 13 n.9). The Court agrees the prospect of the parties and the Court expending resources for the sake of orders that might soon be void for lack of jurisdiction is impractical.

3 Plaintiff argues there is no basis for such a motion (*see* Reply 5 n.2), but to resolve this dispute here, the Court and parties would incur precisely the costs a stay judiciously avoids until necessary.

Third, Plaintiff need not be prejudiced by a stay. Plaintiff argues he would be unfairly prejudiced by the delayed resolution of his claim and the "invariable" degradation of evidence during any delay. (*See* Mot. 7–8). As for the delayed resolution, Defendant argues, and the Court agrees, the short wait for the Supreme Court to issue its decision in a case that has already been argued is not substantial enough to unduly prejudice Plaintiff. (*See* Resp. 14–15). As for degradation of evidence, Defendant acknowledges its obligation to preserve evidence. (*See id.* 15). Plaintiff still expresses concern for evidence which may be in the possession of non-party "credit card companies and banks that issued the cards," and thus could "be irretrievably lost if the non-parties go bankrupt, or alter or delete the information as part of their normal data and document destruction policies, or if the data is inadvertently corrupted" without discovery commencing now so subpoenas may issue immediately. (Mot. 8). The Court agrees with Defendant the risk of these outcomes is slight for a delay of a few weeks or months. (*See* Resp. 15).

In light of the foregoing, the Court is satisfied a short stay pending the imminent resolution of *Spokeo* will prevent unnecessary expenditures of time and resources, will not prejudice either party, and is in the public interest of judicial economy and efficiency. *See Lopez v. Miami-Dade Cnty.*, No. 15-Civ-22943-COOKE/TORRES, 2015 WL 7202905, at *1 (S.D. Fla. Nov. 6, 2015). Accordingly, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 18]** is **DENIED**. The Clerk of the Court is **DIRECTED** to mark this case **CLOSED** for statistical purposes only, and any pending motions are **DENIED as moot**. The time for filing Defendant's response to the Complaint is tolled during this stay. The Court nonetheless retains jurisdiction and the case shall be restored to the active docket upon Court order following motion of a party.

The parties are to submit a joint status report every forty-five (45) days beginning **March 1, 2016**, advising the Court of the status of the proceedings pending before the U.S. Supreme Court. This Order shall not prejudice the rights of the parties to this litigation.

DONE AND ORDERED in Miami, Florida, this 8th day of February, 2016.

All Citations

Slip Copy, 2016 WL 9526468

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2011 WL 1596007
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

HARRELL'S LLC, and Florala, LLC, Plaintiffs,
v.
AGRIUM ADVANCED (U.S.)
TECHNOLOGIES, INC., Defendant.

No. 8:10–CV–1499–T–33AEP.
|
April 27, 2011.

Attorneys and Law Firms

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ORDER

VIRGINIA M. HERNANDEZ COVINGTON, District Judge.

***1** This matter comes before the Court pursuant to Defendant Agrium's Motion to Stay Discovery (Doc. # 23), which was filed on December 7, 2010. Plaintiffs Harrell's and Florala filed a Response in Opposition to the motion on December 14, 2010. (Doc. # 24). Also before the Court is Agrium' s Motion for Protective Order (Doc. # 39), which was filed on April 18, 2011. For the reasons that follow, the Court grants the motion to stay discovery and denies as moot the motion for protective order.

I. ***Procedural History***

Harrell's and Florala initiated this action for damages and equitable relief against Agrium on July 6, 2010. (Doc. # 1). On October 19, 2010, Harrell's and Florala filed an amended complaint that contains the following counts: (1 and 2) declaratory judgment; (3) injunctive relief enjoining breach of duty; (4) equitable accounting; (5) restitution by disgorgement; and (6) breach of contract. (Doc. # 3). The Court has diversity of citizenship jurisdiction over this matter pursuant to 28 U.S.C. § 1332. On January 3, 2011, Agrium filed its answer, counterclaim for breach of operating agreement by Harrell's, and motion to dismiss count one of the amended complaint. (Doc. # 26, 27). Harrell's and Florala responded to the motion to dismiss on January 31, 2011. (Doc. # 34).

II. ***Arbitration Issues***

A. ***Motion to Compel Arbitration***

Agrium filed a motion to compel arbitration on November 12, 2010 (Doc. # 10), arguing that the parties' dispute is subject to a binding agreement to arbitrate that is contained within the parties' operating agreement. Harrell's and Florala responded on November 22, 2010, asserting "the scope of the narrow arbitration agreement offered by [Agrium] does not embrace arbitration of the claims in this case." (Doc. # 16 at 1). Agrium filed a reply memorandum on December 3, 2010, contending, among other things, that arbitration is required because "the factual allegations forming the basis of each and every claim in the Amended Complaint are identical to the factual impasse items that are subject to arbitration under Section 15.03 [of the parties' operating agreement]." (Doc. # 22 at 1). The Court has yet to resolve the motion to compel arbitration.

B. ***Motion to Stay Discovery and for Protective Order***

On December 7, 2010, Agrium filed a motion stay discovery pending resolution of the motion to compel arbitration. (Doc. # 23). Essentially, Agrium argues that, if it participates meaningfully in discovery, it will be deemed to have waived its right to pursue arbitration. Agrium also filed a motion for protective order on April 18, 2011, asserting similar arguments to those it asserted in its motion to stay discovery: "Engaging in discovery while the Motion to Compel Arbitration is pending would defeat the very purpose of that Motion and the arbitration clause itself-namely, to try to avoid the costs associated with this litigation and instead to create the opportunity for a relatively inexpensive and expedient process to resolve the disputes." (Doc. # 39 at 5).

***2** As will be discussed herein, the Court grants the motion to stay discovery pending resolution of the motion to compel arbitration. It is therefore unnecessary for the Court to analyze the motion for protective order. The

order granting the motion to stay discovery moots the motion for protective order.

C. *Analysis*

A number of courts have determined that participation in litigation, including discovery, can militate in favor of a finding that a party has waived their right to arbitrate. *See Citibank v. Stok & Assocs.,* 387 F. App'x 921, 924 (11th Cir.2010) (participating in litigation can satisfy the first prong of the waiver test when a party seeking arbitration substantially participates in litigation to a point inconsistent with the intent to arbitrate.") (internal citations omitted).

In addition, Harrell's and Florala have taken the position that, if Agrium participates in discovery, it will be deemed to have waived its request to arbitrate. Counsel for Harrell's and Florala indicated in a written communication to Agrium that "it is our fixed position that [Agrium's] proceeding with discovery in this action will constitute a waiver by [Agrium] of arbitration and any other related relief requested in its Motion to Compel Arbitration and to Stay proceedings under applicable law." (Doc. # 23–1 at 2).

In its response to the motion to stay discovery pending resolution of the motion to compel arbitration, Harrell's and Florala recognize the existence of "ample case law holding that a Court may suspend discovery pending the resolution of a motion to compel discovery" but argue that the Court should not stay discovery here because this case presents "exceptional circumstances." (Doc. # 24 at 2). Harrell's and Florala rely on *Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers v. Leona Lee Corp.,* 434 F.2d 192, 194 (5th Cir.1970) and *Koch Fuel Int'l, Inc. v. S. Star,* 118 F.R.D. 318, 320 (S.D.N.Y.1987).

The Court has considered the arguments of the parties and determines that it is appropriate to stay discovery pending resolution of the motion to compel arbitration. There are no exceptional circumstances here that require denial of the motion to stay. The cases cited by Harrell's and Florala describing exceptional circumstances are inapposite to the present case. Specifically, in *Int'l Ass'n of Heat & Frost Insulators,* the court required the parties to engage in discovery "to the extent necessary for the presentation of matters submitted for Trade Board and Arbitration determination" where a collective bargaining agreement required "the settlement of disputes in Trade Board proceedings, followed by arbitration in the event the Trade Board failed to reconcile the parties' differences." 434 F.2d at 193.

Likewise, in *Koch Fuel,* an admiralty case, the court held, "Although discovery on the subject matter of a dispute to be arbitrated generally has been denied, courts have recognized that discovery may be appropriate in exceptional circumstances ... [such as] where a vessel with crew members possessing particular knowledge of the dispute is about to leave port." 118 F.R.D. at 320. The facts of the present case are not aligned with the facts of the cases mentioned by Harrell's and Florala and do not present exceptional circumstances. After due consideration, the Court grants the motion to stay discovery.

***3** Accordingly, it is hereby

ORDERED, ADJUDGED, and **DECREED:**

(1) Defendant Agrium's Motion to Stay Discovery (Doc. # 23) is **GRANTED.**

(2) Discovery is **STAYED** pending the Court's ruling on Agrium's Motion to Compel Arbitration (Doc. # 10).

(3) Agrium's Motion for Protective Order (Doc. # 39) is denied as moot.

DONE and **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 1596007

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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
|
Signed 03/01/2017

Attorneys and Law Firms

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Courtney Blair Wilson, Lindsay Marie Alter, Jessica Theresa Travers, Littler Mendelson, P.C., Miami, FL, for Defendant.

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

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 Aerospoace 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

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

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

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

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.

All Citations

Slip Copy, 2017 WL 878712, 2017 L.R.R.M. (BNA) 65,740

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United States District Court, M.D. Florida,
Fort Myers Division.

Frank LATELL, Plaintiff,
v.
Peter C. TRIANO and Santander Bank, National Association, Defendants.

No. 2:13–cv–565–FtM–29CM.
|
Signed Feb. 28, 2014.

Attorneys and Law Firms

John D. Agnew, Henderson, Franklin, Starnes & Holt, PA, Ft. Myers, FL, for Plaintiffs.

Lawrence P. Rochefort, Akerman Senterfitt, West Palm Beach, FL, for Defendants.

ORDER

CAROL MIRANDO, United States Magistrate Judge.

***1** This matter comes before the Court upon review of Defendants' Motion to Stay Discovery Pending Adjudication of Their Motions to Dismiss Plaintiff's Amended Complaint (Doc. 33) filed on January 21, 2014. Plaintiff, *pro se,* Frank Latell has failed to file a response and the time to do so has expired, although when contacted by Defendants regarding the Motion, Plaintiff objected to the relief requested. Doc. 33 at 6.

Defendants Peter C. Triano and Santander Bank, National Association, jointly request to stay discovery of this matter, citing *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353 (11th Cir.1983), pending a ruling by the Court on their Motions to Dismiss (Docs.27, 28), which assert lack of personal jurisdiction, lack of standing, failure to state a claim, and Florida's absolute litigation privilege. In *Chudasama,* the Eleventh Circuit noted that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should ... be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true." *Id.* at 1367 (footnote omitted). "Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion." *Id:, Horsley v. Feldt,* 304 F.3d 1125, 1131 n. 2 (11th Cir.2002). However, *Chadsuma* does not stand for the proposition that all discovery in every circumstance should be stayed pending a decision on a motion to dismiss. *Koock v. Sugar & Felsenthal, LLP,* 2009 WL 2579307, at *2 (M.D.Fla. Aug.19, 2009). "Instead, *Chudasama* and its progeny 'stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount.' " *Id.* (citing *In re Winn Dixie Stores, Inc.,* 2007 WL 1877887, at *1 (M.D.Fla. June 28, 2007)).

In deciding whether to stay discovery pending resolution of a motion to dismiss, the court must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery. *McCabe v. Foley,* 233 F.R.D. 683, 685 (M.D.Fla.2006) (citation omitted). To this end, the court must take a "preliminary peek" at the merits of the dispositive motion to see if it "appears to be clearly meritorious and truly case dispositive." *Id.* (citation and internal quotation marks omitted).

Defendants argue that good cause exists to grant the stay because they have made a likely meritorious facial challenge to Plaintiff's Amended Complaint and if discovery goes forward, unnecessary costs will be incurred. In this case, the Court previously dismissed Plaintiff's Complaint as an impermissible "shotgun pleading" and directed him to amend his complaint. Doc. 23. Defendants argue that Plaintiff's Amended Complaint (Doc. 24) still contain numerous pleading deficiencies and fails to state a claim.

***2** Because there are pending motions challenging personal jurisdiction, standing, and the legal sufficiency of the amended complaint, the Court will stay discovery for a period of 90 days. Delaying discovery until the Court rules on whether it has jurisdiction and Plaintiff has stated a viable cause of action will cause Plaintiff little harm.

ACCORDINGLY, it is hereby

ORDERED:

(1) Defendants' Motion to Stay Discovery Pending Adjudication of Their Motion to Dismiss Plaintiff's

Amended Complaint (Doc. 33) is **GRANTED in part.** All deadlines in the Case Management and Scheduling Order (Doc. 30), as well as disclosures and discovery, are **STAYED** for a period of 90 days from the date of this Order. The Clerk is directed to add a stay flag to the docket.

(2) Within ten days after the expiration of the 90–day period, if this matter is not resolved by the dispositive motions or the Court has not yet ruled on the motions, the parties are directed to file an amended case management report.

(3) Plaintiff's Motion to Compel Discovery (Doc. 35) is **DENIED as moot.** Plaintiff may re-file the Motion to Compel when and if discovery recommences in this case.

(4) Defendants' Restated Motion for Extension of Time to Respond to Discovery Requests (Doc. 37) is **DENIED as moot.**

(5) Defendants' Motion for Leave to Appear Telephonically at Mediation (Doc. 38) is **DENIED as moot** as the mediation deadline in this matter is stayed.

DONE and **ORDERED.**

All Citations

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United States District Court, S.D. Florida.

In re: MANAGED CARE LITIGATION

No. 1334, 00-1334-MD.
|
June 12, 2001.

ORDER STAYING PROVIDER TRACK DISCOVERY

MORENO, J.

***1** THIS MATTER came before the Court on *June 4, 2001* upon Defendant PacifiCare's oral motion to stay discovery in the provider track cases, and the Subscriber Plaintiffs' oral motion for the Subscriber Plaintiffs to be permitted to join the Provider Plaintiffs in conducting discovery, as per the Court's May 8, 2001 Order Lifting Stay of Discovery in the provider track cases. It is

ADJUDGED that the Court stays discovery in the provider track cases until after it rules upon (1) the Provider Defendants" motions to compel arbitration, (2) the Provider Defendants' motions to dismiss the Provider Plaintiffs' Consolidated, Amended Class Action Complaint, and (3) the anticipated Subscriber Defendants' motions to dismiss the Subscriber Plaintiffs' anticipated amended complaint. [1]

1 Simultaneous with the Court issuing this Order, the Court also is issuing its Order of Partial Dismissal Without Prejudice of the Subscriber Plaintiffs' complaints. As stated in that Order, the Subscriber Plaintiffs shall have until *June 29, 2001* to file amended complaints. The Defendants shall have until *July 27, 2001* to respond to the amended complaints. In the event that the Subscriber Defendants do not move to dismiss the amended complaints by this date (and the Court has ruled on the provider track motions to compel arbitration and to dismiss), discovery shall be lifted at that juncture.

Defendant PacifiCare raises various grounds to justify a stay of all provider track discovery. First, Defendant posits that the Court should stay discovery pending appellate review of the Court's December 11, 2001 Order Granting in Part and Denying in Part Various Defendants' Motions to Compel Arbitration ("Arbitration Order"), relying primarily upon Chief Judge Easterbrook's opinion in *Bradford-Scott Date Corp., Inc. v. Physician Computer Network, Inc .,* 128 F.3d 504 (7th Cir.1997). Second, Defendant argues that the Court should stay discovery until after the Court rules on Provider Plaintiffs' motion for class certification. *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353 (11th Cir.1997). Lastly, Defendant argues that the Court should stay discovery until after the Court rules on the pending motions to compel arbitration and to dismiss Provider Plaintiffs' Consolidated, Amended Class Action Complaint. *Id.* In addition, Subscriber Plaintiffs move the Court to be permitted to join Provider Plaintiffs in discovery, so that there will be parallel discovery with no duplication of effort by any of the parties to the litigation.

A. Whether to Stay Discovery Pending Appellate Review of Arbitration Order

Defendant PacifiCare argues again that this Court is divested of jurisdiction over this entire multi-district litigation, or at least all provider track cases, based upon *Bradford-Scott,* where the Seventh Circuit stayed discovery while an appeal of a denial of arbitration, pursuant to § 16(a)(1)(A) of the Federal Arbitration Act ("FAA"), was pending. *Bradford-Scott,* 128 F.3d at 507; *see Baron v. Best Buy Co., Inc.,* 79 F.Supp.2d 1350 (S.D.Fla.1999) (adopting *Bradford-Scott* holding, preventing delay tactics by defendants by making determination that appeal was colorable). Only two of the four defendants in *Bradford-Scott* were appealing the denial of motions to compel arbitration. Nonetheless, the Court ruled that:

"[I]t is fundamental to a hierarchical judiciary that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance-it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."

***2** *Bradford-Scott,* 128 F.3d at 505 (*quoting Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982)).

Although *Bradford-Scott* is persuasive, it is factually distinguishable from the provider track of this multi-district litigation, which involves twelve named defendants, twenty individual plaintiffs, and four associational plaintiffs (not including tag-along litigants).

In the instant litigation, unlike in *Bradford-Scott,* there are individual claims that conclusively are non-arbitrable. These claims include all RICO claims lodged by any individual plaintiff against a defendant where the parties did not sign an arbitration agreement (i.e., Dr. Book's RICO claims against Aetna, United, PacifiCare, and Humana). Furthermore, there are other potential distinguishing factors between the instant litigation and the factual scenario in *Bradford-Scott.* For example, the *Bradford-Scott* court noted that the district court did not make a determination as to whether discovery among the plaintiffs and the non-appealing defendants may sensibly proceed without the other two defendants. *Id.* at 507. The *Bradford-Scott* plaintiff did not make any argument that the appeals, or any portion, are frivolous. *Id.* at 506; *see Baron,* 79 F.Supp.2d at 1354 ("[D]ilatory conduct ... can be checked by allowing the district court to proceed with the litigation if the appeal from the order refusing to compel arbitration is frivolous.").

This Court need not determine if the appeal, or any portion, is colorable because it is staying discovery until it rules on provider motions to compel arbitration and both provider and subscriber motions to dismiss, so that discovery on both tracks proceeds at the same time. [2]

[2] The Court also reserves judgment on whether discovery may sensibly proceed against the non-appealing Defendants, as well as the Defendants who have appealed certain claims but have other non-arbitrable claims pending before the Court.

B. Whether to Stay Discovery Until After Court Rules

Defendant PacifiCare also urges the Court to stay all provider track discovery until after the Court rules upon Defendants' motions to dismiss and to compel arbitration, as well as Provider Plaintiffs' motion for class certification. *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353 (11th Cir.1997). As discussed below, this request dovetails, in certain respects, with Subscriber Plaintiffs' oral motion to join in Provider Plaintiffs' discovery.

At the onset, the Court notes that the management of the provider track cases is markedly distinguishable from *Chudasama,* where the parties engaged in years of discovery without meaningful court involvement. *See id.* at 1367 (holding that trial court's "mismanagement" of the case was an abuse of discretion). This Court firmly abides by *Chudasama*' s instructions that "[d]iscovery should follow the filing of a well-pleaded complaint[,]" *id.* at 1367 (*quoting Kaylor v. Fields,* 661 F.2d 1177, 1184 (8th Cir.1981)), and that "any legally unsupported claim that would unduly enlarge the scope of discovery should be eliminated before the discovery stage, if possible." *Chudasama,* 123 F.3d. at 1368.

***3** Nevertheless, the Court does find in its discretion sufficient justification to stay discovery for a limited period of time while the Court rules on the provider motions to dismiss and to compel arbitration, as well as the anticipated motions to dismiss the subscriber track anticipated amended complaints. The litigants in the provider track cases have worked arduously under a demanding Court schedule to brief a variety of issues that are now pending before the Court. While the Court desires to move this multi-district litigation at the swift pace that the Court typically moves its other cases, the Court is cognizant of the complexity of the issues involved in this litigation and the amount of time, effort, and money that all parties are expending litigating this case. As such, the Court expects that discovery will proceed in the most efficient and effective manner feasible.

Discovery in this case has the potential to consume vast resources from all litigants. The Court does not desire to see duplication of effort. Under current circumstances, it would be burdensome if the Defendants-many of whom are involved in both subscriber and provider track cases-were required to conduct quite similar discovery first with Provider Plaintiffs and then with Subscriber Plaintiffs. While the Court already has granted Provider and Subscriber Plaintiffs' request to be permitted to share discovery materials, the granting of this request will not eliminate the plaintiffs' right to depose Defendants' corporate representatives. Discovery, when the stay is lifted, shall continue in a fashion that will not duplicate efforts and will cause the least possible disruption to Defendants' businesses.

Accordingly, the Court grants Subscriber Plaintiffs' request to be permitted to join with Provider Plaintiffs in discovery. Parallel discovery is the most efficient way for this multi-district litigation to proceed. Thus, once the Court rules on the provider and subscriber motions to dismiss and the provider motions to compel arbitration, all parties will be able to proceed with discovery concurrently.

2001 WL 664391

All Citations

Not Reported in F.Supp.2d, 2001 WL 664391

KeyCite Yellow Flag - Negative Treatment
Distinguished by Orbitcom, Inc. v. Qwest Communications Corp., D.Colo., June 15, 2009

357 F.Supp.2d 1277
United States District Court, D. Colorado.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC. Plaintiff,
v.
Joseph COORS, Jr., and K. Mack Robinson, Defendants.

No. CIV.A. 04–F–1609CBS.
|
Dec. 21, 2004.

Synopsis

Background: Securities broker brought action against corporate client's alleged principal, alleging claims for fraud—nondisclosure or concealment, aiding and abetting fraud, and negligent misrepresentation, nondisclosure, and/or concealment causing financial loss in a business transaction. Defendant moved to stay proceedings pending a decision on his motion to dismiss or, in the alternative, compel arbitration.

Holding: The District Court, Shaffer, United States Magistrate Judge, held that stay was warranted pending resolution of pending dispositive motion.

Motion granted.

West Headnotes (1)

[1] Alternative Dispute Resolution
Performance, breach, enforcement, and contest of agreement

Stay of securities broker's action against corporate client's alleged principal, alleging claims for fraud—nondisclosure or concealment, aiding and abetting fraud, and negligent misrepresentation, nondisclosure, and/or concealment causing financial loss in a business transaction, pending a decision on alleged principal's motion to dismiss or, alternatively, compel arbitration was warranted, given that it was inexorably intertwined with client's arbitration proceeding against broker, alleging that it suffered losses in excess of $6 million because of broker's malfeasance, resolution of pending dispositive motion could dispose of entire action, and broker would not be prejudiced by stay.

17 Cases that cite this headnote

Attorneys and Law Firms

***1277** Stephen K. Ingebretsen, Esq., Sander Ingebretsen, Miller & Parish, PC, Denver, CO, for Plaintiff.

Tom McNamara, Esq., S. Lee Terry, Jr., Esq., Davis Graham & Stubbs, Denver, CO, for Defendant Coors, Jr.

David A. Zisser, Esq., Isaacson Rosenbaum Woods & Levy, PC, Denver, CO, for K. Mack Robinson.

ORDER GRANTING DEFENDANT COORS, JR.'S MOTION TO STAY DISCOVERY PENDING DETERMINATION OF THRESHOLD ARBITRATION ISSUES

SHAFFER, United States Magistrate Judge.

THIS MATTER comes before the court on Defendant Coors, Jr.'s Motion to Stay Discovery, Vacate Scheduling/ Planning Conference and Defer Fed.R.Civ.P. 16 Scheduling Process Pending Determination of Threshold Arbitration Issues, dated October 7, 2004. Defendant Coors seeks ***1278** to stay proceedings in this action, including discovery and pretrial scheduling, pending a decision on his motion to Motion to Dismiss or, in the Alternative, Compel Arbitration, filed on September 1, 2004. Plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") filed its Response to Defendant Coors' Motion to Stay on November 4, 2004, arguing that the court should not stay pretrial proceedings because its claims against Defendants Coors and Robinson are not referable to arbitration. By Order of Reference to United States Magistrate Judge, dated August 6, 2004, this matter was referred to the Magistrate Judge to, *inter alia,* "hear

and determine pretrial matters, including discovery and non-dispositive motions." The court heard oral argument on the pending motion during a hearing on November 29, 2004.

The instant action is inexorably intertwined with an arbitration proceeding initiated against Merrill Lynch and a Merrill Lynch broker, James D. Pell, by Comet Enterprises, LLC ("Comet") on June 8, 2004. *See Comet Enterprises, LLC v. Merrill Lynch, Pierce, Fenner & Smith Inc. and James D. Pell,* NASD Case No. 04–04080. In that arbitration proceeding, Comet alleges that it suffered losses in excess of $6 million because of the malfeasance of Merrill Lynch and Pell relating to Comet's account at Merrill Lynch. Comet contends that Merrill Lynch and Pell breached their contract with Comet, breached their fiduciary duties, acted negligently, engaged in unauthorized transfers, and aided and abetted the fraud perpetrated by another Merrill Lynch customer, Claude Lefebvre, his associate, Dennis Herula, and their company, Watch Hill Capital Management LLC. Comet's arbitration remains pending.

Plaintiff Merrill Lynch initiated this action on August 3, 2004, alleging three claims for relief: (1) fraud—nondisclosure or concealment, (2) aiding and abetting fraud, and (3) negligent misrepresentation, nondisclosure and/or concealment causing financial loss in a business transaction. More specifically, Merrill Lynch contends that Defendants Coors and Robinson engaged in tortious conduct and fraudulently induced Plaintiff to enter into transactions with Comet by, *inter alia,* failing to disclose certain "blatantly false promises of exorbitant returns" made by Mr. Lefebvre, and by failing to disclose that Comet had been created with the express purpose of pursing "alternative" strategies and "aggressive" business opportunities and instead by representing only that Comet's business was "Trading AA or better Fixed income products." *See* Complaint, at ¶ 11. With this action, Merrill Lynch seeks to recover for damages incurred in responding to subpoenas and cooperating with the criminal investigations of Lefebvre and Herula, and for significant damages incurred in responding to Comet's arbitration actions alleging that Merrill Lynch, rather than Coors and Robinson themselves, are responsible for Comet's losses. *See* Complaint, at ¶ 12.

Plaintiff's Complaint specifically alleges that Defendant Coors was a principal of Comet Enterprises, LLC ("Comet"). *See* Complaint, at ¶ 2. Merrill Lynch further alleges, in pertinent part, that

> on or about July 3, 2002, Comet opened a nondiscretionary account at Merrill Lynch. In its WCMA Account Authorization for Limited Liability Companies (the "WCMA Authorization"), which is one of the contractual forms Comet submitted with its new account documentation, Comet expressly named [Claude] Lefebvre as an "Authorized Representative," along with Coors and Robinson.

See Complaint, at ¶ 18.

The WCMA Authorization states that Comet Enterprises is managed by its "members" and identifies Defendant Coors ***1279** as one of those members. Under the terms of the WCMA Authorization, Defendant Coors and his fellow members certified that Comet was authorized to open a margin securities account and a "WCMA Check/Card Account." Both of these accounts were to be governed by the terms and conditions set out in pages 1 through 9 of the WCMA Agreement/Program Description Booklet. The WCMA Authorization also specifically provided that "[Comet] through the members ... and the members ... individually, hereby consent and agree to hold [Merrill Lynch] harmless for relying upon any orders or instructions received by [Merrill Lynch] from any of the above Authorized Representative(s)." Finally, Comet and Defendant Coors, individually, "agree[d] to all of the terms and conditions of the WCMA agreement" and agreed "in accordance with Paragraph 16 which may be found in the WCMA Agreement/Program Description Booklet ... to arbitrate any controversy which may arise with [Merrill Lynch]." *See* Exhibit C attached to Defendant Coors' Motion to Dismiss, and Exhibit B attached to Plaintiff's Response to Defendant Coors' Motion to Dismiss.

The terms and conditions set forth in the WCMA Agreement are also germane to the issues raised in the pending motion. Plaintiff correctly cites that portion of the Agreement which states that "[t]he customer agrees that all controversies that may arise between the Customer and [Merrill Lynch] ... shall be determined by arbitration." Merrill Lynch contends that the term "Customer" is

narrowly defined to mean "the business or organization on whose behalf the WCMA Account Authorization form is signed." *See* Exhibit D attached to Defendant Coors' Motion to Dismiss, and Exhibit C attached to Plaintiff's Response to Defendant Coors' Motion to Dismiss. According to Plaintiff, the "protections of the contractual agreement between Merrill Lynch and its customer, Comet" are available only to "Comet and Comet's members or managers." [1] *See* Plaintiff's Response to Defendant Coors' Motion to Dismiss, at 2. Merrill Lynch claims that, notwithstanding "Coors' and Robinsons' misrepresentations in the WCMA Agreement," the only "members" of Comet Enterprises are Golden Heritage, LLC and Progressive Financial Group, Inc. *See* Complaint at ¶ 16.

1 It should be noted that the WCMA Agreement/ Program Description Booklet states that a "Customer" subscribing to the WCMA financial service may elect to receive standard or WCMA Visa Business Signature Cards. Under the terms of the WCMA Agreement, "certain individuals are designated in the WCMA Account Opening Documents ... as authorized to use Visa Business Cards." Those persons "individually can do anything that the Customer can do under the WCMA Agreement." Presumably, those individuals would enjoy the same arbitration rights under Paragraph 16 as the "Customer," which would seem to argue against Plaintiff's very restrictive interpretation of the arbitration provision.

The Federal Arbitration Act provides that upon motion by a party, the court "shall" stay judicial proceedings if the court is satisfied that the issue *sub judice* is encompassed a written arbitration agreement. *See* 9 U.S.C. § 3. Section 4 of the Federal Arbitration Act also empowers a party "to invoke the authority of a federal district court in order to force a reluctant party to arbitrate a dispute." *Mutual Benefit Life Insurance Co. v. Zimmerman,* 783 F.Supp. 853, 865 (D.N.J.1992) (quoting *PaineWebber Inc. v. Hartmann,* 921 F.2d 507, 510 (3rd Cir.1990)). Because "the right to compel arbitration derives from a contractual right," it is generally recognized that a third-party lacks standing to compel arbitration. *Trompeter v. Boise Cascade Corp.,* 877 F.2d 686, 687 (8th Cir.1989). However, courts have recognized ***1280** an exception to that general rule where the nonparty is an agent of a party or a third-party beneficiary to the contract. *See Mutual Benefit Life Insurance Co. v. Zimmerman,* 783 F.Supp. at 865 and cases cited therein. *See also Roe v. Gray,* 165 F.Supp.2d 1164, 1175 (D.Colo.2001) (holding that non-signatories to an arbitration agreement may attempt to compel arbitration where the claims against the non-signatories are based on the same factual allegations and even the same contract as claims involving the signatories); *Creative Telecommunications, Inc. v. Breeden,* 120 F.Supp.2d 1225, 1240 (D.Hawai'i 1999) (nothing that "[f]ederal courts have consistently afforded agents, employees and representatives the benefit of arbitration agreement entered into by their principals to the extent that the alleged misconduct relates to their behavior ... in their capacities as agents of the corporation"). "To determine whether an agency relationship exists, courts look to the terms of the agreement and the allegations of the complaint." *Mutual Benefit Life Insurance Co. v. Zimmerman,* 783 F.Supp. at 866.

Plaintiff must concede that the court has considerable discretion over the timing of discovery. *See, e.g., United States v. Evans & Associates Construction Co., Inc.,* 839 F.2d 656, 660 (10th Cir.1988); *Salter v. Upjohn Co.,* 593 F.2d 649, 651 (5th Cir.1979). *See also* Fed.R.Civ.P. 26(c) (permitting the court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"). I also acknowledge the " 'liberal policy favoring arbitration' and that 'any issues concerning the scope of arbitrable issues should be resolved in favor of arbitration.' " *Roe v. Gray,* 165 F.Supp.2d at 1174 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

At this juncture, the court finds good cause for Defendant's requested stay. While the court has no reason to address the ultimate merits of the parties' respective positions on the scope and applicability of the arbitration provision at issue, I find that the interests of judicial economy would be advanced by staying discovery in this action pending a decision on Defendant's dispositive motion. *Cf. Klepper v. SLI, Inc.,* 45 Fed.Appx. 136, 2002 WL 2005431 (3rd Cir.2002) (in reversing lower court's order permitting discovery, held that "requiring the parties to submit to full discovery [prior to a ruling on the arbitrability issue] may unnecessarily subject them 'to the very complexities, inconveniences and expenses of litigation that they determined to avoid' "). Based upon the present record, I do not find that Defendant's motion

to dismiss has been interposed for any improper purpose, such as to harass or cause unnecessary delay. I am also mindful that resolution of the pending dispositive motion may dispose of the entire action. *Cf. Nankivil v. Lockheed Martin Corp.,* 216 F.R.D. 689, 692 (M.D.Fla.2003) (citing various cases in which courts stayed discovery pending rulings on motions that would dispose of the entire case). Finally, I do not find that Plaintiff would be prejudiced by the requested stay. *Cf. Anti–Monopoly, Inc. v. Hasbro, Inc.,* 1996 WL 101277, *2 (S.D.N.Y.1996) (finding that "good cause" for a stay of discovery may be shown where the moving party has filed a dispositive motion, where the stay is for a short period of time, and the opposing party will not be prejudiced by the stay); *In re First Constitution Shareholders Litigation,* 145 F.R.D. 291, 293 (D.Conn.1991) (granting defendants' motion for a stay of discovery after finding there would be no prejudice to plaintiff, "which 'will have ample time [if the motion to dismiss is denied] to take discovery on the merits of its claims' "). ***1281** Accordingly, for the foregoing reasons, Defendant Coors, Jr.'s Motion to Stay Discovery, Vacate Scheduling/Planning Conference and Defer Fed.R.Civ.P. 16 Scheduling Process Pending Determination of Threshold Arbitration Issues, dated October 7, 2004, is GRANTED. With this Order, all discovery and pretrial scheduling in the instant action is stayed pending a decision on Defendant Coors' Motion to Dismiss or, in the Alternative, Compel Arbitration, filed on September 1, 2004.

All Citations

357 F.Supp.2d 1277

End of Document

2008 WL 11336388
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida,
Jacksonville Division.

Gina MORAT on behalf of herself and all others similarly situated, Plaintiff,
v.
CINGULAR WIRELESS LLC, a foreign corporation now known as AT&T Mobility, LLC, Defendant.

Case No. 3:07–cv–1057–J–20JRK
|
Signed 02/14/2008

Attorneys and Law Firms

Jack Reise, Michael L. Greenwald, Stephen Richard Astley, Coughlin, Stoia, Geller, Rudman & Robbins, LLP, Boca Raton, FL, for Plaintiff.

Archis A. Parasharami, Evan M. Tager, Kevin Ranlett, Mayer Brown LLP, Washington, DC, Daniel Kearney Bean, William F. Hamilton, John Matthew Guard, Holland & Knight, LLP, Jacksonville, FL, for Defendant.

ORDER

JAMES R. KLINDT, United States Magistrate Judge

***1** This cause is before the Court on Defendant AT&T Mobility LLC's Motion to Stay Discovery and the Rule 26(f) Conference Pending Resolution of its Motion to Compel Arbitration and to Dismiss Action (Doc. No. 19; Motion) filed on January 18, 2008. Plaintiff filed a Response in Opposition to Defendant's Motion on February 5, 2008 (Doc. No. 22; Response).

On November 15, 2007, Plaintiff filed a class action Complaint against Defendant (Doc. No. 1; Complaint) alleging that Defendant has violated the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681, et. seq., by "continu[ing] to issue electronically printed receipts to consumers that contain more than the last five digits of the consumer's credit card or debit card and/or the consumer's credit card or debit card expiration date," although FACTA prohibits this conduct. Compl. at 6. In response, on December 17, 2007, Defendant filed a Motion to Compel Arbitration and Dismiss the Action (Doc. No. 6; Motion to Compel Arbitration). In the Motion to Compel Arbitration, Defendant contends that Plaintiff's husband "entered into a service agreement with [Defendant] containing an arbitration provision that requires him and all 'users or beneficiaries of services or equipment under this or prior Agreements between [Defendant and Plaintiff's husband]' to resolve their claims through individual arbitration or in small claims court." Motion to Compel at 1 (presumably quoting the service agreement). Plaintiff responded on January 7, 2008 (Doc. No. 9; Response to Motion to Compel Arbitration) by asserting that the arbitration clause contained in the service agreement "by its very terms does not cover Plaintiff's FACTA claim." Response to Motion to Compel Arbitration at 6. Additionally, Plaintiff states that the arbitration clause "as interpreted by [Defendant] would render the provision [requiring arbitration] ambiguous, thus resulting in a finding in Plaintiff's favor." Id. Finally, Plaintiff contends that Florida and Federal law do not permit the application of such an arbitration clause when such application would frustrate the purposes of the FACTA." Id.

In the Motion now before the Court, Defendant seeks to stay discovery and the Rule 26(f) conference pursuant to Federal Rules of Civil Procedure ("Rule(s)") 6(b) and 26(a) and (c) and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, until Defendant's Motion to Compel Arbitration is resolved. Motion at 1. Defendant contends that Plaintiff has brought a "putative class action lawsuit in contravention of the arbitration agreement governing her relationship with [Defendant]." Id. As such, Defendant has moved to compel Plaintiff to pursue her claims in arbitration or small claims court and dismiss the action. Id. Defendant's Motion to Compel Arbitration is currently pending. Id.

Plaintiff contends that Defendant's Motion to Compel Arbitration is without merit and should be denied. Opposition at 1. As a result, Plaintiff states that the need to stay discovery is moot. Id. Plaintiff also points out that the Court already has ordered the parties to conduct a conference pursuant to Rule 26(f) and submit a case management plan. Id. at 2; see also Doc. No. 17. Finally, Plaintiff argues that if the Court is inclined to grant a stay of discovery, "the stay should be limited to the underlying merits of Plaintiff's FACTA claim, and not to any issues

surrounding the enforceability of the arbitration provision itself." Opposition at 2.

***2** A court may stay discovery pursuant to Rule 26(c) if there is good cause, such as "the elimination of unnecessary expenditures of time, money, and other resources." Feldman v. Flood, 176 F.R.D. 651, 653 (M.D. Fla. 1997). The burden is on the moving party to show good cause and reasonableness for the stay. See id. at 652 (citing Howard v. Galesi, 107 F.R.D. 348, 350 (D.C.N.Y. 1985)); see also Nankivil v. Lockheed Martin Corp., 216 F.R.D. 689, 692 (M.D. Fla. 2003). To determine whether a stay is appropriate, "the harm produced by a delay in discovery [is weighed] against the possibility that the [dispositive] motion will be granted and entirely eliminate the need for such discovery." Feldman, 176 F.R.D. at 652 (quoting Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988)). Generally, a court will not stay discovery pending resolution of a motion unless the motion is directed to all of the claims in the case. See id. (citing Simpson, 121 F.R.D. at 263). In addition, if a party needs discovery to oppose the motion, a court will not enter a stay. See id. (citing Simpson, 121 F.R.D. at 263).

Recognizing the "unmistakenly clear congressional purpose that the arbitration procedure" should "be speedy and not subject to delay and obstruction in the courts," the United States Supreme Court has held that when considering a motion to stay pursuant to the FAA, "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). In addition, if a dispute is arbitrable, "responsibility for discovery lies with the arbitrators." CIGNA HealthCare of St. Louis, Inc. v. Kaiser, 294 F.3d 849, 855 (7th Cir. 2002) (internal citations omitted); see also 9 U.S.C. § 7. Based upon these principles, courts have routinely stayed discovery into the underlying merits of the case when a motion to compel arbitration has been filed in good faith. See, e.g., Merrill Lynch, Pierce, Fenner & Smith Inc. v. Coors, 357 F. Supp. 2d 1277, 1280 (D. Colo. 2004) (finding that the defendant's motion to dismiss [and compel arbitration] was not filed for any improper purpose and temporarily staying discovery pending the resolution of the motion to dismiss); In re Managed Care Litig., 2001 WL 6634391, at * 3 (S.D. Fla. June 12, 2001) (recognizing the complexity of the issues involved in the litigation and staying discovery for a limited period of time for the court to rule on the motions to dismiss and to compel arbitration); Coneff v. AT&T Corp., 2007 WL 738612, at * 2 (W.D. Wash. 2007) (granting a protective order requesting a stay of merits discovery pending the resolution of a motion to compel arbitration, but declining to grant protective order with regard to discovery relevant to the issue of arbitrability).

The Court finds that Defendant's Motion to Compel was filed in good faith, and as a result, discovery into the underlying merits of the FACTA claim and the Rule 26(f) conference shall be temporarily stayed pending the resolution of the Motion to Compel Arbitration. As Plaintiff has filed a class action lawsuit, discovery into the merits could be unnecessarily expensive and time consuming depending on the resolution of the Motion to Compel Arbitration. If the Motion to Compel Arbitration is granted, the need for merits discovery will be eliminated. See Feldman, 176 F.R.D. at 652. Additionally, Plaintiff has not shown that she will be harmed by the temporary stay. See id.

In an abundance of caution, the Court will permit discovery into the question of the enforceability of the arbitration provision. Plaintiff contends that there are unanswered questions with regard to the enforceability of the arbitration provision that would require the denial of the Motion to Compel Arbitration as premature. [1] Opposition at 2. As such, the Court declines to stay discovery into the underlying arbitration provision's enforceability.

1 The Court has some doubts as to how helpful this discovery will be, as Defendant has been permitted to file a Reply brief with regard to the Motion to Compel Arbitration (See Doc. No. 25), but Plaintiff has not requested, nor been permitted, an opportunity to rebut Defendant's Reply brief. Nevertheless, the Court is mindful of the potential for Plaintiff needing discovery to "defend against the motion." See Feldman, 176 F.R.D. at 652.

***3** After due consideration, it is

ORDERED:

1. Defendant's Motion to Stay Discovery and the Rule 26(f) Conference Pending Resolution of its Motion to Compel Arbitration (Doc. No. 19) is **GRANTED** in part and **DENIED** in part.

2. Defendant's Motion to Stay Discovery and the Rule 26(f) Conference Pending Resolution of its Motion to Compel Arbitration is **GRANTED** to the extent that discovery into the underlying merits of the case and the Rule 26(f) conference are hereby **STAYED** until the Motion to Compel Arbitration and Dismiss the Action is resolved.

3. Defendant's Motion to Stay Discovery and the Rule 26(f) Conference Pending Resolution of its Motion to Compel Arbitration is **DENIED** to the extent that it seeks a stay of discovery with respect to the enforceability of the arbitration provision.

DONE AND ORDERED at Jacksonville, Florida on February 14, 2008.

All Citations

Slip Copy, 2008 WL 11336388

2008 WL 380573
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Ft. Myers Division.

The O.N. EQUITY SALES COMPANY, Plaintiff,
v.
Robert MERKEL, Defendant.

No. 2:07–cv–531–FtM–29DNF.
|
Feb. 11, 2008.

Attorneys and Law Firms

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Joel A. Goodman, Goodman & Nekvasil, PA, Clearwater, FL, for, Defendant.

ORDER

DOUGLAS N. FRAZIER, United States Magistrate Judge.

***1** This cause came on for consideration on the following motion(s) filed herein:

MOTION: **MOTION FOR PROTECTIVE ORDER (Doc. No. 28)**

FILED: **December 31, 2007**

THEREON it is **ORDERED** that the motion is **GRANTED.**

MOTION: **MOTION UNDER CIVIL RULE 56(F) FOR AN ORDER PRECLUDING SUMMARY DISPOSITION OF DEFENDANT'S MOTION TO COMPEL ARBITRATION PENDING DISCOVERY TO BE TAKEN ON THE ISSUE OF ARBITRABILITY (Doc. No. 32)**

FILED: **January 15, 2008**

THEREON it is **ORDERED** that the motion is **DENIED.**

The defendant, Robert Merkel filed a Motion for Protective Order (Doc. 28) requesting that the Court preclude the Plaintiff, The O.N. Equity Sales Company from conducting discovery until the Motion to Compel Arbitration is determined. The Plaintiff is requesting in its Motion Under Civil Rule 56(f) that the Court not summarily dispose of the Motion to Compel Arbitration without allowing discovery on the issue of arbitrability.

The Plaintiff was an investor in Lancorp Financial Fund Business Trust ("Lancorp"). Gary Lancaster organized Lancorp. Lancaster eventually became employed by the Plaintiff. The Defendant refers the Court to sixteen other cases filed by investors in Lancorp. In each of these cases, the courts did not allow discovery until the Motion to Compel Arbitration was decided. [1] The discovery that is permissible until a determination is made as to whether this action will go to arbitration must be related to the impact on the enforceability of the arbitration clause. *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1318 (11th Cir.2005). The Court has reviewed the submissions of the Defendant and must concur with the other courts that found that discovery is not needed to determine the issue of arbitrability in this case. Therefore, the Court will stay the discovery in this matter until the Motion to Compel Arbitration is decided.

[1] *See, e.g., O.N. Equity Sales Co., v. Samuels,* 2007 WL 4237013 (M.D.Fla.2007); *O.N. Equity Sales Co. v. Cui,* 2007 WL 3071553 (N.D.Cal.2007); *O.N. equity Sales Co. v. Prins,* 2007 WL 3052756 (D.Minn.2007); and, *O.N. Equity Sales Co. v. Rahner,* 2007 WL 2908297 (D.Colo.2007).

IT IS FURTHER ORDERED:

1) Discovery is this action is stayed until the Motion to Compel Arbitration is determined.

2) The Case Management and Scheduling Order (Doc. 35) entered on February 4, 2008, is hereby abated. If appropriate, the parties shall file a new Case Management Report within fifteen (15) days from the date the Motion to Compel Arbitration is determined.

DONE and **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 380573

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2017 WL 416123
United States District Court,
S.D. Florida.

Renel RICHEMOND, Plaintiff,
v.
UBER TECHNOLOGIES, INC., Defendant.

Case No. 16–cv–23267
|
Signed January 27, 2017

Synopsis

Background: Driver brought action against passenger transportation service that connected potential riders and drivers through smartphone application, alleging service failed to comply with Fair Labor Standards Act (FLSA) by not properly paying overtime wages and misclassifying employees as independent contractors. Service filed motion to compel arbitration.

Holdings: The District Court, Darrin P. Gayles, J., held that:

[1] driver agreed to arbitrate arbitrability, and

[2] whether driver was employee was threshold issue for arbitrator.

Motion granted.

West Headnotes (8)

[1] Alternative Dispute Resolution
Constitutional and statutory provisions and rules of court

The Federal Arbitration Act (FAA) places arbitration agreements on equal footing with all other contracts and sets forth a clear presumption, a national policy, in favor of arbitration. 9 U.S.C.A. § 2.

Cases that cite this headnote

[2] Alternative Dispute Resolution
Validity

Arbitration provisions will be upheld as valid under Federal Arbitration Act (FAA) unless defeated by fraud, duress, unconscionability, or another generally applicable contract defense. 9 U.S.C.A. § 2.

Cases that cite this headnote

[3] Alternative Dispute Resolution
Remedies and Proceedings for Enforcement in General

Under Federal Arbitration Act (FAA), where a court finds a valid arbitration agreement between the parties, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. 9 U.S.C.A. § 4.

Cases that cite this headnote

[4] Alternative Dispute Resolution
Existence and validity of agreement

Parties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable.

3 Cases that cite this headnote

[5] Alternative Dispute Resolution
Existence and validity of agreement

Under Federal Arbitration Act (FAA), unless a party directly challenges a delegation provision, the court must treat arbitration agreement as valid, and must enforce it, leaving any challenge to the validity of the agreement as a whole for the arbitrator. 9 U.S.C.A. §§ 2, 3, 4.

1 Cases that cite this headnote

[6] Alternative Dispute Resolution
Evidence

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

Cases that cite this headnote

[7] Alternative Dispute Resolution
Arbitrability of dispute

Driver agreed to arbitrate arbitrability, and thus arbitrator, rather than district court, would decide driver's claims regarding enforceability of arbitration agreements with passenger transportation service that connected potential riders and drivers through smartphone application, in driver's action against service for violation of Fair Labor Standards Act (FLSA); driver had ample opportunity to review terms of agreements before accepting them, agreements alerted him to consult with attorney in boldface all-capital text, had highlighted text that provided for binding arbitration, and required driver to agree to terms of agreement twice before permitting him to begin terms of contract, and driver did not opt out of arbitration provision during allotted 30-day period. Fair Labor Standards Act of 1938 § 1, 29 U.S.C.A. § 201 et seq.

Cases that cite this headnote

[8] Alternative Dispute Resolution
Matters to Be Determined by Court

Whether driver was employee of passenger transportation service that connected potential riders and drivers through smartphone application, and thus covered under National Labor Relations Act (NLRA), was threshold issue for arbitrator, in driver's action against service for violation of Fair Labor Standards Act (FLSA); partner agreement provided that relationship between parties was that of independent contractor, arbitration agreement stated that provision applied to disputes arising out of or related to relationship with service, and NLRA applied only to an employee. National Labor Relations Act § 2, 29 U.S.C.A. § 152(3); Fair Labor Standards Act of 1938 § 1, 29 U.S.C.A. § 201 et seq.

3 Cases that cite this headnote

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ORDER

DARRIN P. GAYLES, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** comes before the Court on Defendant's Motion to Compel Arbitration [ECF No. 11]. The Court has reviewed the Motion, Plaintiff's Response [ECF No. 15], Defendant's Reply [ECF No. 19], and the record. For the reasons that follow, the Court grants the Motion.

I. BACKGROUND

Plaintiff Renel Richemond ("Richemond") has been working for Defendant Uber Technologies, Inc. ("Uber"), since October 2014. Richemond contends in his Complaint that Uber failed to comply with the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by not properly paying for overtime hours worked [ECF No. 1–2, ¶¶ 12–13]. Richemond further alleges that Uber "has been engaging in a pattern and practicing of misclassifying employees as independent contractors," which has led to Uber's "fail[ure] to provide proper compensation to its employees including reimbursement of gasoline and vehicle maintenance." [*Id.* ¶ 14].

Uber argues that Richemond's "claims are subject to arbitration and dismissal pursuant to the Federal Arbitration Act" ("FAA"), 9 U.S.C. § 1 *et seq.*, based on the "valid arbitration agreement covering his claims." [ECF No. 11 at 2]. Richemond, in turn, argues that the arbitration provisions violate the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and are unenforceable under the FAA.

II. THE AGREEMENT

During the course of his employment with Uber, Richemond acceded to the terms of various contracts through his mobile device: the "Raiser Software Sublicense Agreement June 21 2014" ("June 2014 Agreement") [ECF No. 11–2 at 13–30]; the "Partner Agreement November 10 2014" ("November 2014 Agreement") [*Id.* at 31–50]; and the "Technology Services Agreement" ("December 2015 Agreement"). [ECF No. 19–1 at 4–24]. In order to accept these agreements on the mobile application used for employment with Uber, the user is required to confirm that he has "reviewed all the documents" and that he "agree[s] to all" of them [ECF No. 11–2 at 4–7, ¶¶ 9, 14]. The user then confirms a second time that he has reviewed and agrees to the documents, this time following a notice in boldface all-capital text. [*Id.* at 12].

Uber's business records reflect that Richemond accepted the June 2014 Agreement on October 16, 2014, the November 2014 Agreement on April 1, 2015, and the December 2015 Agreement on December 12, 2015. [*Id.* at 52]. Each of these agreements contains an Arbitration Provision, together with an option to opt out of the arbitration requirement within thirty days of accepting the terms of the agreement. [*Id.* at 6–7, ¶¶ 13–14]. The opt-out clause is prominently displayed in boldface text, indicating that the user can opt out either by electronic mail, U.S. Mail, "any nationally recognized delivery service," or hand delivery. [*Id.* at 28, 49–50]; [ECF No. 19–1 at 24]. Richemond did not opt out of the Arbitration Provision contained in any of the agreements within thirty days of acceptance. [ECF No. 11–2 at 6–7, ¶¶ 13–14].

The agreements advise users in boldface all-capital text that "**WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION**" and that the user "**SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS—INCLUDING BUT NOT LIMITED TO AN ATTORNEY—REGARDING THE CONSEQUENCES**" of agreeing to the Arbitration Provision. [*Id.* at 25, 46]; [ECF No. 19–1 at 19–20].

***2** Also in boldface text, the agreements state as follows:

> **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.**

[ECF No. 11–2 at 25, 46]. [1]

[1] The language in the December 2015 Agreement is slightly expanded as follows:

> **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, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, 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.**

[ECF No. 19–1 at 20].

The subsequent paragraph provides the language of the Delegation Clause:

> 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*.

[*Id.* at 25, 46–47] (emphasis added). [2]

[2] The language in the December 2015 Agreement is slightly modified as follows:

> Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, 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. However, as set forth below, the preceding sentences shall not apply to disputes relating to the interpretation or application of the Class Action Waiver or PAGA Waiver below, including their enforceability, revocability or validity.
>
> [ECF No. 19–1 at 20].

The agreements provide explicitly that "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." [*Id.* at 25, 47].[3] And, relevant to the instant case, the agreements provide that "[t]his Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, ... expense reimbursement, ... and claims arising under the ... Fair Labor Standards Act." [*Id.*]; [ECF No. 19–1 at 20].

[3] The language in the December 2015 Agreement slightly modifies the text to read that "this Arbitration Provision also applies, without limitation, to all disputes between You and the Company or Uber ... 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." [ECF No. 19–1 at 20].

III. LEGAL STANDARD

***3** **[1]** **[2]** The FAA provides that written contractual arbitration agreements 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, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). "Arbitration provisions will be upheld as valid unless defeated by fraud, duress, unconscionability, or another generally applicable contract defense." *Id.* (citation and internal quotation marks omitted).

[3] **[4]** **[5]** **[6]** Under the FAA, a party may petition the district court to enforce a written arbitration agreement. 9 U.S.C. § 4. Where the court finds a valid arbitration agreement between the parties, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* The court is authorized to stay the trial of the action until such time as the issues referable to arbitration have been decided. *Id.* § 3. "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 (citations omitted). Unless a party directly challenges a delegation provision, the court "must treat it 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." *Rent–A–Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). However, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Parnell*, 804 F.3d at 1147 (citation and internal quotation marks omitted).

IV. ANALYSIS

[7] Richemond argues that the arbitration provisions of his agreements with Uber are unenforceable under the FAA, particularly because they violate the NLRA. [ECF No. 15]. As discussed above, the agreements between Richemond and Uber provide that any dispute regarding the "enforceability, revocability[,] or validity of the Arbitration Provision or any portion of the Arbitration Provision ... shall be decided by an Arbitrator and not by a court or judge." [ECF No. 11–2 at 25, 46–47]. This delegation provision explicitly provides that an Arbitrator shall decide Richemond's claims regarding the enforceability of his agreements with Uber, and it divests this Court of the ability to make that determination at this time. If the Arbitrator decides that any portion of the Arbitration Provision is invalid, those matters may then be tried before this Court.

The Court finds that Richemond clearly acceded to the terms of his agreements with Uber. First, Richemond had ample opportunity to review the terms of the agreements before accepting them on the mobile device. Second, the agreements themselves provided prominent markers to emphasize to Richemond the gravity of the Arbitration Provision: by alerting him to consult with an attorney in boldface all-capital text, by highlighting the text

that provided for binding arbitration, and by requiring Richemond to agree to the terms of the agreement twice on his mobile device before permitting him to begin the terms of his contract. And third, Richemond did not opt out of the Arbitration Provision during the allotted thirty-day period following acceptance of each of the three agreements to which he assented. Accordingly, this Court finds that there is "clear and unmistakable evidence" that Richemond "agreed to arbitrate arbitrability." *See Parnell*, 804 F.3d at 1147; *see also Sena v. Uber Techs. Inc.*, No. CV–15–02418–PHX–DLR, 2016 WL 1376445, at *4 (D. Ariz. Apr. 7, 2016) (analyzing identical delegation clause and concluding that "[g]iven the plain language of the Delegation Clause, the Court finds that the parties clearly and unmistakably intended to arbitrate questions of arbitrability"), *reconsideration denied*, No. CV–15–02418–PHX–DLR, 2016 WL 4064584 (D. Ariz. May 3, 2016).

***4** Additionally, Plaintiff does not directly challenge the validity of the delegation provision of his agreements, thus providing another basis on which this Court should grant Defendant's motion. *See Suarez v. Uber Techs., Inc.*, No. 8:16–CV–166–T–30MAP, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016) ("Notably, Plaintiffs do not *directly* challenge the validity of the delegation provision. As such, Defendant's motion should be granted on this basis alone and adjudication of Plaintiffs' attacks on the Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability."), *appeal filed*, No. 16–13263 (11th Cir. June 6, 2016). However, even if the Court were to analyze the validity of the Arbitration Provision, the Court adopts the reasoning in *Suarez* and finds that under Florida law, the Arbitration Provision is not procedurally or substantively unconscionable. *See id.* at *4–5 (finding no procedural unconscionability because the plaintiffs "had the absolute right to opt out of the Arbitration Provision" and no substantive unconscionability because the Arbitration Provision's fee-splitting clause does not "render[ ] the cost of arbitration prohibitively or unfairly expensive" and because "the law is clear that the waiver of class/collective claims cannot render the Arbitration Provision unconscionable") (citations omitted); *accord Rimel v. Uber Techs., Inc.*, No. 6:15–cv–2191–Orl–41KRS, 2016 WL 6246812 (M.D. Fla. Aug. 4, 2016) (magistrate judge recommendation that the district court compel arbitration in a substantially similar case, finding that the arbitration provision was not unconscionable under Florida law).

[8] As an additional matter, this Court notes that the NLRA applies only to an "employee," which the NLRA defines to "not include ... any individual having the status of an independent contractor." 29 U.S.C. § 152(3). The parties' June 2014 Agreement provides that "[y]ou represent that you are an *independent contractor* engaged in the independent business of providing the transportation services described in this Agreement," [ECF No. 11–2 at 16] (emphasis added), and their November 2014 Agreement provides that "the relationship between the parties under this Agreement is solely that of *independent contractor*," [*Id.* at 43] (emphasis added). Richemond argues that Uber misclassifies him as an "independent contractor." [ECF No. 1 at ¶ 14]. However, pursuant 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. *See* [ECF No. 11–2 at 25, 47] (stating that "this Arbitration Provision also applies, without limitation, to ... disputes arising out of or related to your relationship with the Company, including termination of the relationship"). [4]

4 The Court further notes that the Supreme Court recently granted certiorari in three cases that address the issue of whether an agreement between an employer and an employee that requires resolution of disputes through individual arbitration and prohibits class and collective proceedings is enforceable under the FAA and the NLRA. Order Granting Petitions for Writ of Certiorari, *Epic Systems Corp. v. Lewis*, Nos. 16–285, 16–300 & 16–307, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2017 WL 125664 (U.S. Jan. 13, 2017).

V. CONCLUSION

Because the Court finds that the agreements between Richemond and Uber require that an Arbitrator, and not this Court, decide the threshold issue of enforceability and, if the Arbitration Provision is valid and enforceable, adjudicate Richemond's FLSA claims, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Compel Arbitration **[ECF No. 11]** is **GRANTED**. The parties shall proceed to arbitration within thirty (30) days of this Order. This action shall be **STAYED** until such time as the parties' arbitration proceedings have been completed. The parties shall file a status report with

this Court within ten (10) days of the termination of the arbitration proceedings. This action is **CLOSED** for administrative purposes, and any pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of January, 2017.

All Citations

--- F.Supp.3d ----, 2017 WL 416123, 2017 Wage & Hour Cas.2d (BNA) 26,757