

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

KO HUTS, INC.

and

Case No. 14-CA-164874

MICHAEL TIFFANY, an Individual

**RESPONDENT'S BRIEF TO ADMINISTRATIVE LAW JUDGE
IN OPPOSITION OF BOARD'S COMPLAINT**

The United States Supreme Court has authored numerous opinions regarding the scope of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.* The common theme through these opinions is that the FAA establishes “a liberal federal policy favoring arbitration agreements.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Flowing from this strong federal policy is the conclusion that arbitration agreements must be rigorously enforced according to their terms. *Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304, 2309 (2013). Following the FAA and the Supreme Court interpretations of it, every Federal Court of Appeals to decide the issue has found provisions in an employment arbitration agreement in which employees agree to prosecute any claims against the employer on an individual basis, and not as part of a class or collective action, to be lawful and fully enforceable.

Contrary to Congressional directive and the instruction of the Supreme Court and the Federal Courts of Appeals, the National Labor Relations Board (“Board”) filed a Complaint against KO Huts, Inc. (“KO Huts”) alleging that it committed an unfair labor practice by requiring prospective employees to execute a mutual agreement to arbitrate claims only on an individual basis. The Board further alleges that KO Huts’ committed separate and additional unfair labor practices by seeking to enforce the terms of the arbitration agreement in federal court. The Board’s current position is driven by two previous Board decisions, each of which

was rejected by the Fifth Circuit Court of Appeals on appeal. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (2013) (refusing to enforce in relevant part *D.R. Horton*, 357 NLRB No. 184 (2012)); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (2015) (refusing to enforce in relevant part *Murphy Oil USA*, 361 NLRB No. 72 (2014)). Undeterred by these and other federal court opinions rejected its position the Board continues its unsupported crusade against class action arbitration waivers, with KO Huts as the current target.

The Board's position is flawed. First, for various reasons the conduct at issue does not violate, and is actually protected by, the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* Mr. Tiffany's conduct was not concerted. In addition, the underlying class procedures to which the arbitration waiver applies are not substantive rights under Section 7 of the NLRA. Further, the Board's position runs afoul of the NLRA by impermissibly limiting an employee's right to individually address and resolve workplace disputes. Alternatively, even assuming that the arbitration agreement may tangentially implicate the NLRA, the clear weight of Supreme Court authority demonstrates that the FAA requires the arbitration agreement, including the class waiver, to be enforced.

BACKGROUND

Michael Tiffany ("Tiffany") sought employment with KO Huts, Inc., a Pizza Hut franchisee, as a delivery driver at a KO Huts restaurant in Enid, Oklahoma. [Joint Stipulation ¶ 10]. In conjunction with his hire, Tiffany and KO Huts mutually executed "KO Huts, Inc. Agreement to Arbitrate" ("Arbitration Agreement") [See Joint Stipulation, ¶ 9]. The Arbitration Agreement provides, in relevant part, that each party agrees to use binding arbitration for any claims that it may have against the other. The Arbitration Agreement also provides that all claims subject to arbitration "may be instituted and arbitrated only in an individual capacity, and

not on behalf of or as part of any purported class, collective, representative, private attorney general, or consolidated action.” [Joint Stipulation, ¶ 7(b)]. Through this aspect of the Arbitration Agreement, the parties intended “to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures . . . with respect to all claims subject to this Agreement to Arbitrate.” [Joint Stipulation, ¶ 7(b)]. Notably, the Agreement expressly permits Tiffany to pursue “action with an administrative agency in accordance with applicable law, including the filing of charges or claims with the National Labor Relations Board” [Id.]¹

On October 21, 2015, Tiffany filed a civil action styled *Michael Tiffany v. KO Huts, Inc.*, (Case No. CIV-15-1190-HE), in the United States District Court for the Western District of Oklahoma (“Lawsuit”). Tiffany’s claims in the Lawsuit centered on the allegation that KO Huts did not properly reimburse him for expenses he allegedly incurred using his personal vehicle to make deliveries. Tiffany alleges that this under-reimbursement violated the minimum wage provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 206(a), and its Oklahoma equivalent. [Joint Stipulation, ¶ 15, and Exhibit G attached thereto]. Although the Complaint is styled as a collective action under the FLSA and a class action under Oklahoma law, it was filed individually by Tiffany alone, and to date no other employees have sought to join the Lawsuit.

On November 19, 2015, KO Huts filed a motion in the Lawsuit to enforce the Arbitration Agreement by requiring Tiffany to prosecute his claims on an individual basis in arbitration. [Joint Stipulation, ¶ 17]. In response, Tiffany filed an arbitration demand and submitted an initial complaint in arbitration that alleged the same individual and purported collective claims under the FLSA as had been alleged in the Lawsuit. In addition, and solely in support of his

¹ Accordingly, this case does not present the additional alleged Section 8(a)(1) violation concerning alleged interference with an employee’s right of access to the Board or other governmental agency that was present in *D.R. Horton* and *Murphy Oil*.

litigation strategy, on November 23, 2015, Tiffany filed the ULP charge that forms the basis for the Board's complaint at issue. [Joint Stipulation, ¶ 1].

Through orders on April 13, 2016, and April 15, 2016, the district court in the Lawsuit determined that it (and not the arbitrator) had authority to rule on the enforceability of the class waiver in the arbitration agreement and subsequently determined that the waiver was enforceable under the FAA and was not "even arguably prohibited" by the NLRA. [*Tiffany v. KO Huts, Inc.*, Apr. 13, 2015, Order, at p. 3].²

ARGUMENT AND AUTHORITIES

I. The NLRA does not prohibit an individual employee from agreeing to mutually arbitrate non-NLRA claims on an individual basis.

As a threshold matter, in order for an unfair labor practice to exist there must be restraint or interference with rights guaranteed by Section 7. *See* 29 U.S.C. §§ 157; 158(a)(1). Section 7 identifies three specific categories of protected employee activity; namely, (1) the right to self-organize, (2) the right to form, join, or assist a labor organization, and (3) the right to bargain collectively through a chosen representative. *See id.* § 157. Clearly, the Arbitration Agreement does not implicate any of these rights. Section 7 also protects "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* While not specifically defined, the Supreme Court has found this clause to be related to and only "somewhat broader" than the three more specific categories. *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

In alleging that KO Huts' mutual and voluntary Arbitration Agreement violates Tiffany's Section 7 rights, the Board has turned "somewhat broader" on its head. Not only are Tiffany's actions in filing the Lawsuit not protected, Section 7 does not protect Tiffany's right of access to procedural rules in a non-NLRA proceeding. Moreover, even if the right might otherwise be

² Copies of the April 13 and April 15 Orders in the Lawsuit are attached as Exhibits A and B, respectively.

protected, where, as here, there is no collective bargaining agreement, the NLRA expressly vests employees with the authority to individually resolve disputes.

A. Tiffany’s action in individually pursuing an FLSA claim, regardless of his styling the claim as a purported collective action, is individual and not concerted activity.³

Simply put, Tiffany’s actions in filing the Lawsuit are focused on his individual benefit. Beyond some words crafted by his attorney in a court pleading, there is nothing in this case to suggest that Tiffany engaged in concerted activity as that term has been historically defined by the Board. The Lawsuit does not purport to enforce collectively bargained rights. There is no evidence that Tiffany spoke with any other employees about his intention of filing the Lawsuit. Likewise, there is no evidence that Tiffany has spoken with employees since the filing of the lawsuit, and it is undisputed that no other employees have joined the action. The act of filing the Lawsuit cannot be viewed as an appeal to other employees as there is no guarantee that any other employees will ever become aware of the case much less decide to participate in it. There is also no assurance that certification of his FLSA claims will ever be granted. Moreover, the participation by other employees is not required, legally or practically, for Tiffany to pursue his claims.

In sum, Tiffany filed the Lawsuit to recover alleged back wages for himself. He cannot recover under the FLSA on behalf of anyone else, and any potential future participation by other employees in the Lawsuit is nothing more than pure speculation. That Tiffany has been employed at KO Huts for nearly one year, and the Lawsuit has been on file for nearly six

³ KO Huts acknowledges that the Board recently found the mere act by a single employee of filing an FLSA lawsuit as a collective action was protected activity under Section 7. *See 200 East 81st Rest. Corp.*, 362 NLRB No. 152 (2015). For the reasons outlined below, and in Member Miscimarra’s dissent in that case, as well as his dissents in *Murphy Oil*, 361 NLRB No. 72 (2014) and *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), this decision is contrary to the NLRA and Supreme Court precedent.

months, yet Tiffany remains the only participant is telling as to the individual nature of his actions. This is not the type of “individual activity ‘looking toward group action’” that the Board has found to be concerted activity. *Meyers Industries*, 281 NLRB No. 118, 1986 WL 54414, at *7 (1986); *see also Murphy Oil*, 361 NLRB No. 72, slip op. at 40 (Member Johnson dissenting) (“There is simply no basis for the Board to find that the filing of a class action is concerted under these circumstances, and *D.R. Horton’s* presumption of concertedness is contrary to the precedence it cites.”).

B. The procedures used for the prosecution of non-NLRA claims in the federal courts are not protected by Section 7.

The heart of the Board’s position is the conclusion that Congress, through the NLRA, authorized the Board to expand the scope of Section 7 by *guaranteeing access* to procedural rules established by other federal statutes, such as the Rules Enabling Act (the statutory basis for Rule 23) or the FLSA (Section 216(b)), for private litigation of non-NLRA claims, whenever the litigants are also “employees” under the NLRA. This would turn Section 7 into a “procedural superhalo,” as Member Johnson aptly described it in his dissent in *Murphy Oil*, and is well outside the scope of the Board’s authority or any reasonable interpretation of Congressional intent regarding the scope of Section 7.⁴

The Board’s position is contrary to the Supreme Court’s long-held determination that access to F.R.C.P. 23 is “a procedural right only.” *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 332 (1980). Numerous federal courts have made similar findings with respect to

⁴ The Board’s proclamation that it is only protecting “access” to the class action process and not guaranteeing “class certification” is hollow as the underlying rules, to which the Board is now ensuring access, don’t guarantee certification anyway. By guaranteeing employees a right of access to these procedures, the Board is effectively creating a new, substantive right. “By any definition, that is creating both a guarantee and a substantive alteration of the [procedural rules].” *Murphy Oil*, 361 NLRB No. 72 slip op. at 45 n.49 (Member Johnson dissenting).

Section 216(b) of the FLSA. *See e.g., Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014) (following Supreme Court authority to conclude Section 216(b) of the FLSA does not establish “a non-waivable substantive right to a collective action”).

When assessed against the backdrop of the FLSA, the Board’s position stands on even weaker ground. As Member Johnson explained, “the very individual-by-individual requirement to sue that class action waivers contain, and that *D.R. Horton* condemns, indeed *underpins* the opt-in mechanism that Congress chose for the FLSA.” *Murphy Oil*, 361 NLRB No. 72, slip op. 43 (Member Johnson dissenting) (internal quotes omitted).⁵ Through this statutory framework, Congress expressly intended to limit the right that an individual employee would have to file a group action under the FLSA. *See Walthour*, 745 F.3d at 1336. Because this procedural framework was an intentional part of the FLSA’s statutory framework, the Board cannot effectively modify that framework by making it unwaivable under the guise of Section 7.

The timing of the respective procedural enactments further undercuts the Board’s position. While the NLRA was enacted in 1935, the collective action procedures within the FLSA were not added until 1947. And modern class action practice did not arise until amendments to the Federal Rules of Civil Procedure in 1966. Clearly, these changes occurred well after the “mutual aid and protection” language was enacted through Section 7. One cannot contend that Congress intended in 1935 to protect group litigation procedures within the scope of Section 7 when those procedures did not yet exist. *Murphy Oil*, 361 NLRB No. 72, slip op. 44 (Member Johnson dissenting).

⁵ An employee cannot become a party-plaintiff to an FLSA collective action until the employee files an individual consent form with the court that clearly evidences the employee’s intention to join the case. *See* 29 U.S.C. § 216(b). This is in sharp contrast to the opt-out mechanism under Rule 23, in which, following certification, all class members, regardless of individual intent, are considered part of the case unless they affirmatively ask to be removed.

In summary, the Board’s position “inappropriately substitutes the Board’s judgment for that of the Congress. Congress has occupied the field in determining the scope of the rights afforded by Rule 23 and Section 216(b), and has given the Board no role to play in the administration of those provisions. . . . And, regardless of whether the Board might believe that the procedures provided by these statutes are somehow ‘rendered inadequate’ or even ‘violated’ because of a class action waiver, the Board cannot then construe Section 7 to provide an additional remedy. That kind of determination is the province of Congress.” *Murphy Oil*, 361 NLRB No. 72, slip op. 44 (citing *Emporium Capwell Co. v. Western Addition*, 420 U.S. 50, 72-73 (1975) (Member Johnson dissenting)).

C. The Board’s position impermissibly restricts employees from their NLRA-protected right to adjust grievances individually.

While Section 9(a) of the NLRA is generally known for setting forth the right to exclusive representation through a showing of majority support, the provision goes further. In particular, it also provides that “any individual employee . . . shall have the right at any time to present grievances to [the] employer and to have such grievances adjusted.” 29 U.S.C. § 159(a). Through this aspect of the NLRA, Congress intended to protect each employee’s right to individually adjust the merits of any dispute that employee may have with his or her employer.⁶ *See Murphy Oil*, 361 NLRB No. 72, slip op. 32 (2014) (relying on extensive analysis of legislative history of Wagner Act) (Member Miscimarra dissenting). The logical extension of the right to individually adjust the merits of a dispute is the right of each individual employee to agree on the procedure to be used to resolve a dispute. *See id.* This is especially true given that

⁶ The only statutory limit on this right was that the “adjustment” could not be inconsistent with the terms of an applicable collective bargaining agreement. *See* 29 U.S.C. § 159(a). However, the existence of a collective bargaining relationship is not required for the right to exist. *See Murphy Oil*, 361 NLRB No. 72, slip op. 33 n. 66 (explaining that union representation is not a prerequisite for the right to individual adjustments to attach) (Member Miscimarra dissenting).

individuals do not have a substantive right to the use of class or collective action procedures. *See infra* pp. 6-8. Moreover, this interpretation of Section 9(a) is supported by Section 7, which provides that employees have the right to “refrain from” engaging in the various activities that are otherwise statutorily protected. *See* 29 U.S.C. § 157. “Taken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers – and not the NLRB – to choose for themselves *whether* to pursue non-NLRA disputes on a ‘collective’ versus ‘individual’ basis.” *Murphy Oil*, 361 NLRB at 72, slip op. at 33 (Member Miscimarra dissenting) (emphasis in original).

That is exactly what occurred between Tiffany and KO Huts through the Arbitration Agreement. Tiffany voluntarily agreed to commence employment knowing that any claims he or KO Huts may have against the other would be resolved through individual arbitration. He voluntarily accepted this term just as he accepted other employment terms, such as his wage rate, schedule, and work location.

II. The Federal Arbitration Act Precludes the Board from Finding KO Huts’ Arbitration Agreement to be Unlawful.

Assuming solely for argument’s sake that the right to the class or collective procedures set forth in F.R.C.P. 23 or Section 216(b) of the FLSA is protected to some extent under the NLRA, the inquiry does not end there. Because the voluntary waiver of those rights exists in an arbitration agreement, the Board must consider the impact of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1. As discussed below, the many rulings of the Supreme Court, some of which have occurred since the Board’s decision in *D.R. Horton*, demonstrate with crystal clarity that if the class waiver creates a conflict between the NLRA and FAA, the NLRA must yield.

Congress passed the FAA with the express intention of eliminating hostility towards the enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The core substantive provision of the FAA states that a written agreement to resolve disputes through arbitration “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 further provides that courts must stay litigation of claims to which an arbitration agreement applies, and compel arbitration in accordance with the terms of the agreement. *See id.* §§ 3, 4.

As the Supreme Court has repeated in numerous cases, the FAA establishes “a liberal federal policy favoring arbitration agreements.” *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). To further the federal policy behind the FAA, arbitration agreements must be “rigorously enforce[d]” according to their terms. *American Exp. Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304, 2309 (2013); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 21 (1985). From this strong policy the Supreme Court has held that the parties to an arbitration agreement “may limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate disputes.” *Concepcion*, 563 U.S. at 344 (internal quotations and citations omitted) (emphasis in original). The Congressional policy favoring arbitration applies with equal force to employment-related arbitration agreements. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

In line with this clear federal policy, the Supreme Court has held that arbitration agreements *must* be enforced according to their terms unless an exception to the FAA applies. The Board’s ruling in *D.R. Horton* relies on two such exceptions, but neither applies.

A. The FAA’s “Savings Clause” Does Not Foreclose the Enforcement of KO Huts’ Arbitration Agreement.

Section 2 of the FAA, known as the “savings clause,” states that an arbitration agreement is subject to “such grounds that exist in law or equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court has interpreted this language to permit arbitration agreements to be invalidated according to “generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotes omitted). Of note, where a facially neutral defense has a disproportionate impact on arbitration, the Court has found the “savings clause” inapplicable to that defense. The Supreme Court’s decision in *Concepcion* is instructive, and controlling, on the case at hand.

Concepcion dealt with a California statute that prohibited the enforcement of unconscionable contracts. Known as the *Discovery Bank* rule, this statute had been interpreted by California courts to prohibit class waivers in most contracts. *Concepcion*, 563 U.S. at 340 (describing California’s “*Discovery Bank*” rule). Although the rule ostensibly applied to all contracts, the Supreme Court rejected the argument that it fell within the FAA’s savings clause.

The Supreme Court found the *Discovery Bank* rule stood as an impermissible obstacle to arbitration. Class proceedings “sacrifice[] the principal advantage of arbitration – its informality – and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348. In addition, the risks to employers would significantly increase, given the limited judicial review afforded arbitral decisions and the much higher stakes that class arbitrations present. *Id.* at 350 (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”). This “unacceptable risk” would

cause defendants to avoid arbitration rather than employing it as Congress intended under the FAA. *Id.* at 350-51. As the Supreme Court concluded, “[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344.

The Board’s rule from *D.R. Horton* is indistinguishable from the *Discovery Bank* rule and, thus, fatally flawed for the same reasons. The Supreme Court’s opinion in *Concepcion* provides *a controlling view of how the FAA must be interpreted*. The Board is without authority to ignore this controlling precedence. In its refusal to adopt the Board’s position in *D.R. Horton*, the Fifth Circuit determined, after a detailed analysis of *Concepcion*, “that the Board’s rule does not fit within the FAA’s savings clause.” *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359 (2013). By requiring the availability of class procedures, the Board’s position “interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice.” *Iskanian v. CLS Transp. Los Angeles LLC*, 327 P.3d 129, 141 (Cal. 2014) (finding *Concepcion* controlling and rejecting Board’s *D.R. Horton* rule).

B. No “Contrary Congressional Command” Exists to Override the Enforceability of KO Huts’ Arbitration Agreement.

The only other situation in which courts may invalidate an arbitration agreement is when “the FAA’s mandate has been ‘overridden by a contrary congressional command in another federal statute.’” *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665 (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). If such a contrary command exists it will be clearly stated in the statutory text or its legislative history, or the command will create an “inherent conflict” between arbitration and the statute’s underlying purpose. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Assessing whether another federal statute has overridden or conflicts with the FAA must occur in the proper context. In particular, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* Doubts must be resolved in favor of arbitration. *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Where a statute is “silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *CompuCredit*, 132 S.Ct. at 673.

The importance of clear statutory language reflecting the conflict cannot be overstated. The Supreme Court has consistently cited the lack of clear language in rejecting arguments that the FAA conflicts with other statutes or their goals. *See e.g., American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013) (despite focus of Sherman Act on protecting consumers from antitrust violations and acknowledgement of the significant expense associated with proving these violations, Court found nothing in it to prohibit enforcement of class waiver under FAA); *CompuCredit*, 132 S. Ct. at 672-73 (finding no conflict between FAA and Credit Repair Organizations Act, in spite of express language in CROA that gives affected individuals the “right to sue” an organization that violates the act); *Gilmer*, 500 U.S. at 27-29 (no conflict between class waiver under FAA and Age Discrimination in Employment Act, even though ADEA expressly authorizes and provides procedures for group actions).

This view has been followed by numerous federal appellate courts in cases interpreting the Fair Labor Standards Act. Within the FLSA Congress expressly authorized group lawsuits among similarly situated employees and created a specific and unique statutory framework for the prosecution of those group or “collective” actions. *See* 29 U.S.C. § 216(b). Despite this express language, the federal appellate courts have repeatedly rejected the argument that it

reflects the requisite clear congressional command to override the FAA. *See e.g., Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2nd Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013).

When this framework is applied to the NLRA, the lack of a clear congressional command to invalidate arbitration is striking. It is undisputed that nothing in the NLRA’s language suggests, much less expressly states that Congress intended to override the FAA through the NLRA. While Section 7 protects an employee’s right to associate with one another, that general language does not meet the Supreme Court’s standard. As the Fifth Circuit found, Section 7 “is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the [NLRA’s] text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suit all have been found insufficient to infer a congressional command against application of the FAA.” *D.R. Horton*, 737 F.3d at 360 (citing *CompuCredit*, 132 S. Ct. at 670-71). Similarly, the legislative history of the NLRA does not support a finding that arbitration agreements should not be enforced pursuant to the FAA. *See id* at 361.⁷

In the absence of clear and contrary statutory language or legislative history, the arbitration agreement may only be invalidated if an “inherent conflict” exists between the arbitration and the NLRA’s “underlying purposes.” *See Gilmer v. Interstate/Johnson Lane*

⁷ The Board’s interpretation of the Norris-LaGuardia Act (“NLA”), 29 U.S.C. § 101 *et seq.*, to find a conflict between the NLRA and FAA is flawed. First, the Board’s view of the NLA is entitled to no deference. *D.R. Horton*, 737 F.3d at 362 n.10 (“It is undisputed that the NLA is outside the Board’s interpretive ambit.”). More importantly, neither the purpose nor the substance of the NLA supports the Board’s position. “Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not . . . to regulate the conduct of people engaged in labor disputes.” *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960). To that end, the primary substantive provisions of the NLA are designed to render “yellow dog” contracts unlawful and unenforceable, and to prohibit courts from injoining certain types of lawful conduct “involving or growing out of any labor dispute.” *See* 29 U.S.C. §§ 103, 104. “Intentionally breaching one’s obligations under an arbitration agreement, as defined by the FAA, cannot rationally be deemed a lawful means” under section 4 of the NLA. *Murphy Oil*, 361 NLRB No. 72, slip op. at 55 (Member Johnson, dissenting).

Corp., 500 U.S. 20, 26 (1991). Clearly there is no conflict between the purposes of the two statutes as the Board has long endorsed arbitration as an important part of the dispute resolution process within collective bargaining agreements. Even as to the narrower issue, no inherent conflict exists between the NLRA and a waiver of class procedures to pursue a non-NLRA statutory claim, such as under the FLSA.

As discussed above, the right to utilize collective action procedures, such as those set forth in Section 216(b) of the FLSA, is not a substantive statutory right that would otherwise create the requisite “conflict” to invalidate an arbitration agreement. The Supreme Court addressed this very issue in *Gilmer*. See *Gilmer*, 500 U.S. at 27-29 (permitting waiver through an arbitration agreement of the ADEA’s collective action procedures, which mirror the provisions of Section 216(b) of the FLSA). Other federal courts have applied this conclusion to cases arising under the FLSA. See *Sutherland*, 726 F.3d at 296-97; *Owen*, 702 F.3d at 1052. As discussed *infra* Section I.B, any suggestion that these procedural rights are substantive under the NLRA is similarly misplaced as it would be premised on the NLRA being intended to protect a right of access to a procedural framework for class actions that did not exist at the time the NLRA was enacted. The Fifth Circuit found that argument to be of “limited force” and not persuasive. *D.R. Horton*, 737 F.3d at 362.⁸

The Board’s position does not reflect a balancing of interests between the NLRA and FAA, but rather a dismissal of the FAA in favor of the Board’s expansive interpretation of the NLRA. As Member Johnson recognized, “the Supreme Court in the last 3 years has made plain how FAA conflicts are to be resolved – the FAA prevails absent an express textual command in

⁸ Member Miscimarra’s comment in *Murphy Oil* is on-point. “When enacting the NLRA in 1935, if Congress had intended to guarantee the availability of [class-based] procedures regarding litigation of employees’ non-NLRA claims, one would reasonably expect this intent to be reflected in the Act or its legislative history.” *Murphy Oil*, 361 NLRB No. 72 (2014) (Member Miscimarra dissenting).

the other statute – and unless and until the Court changes course, [the Board is] bound by that framework.” *Murphy Oil*, 361 No. 72, slip op. at 43 n.35 (Member Johnson dissenting). Further, the Board’s expansive reading of the scope of Section 7 to justify it trumping the FAA is just the type of statutory extension that the Supreme Court has rejected. “[T]o say that Congress must have intended whatever departures from those normal limits advance [one statute’s] goals is simply irrational. No legislation purses its purposes at all costs.” *Italian Colors*, 133 S. Ct. at 2309 (rejecting expansive definition of federal antitrust laws that would preclude enforcement of arbitration agreement) (internal quotes omitted).⁹ As the Fifth Circuit stated:

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. Particularly relevant to this dispute is that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task. We have accordingly never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.

D.R. Horton, 737 F.3d at 356 (internal Supreme Court citations and quotations omitted).

Because there is no inherent conflict between the FAA and the NLRA, the class waiver within KO Huts’ Arbitration Agreement must be enforced according its terms. As that outcome is not simply permitted, but *required* by federal law, the class waiver cannot also constitute an unfair labor practice under the NLRA.¹⁰

⁹ In assessing how it believes the Tenth Circuit Court of Appeals would rule, the district court found KO Huts’ Arbitration Agreement enforceable, stating “this is not a situation in which the challenged conduct is even arguably prohibited by the NLRA.” *Tiffany v. KO Huts, Inc.*, No. 15-1190-HE, 2016 WL 1453056, at *2 (W.D. Okla. Apr. 13, 2016) (internal quotes omitted).

¹⁰ Member Johnson recognized this outcome. “Without Section 7 expressly condemning arbitration or the type of arbitration provision here at issue, we cannot interpret it to override the FAA.” *Murphy Oil*, 361 NLRB No. 72, slip op p. 37 (Member Johnson dissenting).

CONCLUSION

The Fifth Circuit's analysis and decision in *D.R. Horton*, which was reaffirmed in *Murphy Oil*, is extremely persuasive given its reliance on controlling Supreme Court precedent interpreting the Federal Arbitration Act, and thus, should guide the Board's decision in this matter. Notably, the Fifth Circuit is not an outlier on this issue. As Member Johnson recognized in his dissent in *Murphy Oil*, the Board's "unsound approach" to this issue has been met with "near universal condemnation from the federal and State courts." *Murphy Oil*, 361 NLRB No. 72, slip op. at 36 (2014) (Member Johnson dissenting and citing cases). "Because the Board's interpretation does not fall within the FAA's 'saving clause,' and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, [KO Huts' Arbitration Agreement] must be enforced according to its terms." *D.R. Horton*, 737 F.3d at 362.

For the reasons set forth above, KO Huts respectfully requests that the Complaint be dismissed in its entirety.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 18th day of April, 2016, I electronically filed the foregoing with the National Labor Relations Board's E-Filing System and served a copy of the foregoing on the following by U.S. first-class mail:

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Counsel for Michael Tiffany



Forrest T. Rhodes, Jr.

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

MICHAEL TIFFANY, individually and)	
on behalf of similarly situated persons,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV-15-1190-HE
)	
KO HUTS, INC., ¹)	
)	
Defendant.)	

ORDER

Plaintiff Michael Tiffany filed this action on behalf of himself and other delivery drivers for defendant KO Huts, Inc. (“KO Huts”), which operates Pizza Hut franchise stores in several states. He asserts claims under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, and under the Oklahoma Minimum Wage Act (“OMWA”), 40 Okla. Stat. §§ 197.1-197.14, to recover unpaid minimum wages. Defendant KO Huts filed a motion to compel plaintiff to arbitrate his claims only on an individual basis.

Plaintiff responded by filing a motion to strike the motion to compel and by initiating an FLSA collective action arbitration. KO Huts then filed a motion seeking a preliminary injunction staying the arbitration pending a final judicial decision as to the “scope, validity and enforceability of the [parties’] arbitration agreement.” Doc. #23, p. 1. This order disposes of the motions to strike and for preliminary injunction. The motion to compel will

¹Plaintiff sued KO Huts, Inc. and Chisholm Enterprises, Inc. (“Chisholm”). In its motion to compel, Doc. #16, KO Huts explains that it previously was known as Chisholm before changing its name, effective January 1, 2013. Chisholm is not a separate entity from KO Huts and the court will proceed, as the parties have done, to refer solely to KO Huts as the defendant.

be addressed by separate order.

Background

Plaintiff is a former employee of KO Huts, a Pizza Hut franchisee that operates Pizza Hut restaurants in Kansas and Oklahoma. Plaintiff worked as a delivery driver for KO Huts in Enid, Oklahoma from May 27 to July 20, 2015. It is undisputed that before plaintiff started working for KO Huts he signed an Agreement to Arbitrate (“Agreement”), which requires plaintiff to arbitrate his wages dispute. It is also undisputed that the Agreement includes a waiver of the right to arbitrate as part of any class or collective action. The dispute is who determines the validity of the waiver, the court or the arbitrator.²

Plaintiff filed this lawsuit in October 2015, seeking to pursue his FLSA claim as a collective action and his OMWA claim as a class action. Defendant answered and counterclaimed, seeking a declaratory judgment that, among other things, Tiffany was required to arbitrate his wage claims in an individual action and that the court, not the arbitrator, should determine issues relating to arbitrability.³ Defendant also filed a motion to compel plaintiff to arbitrate his FLSA and OMWA claims on an individual basis. Plaintiff then filed a demand to arbitrate his FLSA claim with the American Arbitration Association,

²As defendant points out, Doc. #55, p. 9 n.4, plaintiff does not oppose the merits of its motion to compel individual arbitration. At least in this action he offers no substantive reasons as to why the collective/class action prohibition is invalid, but instead challenges defendant’s position that it is the court, rather than the arbitrator, who determines whether the waiver is enforceable. See Doc. #20.

³“An issue is arbitrable if it is subject to decision by arbitration or referable to an arbitrator or arbiter.” Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla., 636 F.3d 562, 567 (10th Cir. 2010).

submitting the case as a collective action, and defendant filed its motion for a preliminary injunction. Defendant seeks to enjoin plaintiff from arbitrating the “collective-action FLSA claim” until the court decides the “scope, validity and enforceability of the arbitration agreement.” Doc. #23, p. 1. Plaintiff objects to an injunction and also contends defendant’s motion to compel should be stricken, claiming it has refused to arbitrate.

Primary Jurisdiction

The court previously directed the parties to advise it of the effect, if any, of the Complaint and Notice of Hearing the National Labor Relations Board (“NLRB”) filed, based on plaintiff’s charge that defendant violated Section 7 of the NLRA by maintaining and enforcing the class and collective action waivers in the parties’ arbitration agreement. The court’s concern was whether the NLRB has primary jurisdiction over the dispute and whether this matter should be stayed pending resolution of the unfair labor practice charge.

“Under principles announced in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), both state and federal courts generally lack original jurisdiction to determine disputes involving conduct actually or arguably prohibited or protected by the NLRA.” United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bechtel Power Corp., 834 F.2d 884, 886 (10th Cir.1988). However, this is not a situation in which the challenged conduct is even “arguably prohibited” by the NLRA. Hickey v. Brinker Int’l Payroll Co., L.P., 2014 WL 622883 (D. Colo. Feb. 18, 2014). As the Fifth Circuit noted in D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 362 (5th Cir. 2013), “[e]very . . . circuit[] to consider the issue has either suggested or expressly stated that

they would not defer to the NLRB's rationale,⁴ and held arbitration agreements containing class waivers enforceable.”⁵ See generally Tamburello v. Comm-Tract Corp., 67 F.3d 973, 977 (1st Cir. 1995) (“A primary justification of the preemption doctrine is ‘the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose....’”) (quoting Vaca v. Sipes, 386 U.S. 171, 180 (1967)).

As stated by one court, “[g]iven the recent morbidity of In re D.R. Horton, the outcome of plaintiffs' charge before the NLRB thus seems a foregone conclusion. Hickey, 2014 WL 622883 at *2. Therefore, because “it is clear or may fairly be assumed” that KO Huts, by requiring its employees to sign arbitration agreements with collective or class action waivers, did not commit unfair labor practices, the court concludes it does not have to “yield” jurisdiction and defer to the NLRB. Garmon, 359 U.S. at 244.⁶

Motion to Strike

⁴*The NLRB held In re D.R. Horton, 357 N.L.R.B. No. 184 (Jan. 3, 2012), that the company violated the NLRA when it required its employees to sign arbitration agreements that prohibited them from pursuing claims in a collective or class action.*

⁵*Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014), cert. denied, 134 S. Ct. 2886 (2014); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).*

⁶*Exceptions also exist to the Garmon doctrine. Cumpston v. Dyncorp Tech. Servs., Inc., 76 Fed. Appx. 861, 865 (10th Cir. 2003) (citing Tamburello, 67 F.3d at 977-78). “[F]ederal courts may decide labor questions that emerge as collateral issues in suits brought under statutes providing for independent federal remedies.” Tamburello, 67 F.3d at 977. It is unnecessary to decide whether the waiver issue falls within an exception, as this is not a situation in which the doctrine even arguably applies.*

Another preliminary issue is whether defendant waived its right to compel arbitration by its conduct. The issue merits little discussion. Plaintiff claims defendant's motion to compel should be stricken, citing a portion of a sentence from a letter KO Huts sent the American Arbitration Association ("AAA"), in which it states: "KO Huts does not intend to submit payment, file an answer, or otherwise proceed with arbitration at this time." Doc. #19-5, p. 3.⁷ It is clear, though, when the letter is read in its entirety and defendant's behavior is considered in light of the procedural history of this case, that KO Huts did not breach the arbitration agreement and is not "in default in proceeding with [the] arbitration." Pre-Paid Legal Servs., Inc. v. Cahill, 786 F.3d 1287, 1294 (10th Cir. 2015) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 373 (2015). Although it had been advised by the AAA Case Filing Specialist that it did not have to pay the initial case filing fee, KO Huts has paid the fee and complied with the directions of the Case Filing Specialist regarding the arbitration. Plaintiff's motion to strike is without merit and will be denied.

KO Hut's Motion for Preliminary Injunction

Defendant seeks an order enjoining plaintiff from proceeding with the arbitration until "the scope and enforceability of the Agreement to Arbitrate has been fully and finally litigated, with all appeals exhausted, in this litigation and in proceedings currently pending with the National Labor Relations Board." Doc. #24, pp. 1-2. Defendant claims that the four elements of a preliminary injunction are easily satisfied. They are: "(1) a substantial

⁷Page references to briefs and exhibits are to the CM/ECF document and page number.

likelihood of success on the merits; (2) irreparable injury will result if the injunction does not issue; (3) the threatened injury to the movant outweighs any damage the injunction may cause the opposing party; and (4) issuance of the injunction would not be adverse to the public interest.” Kansas Judicial Watch v. Stout, 653 F.3d 1230, 1233 n.2 (10th Cir. 2011).

Defendant’s ability to demonstrate that it is substantially likely to succeed on its claim that the court, rather than the arbitrator, determines the availability of classwide arbitration depends on the specific provisions of the parties’ Agreement. “[A]rbitration is a matter of contract,” and arbitration agreements must be enforced according to their terms. Nesbitt v. FCNH, Inc., 811 F.3d 371, 376 (10th Cir. 2016) (internal quotation marks omitted). The pertinent provisions of the Agreement follow.

KO Huts, Inc. (KOHI), . . . and I agree to use binding arbitration, instead of going to court, for any claims, including any claims now in existence or that may exist in the future . . . that I may have against KOHI Without limitation, such claims include any concerning wages, expense reimbursement, . . . [and] compensation In any arbitration, the American Arbitration Association (“AAA”) will administer the arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will govern, except that (a) KOHI will pay the arbitrator’s fees; (b) KOHI will pay the arbitration filing fee; and (c) as discussed below, the arbitration shall occur only as an individual action and not as a class, collective, representative, private attorney general action or consolidated action. The rules are available for review as www.adr.org or can be sent to you by the Home Office.

KOHI and I agree that any and all claims subject to arbitration under this Agreement to Arbitrate may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative private attorney general action, or consolidated action (collectively referred to in this Agreement to Arbitrate as a “Class Action”). Furthermore, KOHI and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to

arbitration under this Agreement to ArbitrateThe waiver of Class Action claims and proceedings is an essential and material term of this Agreement to Arbitrate, and KOHI and I [Tiffany] agree that if it is determined that it is prohibited or invalid under applicable law, then this entire Agreement to Arbitrate is unenforceable.

All issues are for the arbitrator to decide, except that issues relating to arbitrability, the scope or enforceability of this Agreement to Arbitrate, or the validity, enforceability, and interpretation of its prohibitions of class and representative proceedings, shall be for a court of competent jurisdiction to decide.

Doc. #16-1, at 2.

Defendant claims it is clear from the Agreement's express terms that the court is to decide issues of arbitrability, including the validity and enforceability of the class action waiver. Plaintiff acknowledges that the Agreement does state "that a court must decide whether the claim will be arbitrated as a class and collective action." Doc. #34, pp. 1-2. However, he contends the Agreement also incorporates the AAA Employment Arbitration Rules and that constitutes clear and unmistakable evidence that the parties intend for the arbitrator to decide the waiver issue. Section 6(a) of the AAA rules state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Doc . #34-1, p. 3.⁸

⁸*The Arbitration Agreement specified that certain matters would not be governed by the AAA rules. Relying on the reference in the first paragraph of the Agreement to "as discussed below," defendant argues that the provision that issues relating to arbitrability were reserved for a court of competent jurisdiction to decide was excepted from the AAA rules, so there is no ambiguity in the Agreement. An intent to include the clause pertaining to arbitrability within the exception is not evident from the language used.*

If the Arbitration Agreement had not included an express provision to the contrary and, if the matter at issue – the class action waiver – did not present a “question of arbitrability,” the court might well agree with plaintiff. However, the Agreement specified that the court, not the arbitrator was to decide “issues relating to arbitrability, the scope or enforceability of this Agreement to Arbitrate, or the validity, enforceability, and interpretation of its prohibitions of class and representative proceedings.” The language is clear and the specific allocation of the authority to determine issues relating to arbitrability to the court controls over the general reference to the AAA rules.⁹

Even if the parties’ Arbitration Agreement is internally inconsistent due to the incorporation of the AAA rules, *see Nesbitt*, 811 F.3d at 380, the ambiguity is resolved by application of the presumption that the parties did not agree to “submit the arbitrability question itself to arbitration (i.e., to arbitrate arbitrability).” *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 568 (10th Cir. 2010). In other words, they did not agree to have the arbitrator determine the validity of the class action waiver. That is because “[t]he question whether parties have submitted a particular dispute to arbitration, *i.e.*, the ‘question of arbitrability,’ is ‘an issue for judicial determination [u]nless the parties

⁹*Plaintiff’s position was recently rejected by the Third Circuit in Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir. 2016), petition for cert. filed, No. 15-1242 (April 6, 2016). There the court held that an arbitration agreement that incorporated the commercial AAA rules did not clearly and unmistakably delegate the question of class arbitrability to the arbitrator. Contrary to plaintiff’s assertion, the fact that the AAA rules that were incorporated by reference in Chesapeake Appalachia were commercial, rather than employment, as here, does not affect the analysis.*

clearly and unmistakably provide otherwise.”¹⁰ Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)); accord Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir. 2016) (“The burden of overcoming the presumption is onerous, as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator.”), *petition for cert. filed*, No. 15-1242 (April 6, 2016) (quoting Opalinski v. Robert Half International Inc., 761 F.3d 326, 335 (3d Cir.2014), *cert. denied*, 135 S.Ct. 1530, (2015)).¹¹

“Questions of arbitrability” are limited, though, to so-called gateway or substantive

¹⁰Plaintiff is correct that “[c]ourts usually apply ordinary state law principles governing contract formation to decide whether the parties agree to arbitrate a certain matter.” Chesapeake Appalachia, 809 F.3d at 760-61. He is not correct, though, that because defendant drafted the Agreement, that if it includes conflicting provisions regarding whether a court or an arbitrator determines issues of arbitrability, “Oklahoma law dictates that the arbitrator will decide such issues.” Doc. #20, pp. 6-7. “[T]he general rule that courts should apply ordinary state law principles is subject to the following qualification: ‘Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clea[r] and unmistakabl[e]” evidence that they did so.’” Chesapeake Appalachia, 809 F.3d at 761 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1994)).

¹¹As explained by the Third Circuit in Chesapeake Appalachia, “[t]he availability of class arbitration implicates two questions or inquiries: (1) the ‘who decides’ inquiry; and (2) the ‘clause construction’ inquiry.” Chesapeake Appalachia, 809 F.3d at 753. The ‘who decides’ inquiry consists of a twofold analysis. The court decide[s] whether the availability of classwide arbitration is a “question of arbitrability.” If yes, it is presumed that the issue is for judicial determination unless the parties clearly and unmistakably provide otherwise. If the availability of classwide arbitration is not a ‘question of arbitrability, it is presumptively for the arbitrator to resolve. In the “clause construction” inquiry, the court or the arbitrator then decides whether the parties’ arbitration agreement permits class arbitration. *Id.* (internal citations and quotation marks omitted).

disputes, such as “whether the parties are bound by a given arbitration clause” or “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Id.* at 84. “‘Procedural’ questions which grow out of the dispute and bear on its final disposition,” are not “questions of arbitrability” and “are presumptively not for the judge, but for an arbitrator, to decide.” *Id.* (internal quotation marks omitted). “[T]he presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’” *Id.* (quoting Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)); see Dell Webb Communities, Inc. v. Carlson, ___ F.3d ___, 2016 WL 1178829, at *9 (4th Cir. Mar. 28, 2016) (“Procedural questions arise once the obligation to arbitrate a matter is established, and may include such issues as the application of statutes of limitations, notice requirements, laches, and estoppel.”).

Although the Tenth Circuit has not addressed the issue, the Third, Fourth and Sixth Circuits have held that “the availability of classwide arbitration is a substantive ‘question of arbitrability’ to be decided by a court absent clear agreement otherwise.” Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 753 (3d Cir. 2016), *petition for cert. filed*, No. 15-1242 (April 6, 2016) (internal quotation marks omitted); Dell Webb Communities, 2016 WL 1178829, at *8-9; Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 599 (6th Cir.2013), *cert. denied*, 134 S.Ct. 2291 (2014).¹² In making that decision, the Sixth

¹²In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 452 (2003), four justices concluded that the class arbitration question is not a “gateway” issue to be decided by a court, but rather a procedural matter for the arbitrator. The Court later “pointedly observed that ‘only the plurality’ in Bazzle decided whether classwide arbitrability is a gateway question,” Reed Elsevier, 734 F.3d at 598 (quoting Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 680 (2010)), and

Circuit reasoned that

[g]ateway questions are fundamental to the manner in which the parties will resolve their dispute—whereas subsidiary questions, by comparison, concern details. And whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail. Unlike the question whether, say, one party to an arbitration agreement has waived his claim against the other—which of course is a subsidiary question—the question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would forc[e] parties to arbitrate not merely a single matter that they may well not have agreed to arbitrate but thousands of them.

Id. at 598-99 (internal citations and quotation marks omitted). The court agrees with this analysis and concludes the question of classwide arbitration is a gateway issue. *See Dell Webb Communities*, 2016 WL 1178829, at *6 (“The [Supreme] Court found that ‘class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.’”) (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010)); *Reed Elsevier*, 734 F.3d at 598 (“Gateway questions are fundamental to the manner in which the parties will resolve their dispute—whereas subsidiary questions, by comparison, concern details. And whether the parties arbitrate one claim or 1,000 in a single proceeding is no mere detail.”).

remarked in Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 n.2 (2013), that “*Stolt–Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability.” According to the Sixth Circuit, “the Supreme Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one.” *Reed Elsevier*, 734 F.3d at 598. It noted that the Court had “characterized the differences between bilateral and classwide arbitration as ‘fundamental.’” *Id.* (quoting *Stolt–Nielsen*, 559 U.S. at 686).

Even assuming that the Arbitration Agreement is ambiguous because it incorporated the AAA rules, that does not result in the necessary clear showing. As a result, the question of the validity of the class action waiver is for the court, not the arbitrator, to decide. The court concludes defendant has met its burden of showing a substantial likelihood of prevailing on its claim that the court should determine issues of arbitrability, including the validity/enforceability of the class action waiver.

With respect to the second element, defendant contends it has demonstrated the requisite irreparable injury as it could be “forced to arbitrate in the absence of a duty to arbitrate.” Doc. #24, p. 12. Plaintiff responds that litigation expense alone does not amount to irreparable harm. In similar circumstances the Eighth Circuit concluded that the trial court properly enjoined a party from pursuing arbitration until it determined arbitrability. McLaughlin Gormley King Co. v. Terminix Int’l Co., L.P., 105 F.3d 1192, 1194 (8th Cir. 1997). The parties in McLaughlin, McLaughlin Gormley King Co. (“MGK”) and Terminix International Company (“Terminix”) had agreed to arbitrate any controversy arising out of their agreement for the sale/purchase of an insecticide. Terminix had been sued in a personal injury action and MGK had refused to defend or indemnify it for injuries allegedly due to exposure to the insecticide. After it settled the lawsuit, Terminix filed a demand to arbitrate its claim against MGK for indemnification and defense costs. MGK refused to arbitrate and filed a declaratory judgment action, contending the dispute was not arbitrable. It also moved for a preliminary injunction prohibiting Terminix from asserting its demand to arbitrate. The district court granted the preliminary injunction, concluding it needed further discovery on

the issue of arbitrability and Terminix, which argued that the arbitrator, not the court, initially had to decide arbitrability, appealed. Terminix claimed the district court had abused its discretion when it preliminarily enjoined it from pursuing arbitration, in particular because “the monetary cost MGK would incur in arbitration [was] not legally recognized irreparable harm.” *Id.* The Eighth Circuit disagreed, reasoning:

If a court has concluded that a dispute is non-arbitrable, prior cases uniformly hold that the party urging arbitration may be enjoined from pursuing what would now be a futile arbitration, even if the threatened irreparable injury to the other party is only the cost of defending the arbitration and having the court set aside any unfavorable award. *See PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 514 (3rd Cir.1990); *Nordin*, 897 F.2d at 343; *U.S. v. Pool & Canfield, Inc.*, 778 F.Supp. 1088, 1092 (W.D.Mo.1991). If that is so, then the order the court issued here, briefly freezing the parties' dispute resolution activities until it determines arbitrability, is surely appropriate.

Id. Following McLaughlin, the court concludes KO Huts will has satisfied the second of the preliminary injunction factors.

As for the third factor, the court concludes that the equities tip in defendant's favor. While plaintiff has an interest in the expeditious and inexpensive resolution of his claims through arbitration, defendant has the countervailing interest of not being compelled to arbitrate class action claims that were not within the scope of its arbitration agreement. *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013) (noting that in the absence of a contractual basis for concluding that a party had agreed to submit to class arbitration, it could not be compelled under the FAA to submit to class proceedings). Plaintiff will be allowed to arbitrate his claims, there simply will be delay in the process. The court also notes that it was plaintiff, not defendant, who filed this lawsuit.

The public interest analysis tracks that of the balance of the equities – while there is a strong public interest favoring arbitration, that is balanced by the equally important interest that “ arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” AT & T Techs., 475 U.S. at 648 (internal quotations marks omitted). Imposing a brief delay will serve the public interest by minimizing the risk that KO Huts will be compelled to arbitrate a collective action it did not agree to arbitrate.

As defendant has shown a substantial likelihood that it will prevail on the merits, and that the other elements weigh in favor of granting it injunctive relief, its motion for a preliminary injunction will be granted. However, the relief granted will be more limited than that sought. The parties will be enjoined from further pursuing arbitration until the court has resolved the gateway arbitrability questions.

Conclusion

Plaintiff’s motion to strike [Doc. #19] is **DENIED**.¹³ Defendant’s motion for a preliminary injunction [Doc. #23] is **GRANTED** as follows.

IT IS ORDERED that the parties are enjoined from further pursuing arbitration until the court decides the gateway arbitrability issues or otherwise modifies the injunction.

IT IS FURTHER ORDERED that defendant post bond within **three (3) days** in the

¹³*The court has considered the supplemental authorities submitted by the parties and grants the following motions: Doc. Nos. 53, 58, 59, 60, 61, 62, 63, 65. Any pleadings or notices requested to be filed, which were attached to the motions, are deemed filed.*

amount of \$5,000 to pay the costs and damages which plaintiff may sustain if found to have been wrongfully enjoined. *See* Fed.R.Civ.P. 65(c).

IT IS SO ORDERED.

Dated this 13th day of April, 2016.


JOE HEATON
CHIEF U.S. DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

MICHAEL TIFFANY, individually and)	
on behalf of similarly situated persons,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV-15-1190-HE
)	
KO HUTS, INC.,)	
)	
Defendant.)	

ORDER

Plaintiff Michael Tiffany filed this action on behalf of himself and other delivery drivers for defendant KO Huts, Inc. (“KO Huts”), which operates Pizza Hut franchise stores in several states. He asserts claims under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219, and under the Oklahoma Minimum Wage Act (“OMWA”), 40 Okla. Stat. §§197.1-197.14, to recover unpaid minimum wages. When defendant filed a motion to compel plaintiff to arbitrate his claims on only an individual basis, plaintiff initiated an FLSA collective action arbitration. The court then enjoined the parties from pursuing arbitration until it decided certain gateway arbitrability issues. *See* Doc. #66. It now considers defendant’s motion to compel individual arbitration.

Background

Plaintiff worked as a delivery driver for KO Huts in Enid, Oklahoma from May 27 to July 20, 2015. It is undisputed that before plaintiff started working for defendant he signed an Agreement to Arbitrate (“Agreement”), which requires him to arbitrate his wages dispute. It is also undisputed that the Agreement includes a waiver of the right to arbitrate as part of

any class or collective action. The dispute is who determines the validity of the waiver, the court or the arbitrator. At least in this action plaintiff offers no substantive reasons as to why the collective/class action prohibition in the Arbitration Agreement is invalid. Instead he simply challenges defendant's position that it is the court, rather than the arbitrator, who determines whether the waiver is enforceable. *See* Doc. #20.

Analysis

The availability of classwide arbitration depends on the specific provisions of the parties' Agreement. "[A]rbitration is a matter of contract" and arbitration agreements must be enforced according to their terms. Nesbitt v. FCNH, Inc., 811 F.3d 371, 376 (10th Cir. 2016) (internal quotation marks omitted). The pertinent provisions of the Agreement follow.

KO Huts, Inc. (KOHI), . . . and I agree to use binding arbitration, instead of going to court, for any claims, including any claims now in existence or that may exist in the future . . . that I may have against KOHI Without limitation, such claims include any concerning wages, expense reimbursement, . . . [and] compensation In any arbitration, the American Arbitration Association ("AAA") will administer the arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will govern, except that (a) KOHI will pay the arbitrator's fees; (b) KOHI will pay the arbitration filing fee; and (c) as discussed below, the arbitration shall occur only as an individual action and not as a class, collective, representative, private attorney general action or consolidated action. The rules are available for review as www.adr.org or can be sent to you by the Home Office.

KOHI and I agree that any and all claims subject to arbitration under this Agreement to Arbitrate may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative private attorney general action, or consolidated action (collectively referred to in this Agreement to Arbitrate as a "Class Action"). Furthermore, KOHI and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to

arbitration under this Agreement to ArbitrateThe waiver of Class Action claims and proceedings is an essential and material term of this Agreement to Arbitrate, and KOHI and I [Tiffany] agree that if it is determined that it is prohibited or invalid under applicable law, then this entire Agreement to Arbitrate is unenforceable.

All issues are for the arbitrator to decide, except that issues relating to arbitrability, the scope or enforceability of this Agreement to Arbitrate, or the validity, enforceability, and interpretation of its prohibitions of class and representative proceedings, shall be for a court of competent jurisdiction to decide.

Doc. #16-1, at 2.

The court previously concluded in its April 13, 2016, Order granting defendant's motion for preliminary injunction that the language of the Arbitration Agreement is clear and that the express allocation of the authority to determine issues relating to arbitrability to the court controls over the general reference in the Agreement to the American Arbitration Authority ("AAA") rules. It determined that the question of the availability of classwide arbitration is a gateway issue or an "issue of arbitrability." It further concluded that, even if the parties' Arbitration Agreement is internally inconsistent due to the incorporation of the AAA rules, the ambiguity is resolved by applying the presumption that "[t]he question whether parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)). Incorporating the AAA rules did not, the court determined, result in the clear showing required to demonstrate that the parties intended for the arbitrator to decide the

question of the validity/enforceability of the collective and class action waiver. Therefore, the court decides whether, pursuant to the terms of the parties' Arbitration Agreement, plaintiff must arbitrate his FLSA and OMWA claims individually. As plaintiff has not challenged the validity of the waiver, the court concludes it will be enforced.

Conclusion

It is undisputed that plaintiff is required under the terms of the parties' Arbitration Agreement to arbitrate his wages dispute and that he waived the right to arbitrate as part of any class or collective action. Plaintiff has not challenged the validity of the waiver and the court has now resolved the dispute regarding who determines the validity of the waiver. The Federal Arbitration Act provides that, if an issue is referable to arbitration under a written arbitration agreement, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had" 9 U.S.C. § 3.

For the reasons stated in this order and in the court's April 13, 2016, Order [Doc. #66], defendant's motion to compel individual arbitration [Doc. #16] is **GRANTED**. Further proceedings in this case are stayed pending completion of the arbitration process. 9 U.S.C. § 3.¹ As further proceedings in this court may be unnecessary, the Clerk of Court is directed to administratively close this case in her records. Either party may move to reopen the case upon completion of the arbitration for such further proceedings in this court,

¹*Defendant states in its motion that it "does not seek a stay as to its counterclaim for a declaratory judgment that Tiffany must arbitrate his claims in an individual action, that Tiffany cannot pursue his collective and class claims in court or arbitration, and that all decisions regarding the arbitrability of these claims must be made by the Court and not the arbitrator." Doc. #16, p. 10 n.3. Defendant has obtained the relief sought in the court's two orders.*

if any, as may be appropriate. If no party has moved to reopen this case within **ninety (90)** **days** after issuance of a final award in the arbitration proceeding, this case will be deemed dismissed with prejudice. The injunction previously entered by the court is lifted.

IT IS SO ORDERED.

Dated this 15th day of April, 2016.


JOE HEATON
CHIEF U.S. DISTRICT JUDGE