IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Samuel Peacock, *On behalf of himself and those similarly situated*, Plaintiff, v. First Order Pizza, LLC, *et al.*; Defendants.	Case No. 2:22-cv-02315 Judge Samuel H. Mays, Jr. Chief Magistrate Judge Tu M. Pham JURY DEMAND

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Treatises

1. Introduction

Employers routinely require employees, even minimum wage workers, to sign arbitration contracts. Who benefits? It certainly isn't the employees. It is time to have an honest conversation about forced arbitration in the employment setting. With some exceptions, the existing body of caselaw is based on assumptions that arbitration provides a fair and neutral forum to hear disputes between companies and their workers and that the forum is effective and efficient. As this brief discusses, those assumptions are the fantasy—the reality is far different.

Plaintiff opposes Defendants' attempt to force him into arbitration because the arbitration contract fails for multiple independent reasons, including failure of consideration, that the contract is made in violation of the FLSA, or that the contract is unenforceable.

First, Defendants' ability to revoke or modify the arbitration agreement "at any time" means that Defendants have—in truth—promised nothing and attempt to strip Plaintiff and his fellow delivery drivers of their day in court.

Second, Arbitration acts as a private dispute resolution system that cannot validly settle FLSA disputes. Private resolutions of Fair Labor Standards Act (FLSA) disputes are unenforceable unless a court or the Department of Labor (DOL) reviews and approves the resolution. Because the arbitration rules forbid this review, any settlement reached in arbitration is unenforceable. Even if the rules were read to allow such a review, that review—to be meaningful—would negate the purported purpose of the arbitration: a final, binding adjudication of the dispute. A contract in violation of the FLSA is unenforceable. *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 740 (1981); *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Third, when a contract's purpose is frustrated or performance is impractical, it is not enforced. *See, e.g.*, *N. Am. Capital Corp. v. McCants*, 510 S.W.2d 901, 903 (Tenn. 1974).

Plaintiff asks the Court to deny Defendants' Motion to enforce their arbitration agreement because Plaintiff should be permitted to proceed with his case in this Court.

2. Prior courts' rosy assumptions about arbitration do not match the cold reality of forced arbitration.

As employment arbitration has grown in popularity (for employers), courts have based their decisions on outdated assumptions about arbitration. Those assumptions have proven to be incorrect. The fantasy is that arbitration provides a neutral forum where an expert can efficiently and effectively hear disputes. *Contra Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). This is premised on another fantasy: a world where employees and employers are on equal footing in terms of knowledge and bargaining power. If that were the case, nobody would be complaining about arbitration.

The reality, however, is grim.[1] Arbitration is not a neutral forum. The arbitration industry is itself a big business with motivations stacked in favor of its main, repeat customers—employers and the large law firms they work with. Employers (and their attorneys) are the ones who draft forced arbitration contracts and choose the specific arbitration company or arbitrator, so arbitration providers' business *relies* on remaining in the good graces of companies and their counsel. To behave otherwise would jeopardize the future business of organizations like the American Arbitration Association (AAA) and individual arbitrators (who are themselves often practicing

[1] Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 Ohio St. J. On Disp. Resol., 59, 82–83 (2014) (Exhibit 1).

attorneys representing companies in addition to their arbitration practice). It is time for courts to recognize this unfortunate truth and evaluate the reality of forced arbitration.

The most important component of effective and fair adjudication is the neutrality of the decisionmaker. Arbitrators are only paid when they are selected to arbitrate disputes. Common sense indicates that they will favor repeat customers—if they do not, they will not receive further business. And favoring employers results in repeat business.[2] The "repeat player effect" is a significant problem in arbitration.[3] In this case, the Defendants operate eleven Domino's Pizza franchises, and require all delivery drivers to sign arbitration contracts as a condition of their employment. *See* Doc. 19-3 at ¶ 3–4. A fraction of their employees may arbitrate one time. In contrast, Defendants will arbitrate repeatedly.

Neutrality of the forum's rules is also critical to a fair resolution. Again, arbitration fails. After all, if the rules were fair, why would an employer force workers into the forum?

Under the AAA rules,[4] the arbitrator has wide latitude to determine the course and scope of the private adjudication of the case. Defendants' contract embraces the AAA rules. Doc 20 at PageID 128. For example, the arbitrator has the power to rule on their own jurisdiction (including

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[2] For example, in a nearly identical arbitration, the arbitrator Eric Epstein granted the pizza company's cross-motion for partial summary judgment as to the appropriate legal standard for reimbursement. The arbitrator was promptly rewarded for providing a favorable decision—disclosing just twenty days later that he had accepted an offer of employment as arbitrator in another case with the same defense firm. *See* Email of Hiro Kawahara to Counsel and attachment (Exhibit 2).

[3] Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html (Exhibit 3).

[4] *See* AAA Employment Arbitration Rules and Mediation Procedures, https://www.adr.org/sites/default/files/Employment%20Rules.pdf) (Exhibit 4).

any objections with respect to the existence, scope, or validity of the arbitration agreement),[5] the power to determine what discovery is necessary (with the caveat that such discovery should be consistent with the expedited nature of arbitration),[6] and the power to set the rules for conducting the proceedings, including by directing the order of proof, bifurcating proceedings, and directing the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.[7] These rules provide the arbitrator, an individual unbound by the Code of Judicial Conduct for United States Judges or any similar code or regulation and not subject to appellate review, with unchecked power to decide how a case should be resolved.

Another example is that employees are prevented from utilizing the subpoena power to obtain pre-hearing discovery or deposition testimony from non-parties. *See, e.g., Life Receivables Tr. V. Syndicate 102 at Floyd's of London*, 579 F.3d 210, 125–16 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004); *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999); *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1159–60 (11th Cir. 2019).

In a pizza delivery driver under-reimbursement case, the employer's reimbursement method is essential evidence for numerous disputed issues (including to determine if defendants' reimbursements are legally compliant, if defendants acted willfully, and if individual defendants are "employers" as defined by the FLSA). When (as is often the case) an employer, purchases

[5] *See id* at Rule 6(a).
[6] *See id.* at Rule 9.
[7] *See id.* at Rule 28.

their vehicle reimbursement rate from a third-party company,[8] and argues their reliance on that rate eliminates or substantially reduces a driver's damages, but does not know how the third-party calculated their rate,[9] and the third-party company refuses to comply with an arbitrator's subpoena,[10] the individual employee suffers extreme prejudice—especially when arbitrators determine that they lack the power to issue subpoenas in the first place.[11]

Employees *need* discovery to prove their case. The Supreme Court has recognized that employers hold most or all of the evidence in wage and hour cases. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.,* ("The remedial nature of [the FLSA] and the great public policy which it embodies, however, militate against making [the] burden [of proving damages] an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under § 11 (c) of the Act to keep proper records… and who is in position to know and to produce the most probative facts…. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy."). Limitations on discovery harm employees while benefitting employers.

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[8] *See* Excerpts from Deposition of Susan Graves, *Nabor v. Route 41 Pizza*, Arbitration (Exhibit 5) at 25:6–15; 118:9–11 (discussing Route 41 Pizza, LLC's use of reimbursement rates received from Motus to set per-mile reimbursement rates at all stores).
[9] *Id.* at 135:5–7; 175:3–6.
[10] *See* Employee Subpoena to Motus, *Nabor*, Arbitration (Exhibit 6); Motus Subpoena Response, *Nabor*, Arbitration (Exhibit 7).
[11] *See* Case Management Order, *Jones v. Pizza Properties of North Carolina Inc., et al.*, Arbitration (Exhibit 8) at ¶5.f.

And, of course, Defendants strip employees of the most powerful tool they have to adjudicate wage claims: the class and collective action. *See* Doc. 20 at PageID 129. This serves solely to limit Defendants' liability and make it cheaper to break, rather than follow, the law.

One would expect that if, in fact, arbitration was so heavily stacked against employees, it would show up in outcomes. It does. Although arbitration is confidential in nature, empirical studies and investigations have demonstrated that employees fair far worse in arbitration than in court—not only are employees less likely to win, but employees also recover lower damages.[12]

The Supreme Court has said that arbitration must allow for the effective vindication of an employee's rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). As it currently exists, arbitration does not. Under different circumstances, it could. But that is not the reality. Plaintiff asks that the Court deal with the world as it exists, not the fantasy.

3. History of the FAA and FLSA

How did we reach a point where courts recognize that employees lack the bargaining power to negotiate basic wages, but simultaneously find that employees hold sufficient bargaining power to waive away their rights to courts, juries, and representative actions?

An historical review shows the development of a judge-made doctrine of excessive deference to arbitration contracts without foundation in the FAA and in defiance of the FLSA. This deference was improper in its genesis relied upon false assumptions about arbitration. The over-enforcement of the FAA has warped the statute and prompted Congress to prohibit

[12] For an overview of research, *see* Stone, Katherine V.W., and Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute, 414 (2015), https://files.epi.org/2015/arbitration-epidemic.pdf (Exhibit 9); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lal. L. 71 (2014) (Exhibit 10); Estlund, Cynthia, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. Rev. 3 (2018) (Exhibit 11).

arbitration in Sexual Harassment cases[13] and to consider a broader ban on arbitration in employment altogether.[14] The Supreme Court too has taken notice and recognized this problem of excessive difference and the need for course correction. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1710 (2022) [hereinafter *Sundance*]. *Sundance* requires courts to reassess the existing precedents and interpretive frameworks surrounding forced arbitration to ensure that they are not applying "ma[d]e up" "special[] arbitration-preferring rules." *Id.* at 1713–14.

3.1. Historical Overview and Legal Background

Congress passed the Federal Arbitration Act (FAA) in 1925 near the height of the *Lochner* era, when the freedom to contract was an unqualified absolute right. *See generally, W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (abrogating *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) and *Lochner v. New York*, 198 U.S. 45 (1905), and ending the now-reviled "*Lochner* era").[15] In the early Twentieth Century, most workers still earned their daily bread on farms instead of factories,[16] and in 1920, for the first time in history, the census showed a majority of Americans were now living in cities.[17]

As the century opened, massive changes swept American society, working life, and law. In 1938, during the Great Depression, Congress passed the Fair Labor Standards Act to protect

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[13] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Public Law No: 117-90, https://www.congress.gov/bill/117th-congress/house-bill/4445/text (Exhibit 12).
[14] Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/963 (Exhibit 13).
[15] *See also Holden v. Hardy*, 169 U.S. 366, 382 (1898) ("[T]he proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide…").
[16] *See* Donald M. Fisk, *American Labor in the 20th Century*, U.S. Bureau of Labor Statistics (2003), https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf (Exhibit 14).
[17] Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. Mich. J.L. Reform 813, 824 (1994).

American workers when they were at their most vulnerable and in order to standardize working conditions across the country to revitalize the American economy.

3.2. The Federal Arbitration Act

The common law, first in England and then in America, has long-opposed arbitration contracts. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974). In 1925, Congress passed the Federal Arbitration Act, abrogating that common law doctrine that arbitration contracts were unenforceable because they robbed courts of jurisdiction. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

The FAA (unlike the FLSA) provides no internal statement or explanation of its purpose. *See* Part 0, *infra*. The FAA's text shows that the Act's purpose is simply to make arbitration contracts as valid (or invalid) as any other contact:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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 text simply demonstrates that the act was intended to end the traditional common-law jurisdictional prohibition on arbitration—nothing more. *See Sundance,* 142 S. Ct. at 1710.

In passing the FAA, Congress placed arbitration contracts "upon the same footing as other contracts." *Id.* (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010)); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 n.7 (1985) [hereinafter *Dean Witter*] (quoting 65 Cong. Rec. 1931 (1924) ("[The FAA] creates no new legislation, grants no new rights, except a

remedy to enforce an agreement in commercial contracts and in admiralty contracts."). Arbitration contracts are entitled to the same treatment as other contracts and can be invalidated under general contract principles. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) [hereinafter *Epic Systems*] (discussing the how the FAA permits invalidation of arbitration contracts on based on "generally applicable contract defenses"). This does not make arbitration agreements invincible, as the FAA does not pursue its purposes "at all costs." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) [hereinafter *Italian Colors*].

Unfortunately, courts improperly determined the FAA requires that they bend the rules to favor arbitration.

Fortunately, the Supreme Court has recently explained that such interpretations are erroneous and initiated a course-correction, instructing courts (more explicitly than before) to simply "hold a party to its arbitration contract just as the court would to any other kind" and (more explicitly than before) instructed courts "not [to] devise novel rules to favor arbitration over litigation." *Sundance,* 142 S. Ct. at 1710.

In *Sundance*, the Supreme Court unanimously struck down the Eighth Circuit's creation of a more demanding waiver test in the context of an arguably late-raised arbitration agreement. The Supreme Court held that courts "may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'" *Sundance* 142 S. Ct. at 1714. It emphasized that "the FAA's policy 'is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism.'" *Id.* (quoting *Nat'l Found. For Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (1987)). "[T]he FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* at 1713. The

Supreme Court explained that the "frequent use of that phrase… is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Id.* (quoting *Granite Rock*, 561 U.S. at 302).

While *Sundance* focused specifically on waiver of arbitration, the principle undergirding the decision applies broadly: "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 1713. In light of *Sundance*, it is necessary for courts to reconsider the existing precedents and interpretive frameworks. Properly understood, "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it." *Id.*

Unfortunately, the lack of textual purpose has not stopped past courts from discovering additional purposes and supporting policies and less-than-clear statements from previous Supreme Court decisions have not helped.

Courts will routinely make excessively differential rulings based on a "liberal federal policy favoring arbitration agreements,"[18] a requirement to "rigorously" "enforce arbitration agreements,"[19] and additional FAA purposes: "enforcement of private agreements and encouragement of efficient and speedy dispute resolution"[20] and to "facilitate streamlined

[18] *Epic Systems*, 138 S. Ct. at 1630.
[19] *Id.* at 1621 (quoting *Italian Colors*, 570 U. S. at 233).
[20] *Dean Witter*, 470 U.S. at 221; *see also*

proceedings."[21] These statements have been over-interpreted by lower courts. Each of these policies are the resulting in an extra-textual heighten standard of excessive deference to arbitration contracts, that has elevated them *above* normal contracts, contrary to the plain meaning and text of the FAA.

First, the "liberal policy favoring arbitration" derives from *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) [hereinafter *Moses*]. After quoting the statute, the Court simply stated that Section 2 of the FAA (quoted above) serves as "a congressional declaration of a liberal federal policy favoring arbitration agreements" without additional explanation. *Moses*, 460 U.S. at 24 (internal footnotes omitted). The same formulation was repeated in *Gilmer*, 500 U.S. at 24–25 (citing *Moses*, 460 U.S. at 74) ("These provisions manifest a "liberal federal policy favoring arbitration agreements."), and again in *Epic Systems*, 138 S. Ct. at 1621 ("The Act, this Court has said, establishes 'a liberal federal policy favoring arbitration agreements.'").

The FAA permitted arbitration contracts to be enforced, and enacting a statute, of course, shows that Congress favors its policies, but the *mere* enactment of a statute does not magically make one statute superior to others. As *Sundance* explained, "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Id.* at 1713 (emphasis added) (citing *Moses* at 460 U.S. 1, 24). Rather, the Supreme Court's "frequent use of that phrase connotes something different," the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Id.* (quoting

[21] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Granite Rock, 561 U.S. at 302). Worse, the historic tendency to read extreme intent into the FAA is especially egregious when comparing the FAA's interaction with the FLSA, because the FLSA's text explains its purpose in detail, while the FAA does not. *See* Part 0, *infra*.

Second, the perceived requirement that courts must "rigorously" "enforce arbitration agreements" is also drawn from judge-made law. *See Epic Systems*, 138 S. Ct. at 1621 (quoting *Italian Colors*, 570 U. S. at 233). *Italian Colors* simply stated that "Courts must 'rigorously enforce' arbitration agreements according to their terms." *Id.* at 228 (quoting *Dean Witter*, 470 U. S. at 221). Earlier, the Supreme Court had stated that Congress' "preeminent concern" in passing the FAA "was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute." *Dean Witter*, 470 U.S. at 221. Again, *Sundance* corrects the over-zealousness of some courts, clarifying that the FAA "is about treating arbitration contracts like all others, not about fostering arbitration." *Sundance*, 142 S. Ct. at 1713. Not only is the idea of rigorous enforcement unsupported the statute, there is a profound countervailing policy manifested in the FLSA. *See* Part 0, *infra*.

Third, even if the excessive deference must continue, "no legislation pursues its purposes at all costs." *Italian Colors.*, 570 U.S. at 234 (quoting *Rodriguez v. United States*, 480 U.S. 522, 524–25 (1987)). The FAA cannot be used to invalidate Congress' explicit enactment of the FLSA to establish a publicly-known, nationwide, set of minimum permissible employment standards to protect both workers and the American economy. *See* Part 0, *infra* (citing 29 U.S.C. § 202).

Sundance emphasized that "the FAA's 'policy favoring arbitration' *does not authorize federal courts to invent special, arbitration-preferring procedural rules*. *Id.* at 1713 (emphasis added). Rather,

the Supreme Court's "frequent use of that phrase connotes something different," the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'" *Id.* (quoting *Granite Rock*, 561 U.S. at 302). "[T]he FAA's policy 'is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism.'" *Id.* (quoting *Nat'l Found. for Cancer Research*, 821 F.2d at 774).

The FAA was passed because of Courts' *jurisdictional* hostility to arbitration. *See Kulukundis*, 126 F.2d at 985. The FAA was not passed because of Courts' hostility to the arbitral forum itself. *See id.* The Supreme Court and the Sixth Circuit have recognized that the arbitral forum can be unfair, such that it prevents the effective vindication of a plaintiff's rights. *See, e.g.*, *Italian Colors*, 570 U.S. at 235–38 (discussing "effective vindication"); *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 607 (6th Cir. 2013) ("The limitations provision in Boaz's employment agreement operates as a waiver of her FLSA claim. As applied to that claim, therefore, the provision is invalid.").

Ignoring the serious problems in arbitration, as applied to minimum wage workers, risks falling back into the improper excessive deference trap. Defendants' Motion encourages the Court gloss over the contract and approve it based on that excessive deference. *See* Doc. 19-1 at Pages 7–8. Following *Sundance*, courts' assessment of forced arbitration contracts require a more in-depth, skeptical, and searching analysis.

3.3. The Fair Labor Standards Act

When Congress enacted the Fair Labor Standards Act, it used the statute's opening sections to explain that the purpose of this law is to protect both workers and the American economy by creating a set of publicly-known, nationwide, minimum permissible employment standards—or in their own words:

> The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
>
> It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202(a)–(b).

"The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. To accomplish this

purpose standards of minimum wages and maximum hours were provided." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945) (internal footnote omitted) [hereinafter *O'Neil*].

The protections of the FLSA are so strong that "the purposes of the Act require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found. v. Secy. of Labor*, 471 U.S. 290, 302 (1985) [hereinafter *Alamo*]; *O'Neil*, 324 U.S. 697 at 707 ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."). That is because, for example, "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Alamo*, 471 U.S. at 302 (internal citation omitted).

Since the passage of the FLSA, the Supreme Court has regularly affirmed Congress' ability to rectify "[s]ubstandard labor conditions [that] were deemed by Congress to be 'injurious to the commerce and to the states from and to which the commerce flows.'" *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 576–77 (1942) (referencing, specifically that "If, in the judgment of Congress, time and a half for overtime has a substantial effect on these conditions, it lies with Congress' power to use it to promote the employees' well-being" and discussing how "Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length work weeks, by offering opportunities for unfair competition, through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work.").

The Supreme Court's "decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, [the Supreme Court has] held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740; *see also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944) ("The [FLSA] clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.").

For instance, the Supreme Court found it "essential to uphold the Wage and Hour Administrator's authority to ban industrial homework in the embroideries industry, because 'if the prohibition cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage.'" *Id.*

4. Argument

As discussed below, Plaintiff contends that the arbitration agreement in this case is unenforceable for multiple reasons.

First, Defendants' contract fails for lack of consideration. Defendants' ability to unilaterally revoke or modify their contract at any time renders their promises illusory. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 310 (6th Cir. 2000).

Second, it is well-established that employees may not resolve FLSA disputes absent the oversight of a federal district court or the Department of Labor oversight. *Baker v. ABC Phones of N.C., Inc.*, No. 19-cv-02378-SHM-tmp, 2021 U.S. Dist. LEXIS 208344, at *6–7 (W.D. Tenn. Oct. 28, 2021) (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982)) (Mays, J.) [hereinafter *Lynn's Food*]). "The provisions of the FLSA are mandatory and, except in two narrow circumstances, are generally not subject to bargaining, waiver, or modification by contract or settlement." *Gardner v. Blue Sky Couriers, Inc.*, No. 2:20-cv-02390, 2021 U.S. Dist. LEXIS 251859, at *2–3 (W.D. Tenn. May 14, 2021) (citing *O'Neil*, 324 U.S. at 706) (Mays, J.). However, "[t]here are two ways in which claims for back wages arising under the FLSA can be settled or compromised. First, the Department of Labor can supervise a settlement. Second, '[w]hen employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the district court may enter a stipulated judgment after scrutinizing the settlement for fairness.'" *Baker*, 2021 U.S. Dist. LEXIS 208344, at *6–7 (internal citations omitted) (citing cases). Because arbitration is nothing more than a private settlement of FLSA claims, attempting to skirt governmental supervision of FLSA dispute resolution, arbitration of FLSA claims is unenforceable. Creating an arbitration-specific exception for the arbitration of FLSA claims is contrary to the ruling in *Sundance*, 142 S. Ct. at 1712.

Even if the process is enforced, the arbitrator's decision would still necessarily require scrutiny by a federal district court, which would require *de novo* review of the facts and law, defeating the fundamental purpose of the arbitration agreement. As with any contract, if the fundamental purpose is frustrated, or impossible, the contract is unenforceable. *N. Am. Capital Corp.*, 510 S.W.2d at 903.

Third, the agreement is unconscionable as a matter of law. In virtually every other context, the employment relationship is recognized as a fundamentally coercive. *Alamo*, 471 U.S. at 302 (citing cases). But in arbitration, courts have relied upon the judge-created liberal policy favoring rigorous arbitration enforcement to ignore this fact. This is improper. Moreover, arbitration, not as envisioned, but as actually practiced, does not allow employees to effectively vindicate their rights.

4.1. Defendants' forced arbitration contract fails because their promises are illusory.

Consideration is an essential element of every contract. *Floss*, 211 F.3d at 315 (citing *Price v. Mercury Supply Co.*, 682 S.W.2d 924, 933 (Tenn. Ct. App. 1984)). A promise is legally enforceable only if the promisor receives in exchange for that promise some act or forbearance, or the promise thereof. *Id.* (citing *Kozy v. Werle*, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1995)). A promise constitutes consideration for another promise only when it creates a binding obligation. Thus, absent mutuality of obligation, a contract based on reciprocal promises lacks consideration. *Id.* (citing *Dobbs v. Guenther*, 846 S.W.2d 270, 276 (Tenn. Ct. App. 1992)).

Defendants' arbitration contract provides that "[t]he Company may terminate or modify these procedures at any time." Doc. 20 at PageID 129.

"Promises may fail to create legally binding obligations for a variety of reasons. Most notably, a promise may in effect promise nothing at all. Such an illusory promise arises when a promisor retains the right to decide whether or not to perform the promised act." *Floss*, 211 F.3d at 315 (internal citation omitted) (citing Tennessee and other state cases). The Sixth Circuit has found a promise where the promisor has "an unlimited right to unilaterally modify or amend the rules and procedures of the arbitration proceeding without providing notice" is illusory. *Id.* at 310.

"[W]here a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory." *Id.* at 316 (citing 1 Samuel Williston, Contracts § 43, at 140 (3d ed. 1957)).

The Sixth Circuit is not alone. *Floss* interpreted Tennessee (and other) state laws. Other courts have also found that retaining a right to unilaterally revoke or modify an arbitration contract results in an illusory promise, no consideration, and thus no contract. *See, e.g.*, *Cheek v. United Healthcare of the Mid- Atl., Inc.*, 835 A.2d 656, 662 (Md. App. Ct. 2003) (finding "that '[Promisor] reserves the right to alter, amend, modify, or revoke the [Arbitration] Policy at its sole and absolute discretion at any time with or without notice' creates no real promise, and therefore, insufficient consideration to support an enforceable agreement to arbitrate."); *see also Howard v. King's Crossing, Inc.*, 264 F. App'x 345, 346 (4th Cir. 2008) (citing *Cheek* favorably, but distinguishing the case because the promisor had not made the same reservation); *Wynn v. Five Star Quality Care Tr.*, No. 3:13-cv-01338, 2014 U.S. Dist. LEXIS 77295, at *20 n.12 (M.D. Tenn. June 5, 2014) (noting that "Maryland law[] incorporates the same basic contract principles as Tennessee" and citing *Cheek*).

Defendants' gave themselves the ability to ability to revoke or modify their arbitration contract at any time and under any circumstances:

> Modification of Agreement: The Company may terminate or modify these procedures at any time. The termination or modification of these procedures shall not affect the validity of any Arbitration Agreement signed prior to the effective date of such termination or modification. In the event of termination of these procedures, all claims arising under Arbitration Agreements signed prior to the effective date of such termination will be processed in accordance with this Arbitration Agreement.

Doc. 20 at PageID 129. This makes Defendants' promise (if it can be called that) too indefinite for legal enforcement. Defendants may attempt to argue that the last sentence of the clause provides sufficient notice and should save their contract—but there is nothing to stop the Defendants from "modifying" that protection out of the contract prior to terminating the contract. Defendants' "promises" are illusory and for that reason, the Court should deny Defendants' motion to compel arbitration.

4.2. Defendants' forced arbitration contract fails because it evades the judicial and public scrutiny required by the FLSA.

The FLSA is a unique law in that it creates non-waivable rights of a mixed public-private nature. Those rights require courts to exercise additional protective measures not required in virtually any other setting. It is well-established that parties cannot contract around the requirements of the FLSA. *Craig*, 823 F.3d at 388 (citing *Barrentine*, 450 U.S. at 740 (1981). Particularly relevant to this case, the FLSA mandates that private resolutions of FLSA claims must receive either federal district court or Department of Labor approval and supervision. *Baker v. ABC Phones of N.C.*, No. 19-cv-02378, 2020 U.S. Dist. LEXIS 240695, at *17–18 (W.D. Tenn. Dec. 22, 2020) (citing *Lynn's Food*). Absent such approval, private resolutions are unenforceable. *See id.* at *18 n.1; *Salim Hajiani v. ESHA USA, Inc.*, No. 3:14-CV-594, 2017 U.S. Dist. LEXIS 184252, at *17 (E.D. Tenn. Nov. 7, 2017); *Casso-Lopez v. Beach Time Rental Suncoast, LLC*, 335 F.R.D. 458, 461 (M.D. Fla. 2020). As discussed below, this applies as much to arbitration as it does to private settlements—which function as nothing more than an attempt to contract around the FLSA.

Plaintiff notes from the outset that Defendants are likely to say that some courts and the Sixth Circuit have allowed arbitration of FLSA cases. This is undoubtedly true. *See, e.g.*, *Gaffers v. Kelly Servs.*, 900 F.3d 293, 295 (6th Cir. 2018). Although, as stated above, old precedents (many

polluted by the doctrine of excessive deference criticized in *Sundance*) need to be reviewed closely. No court, however, has addressed whether the FLSA's requirement for either federal district court or department of labor settlement supervision and approval prevents arbitration altogether or strips the arbitrator of doing more than rendering a non-binding advisory opinion.[22] And, since the *Sundance* decision, no court has considered whether courts in FLSA arbitration cases are permitted to create arbitration-specific variants of federal procedural rules that otherwise govern approval and enforceability FLSA settlements. *Sundance,* 142 S. Ct. at 1712.

4.2.1. The FLSA creates non-waivable rights that are of a public-private nature.

The FLSA is a remedial statute designed around the fact that employees lack the bargaining power to negotiate what Congress determined to be a wage sufficient for a minimum, acceptable standard of living. *See, e.g.*, *Alamo*, 471 U.S. at 302 (1985); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1043 n.6 (6th Cir. 1986). As a result, "Congress enacted the FLSA in 1938 with the goal of 'protect[ing] all covered workers from substandard wages and oppressive working hours.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (quoting *Barrentine*, 450 U.S. at 739)). Congress designed the FLSA "to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (internal quotation marks omitted) (citing *Overnight Motor Transportation Co.*, 316 U.S. at 578). "The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on

[22] *Gaffers* focused only on the question of whether the right to a collective action was waivable, which is not argued here. *Gaffers*, 900 F.3d at 295–97.

their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Steele v. Staffmark Invs., Ltd. Liab. Co.*, 172 F. Supp. 3d 1024, 1026 (W.D. Tenn. 2016) (quoting *O'Neil*, 324 U.S. at 706–07).

"The central aim of the [FLSA] was to achieve, in those industries within its scope, certain minimum labor standards." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). "The FLSA is not a trivial statute to be 'interpreted or applied in a narrow, grudging manner.'. When FLSA claims are brought before a court, that court must 'discard[] formalities and adopt[] a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.' …[T]he FLSA does not 'deal with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.'" *Steele*, 172 F. Supp. 3d 1024, 1026 (internal citations omitted) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592, 597 (1944))

The FLSA's protections mean nothing if employees can simply waive them. *Alamo*, 471 U.S. at 302; *Stemple v. City of Dover*, 958 F. Supp. 335, 340 n.6 (N.D. Ohio 1997) ("Although individuals are important within the [FLSA's] framework, the real aim is to protect workers as a group."). The purposes behind the FLSA "leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage. [An unsupervised] compromise thwarts the public policy of minimum wages, promptly paid, embodied in the [FLSA], by reducing the sum selected by Congress as proper compensation for withholding wages." *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1234–35 (M.D. Fla. 2010) (quoting *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 116 (1946)).

"The provisions of the FLSA are mandatory and, except in two narrow circumstances, are generally not subject to bargaining, waiver, or modification by contract or settlement." *Gardner*, 2021 U.S. Dist. LEXIS 251859, at *2–3. Casually permitting the waiver of FLSA rights drives wages down. *See Alamo*, 471 U.S. at 302. Thus, the FLSA and its enforcement have both a private and public component. *Id.* This controls the resolution of FLSA cases.

Fulfilling that dual mandate requires that cases must be open to public scrutiny. *See Green v. Hepaco, LLC*, No. 2:13-cv-02496, 2014 U.S. Dist. LEXIS 83155, at *10–11 (W.D. Tenn. June 12, 2014) (citing cases); *Dees*, 706 F. Supp. 2d at 1233, 1245–46 (citing *O'Neil*, 324 U.S. at 705–08). And in approving settlements, the "court must scrutinize the proposed settlement for fairness, and determine whether the settlement is a 'fair and reasonable resolution of a bona fide dispute over FLSA provisions.'" *Green*, 2014 U.S. Dist. LEXIS 83155, at *7 (quoting *Bartlow v. Grand Crowne Resorts of Pigeon Forge*, 2012 U.S. Dist. LEXIS 181808, at *4 (E.D. Tenn. Dec. 26, 2012)).

This scrutiny ensures that the purposes of the FLSA are carried out, protects employees from being taken advantage of (by their employer or their attorney), and permits defendants to obtain enforceable settlements. *Steele*, 172 F. Supp. 3d at 1026–28; *Green*, 2014 U.S. Dist. LEXIS 83155, at *6–11; *Lynn's Food*, 679 F.2d at 1354–55; *Casso-Lopez*, 335 F.R.D. at 461; *Dees*, 706 F. Supp. 2d at 1241–46.

4.2.2. FLSA claims cannot be resolved absent the supervision and approval of a federal district court or the Department of Labor.

The FLSA's mandate also prohibits employees from agreeing to resolve their claims outside of judicial or DOL scrutiny. *Baker*, 2020 U.S. Dist. LEXIS 240695, at *17–18 (citing *Lynn's Food*). The non-waivable and public nature of an employee's FLSA rights necessitate judicial or DOL oversight. Thus far, this has been most thoroughly explored in the context of FLSA settlement approval. As described in the next section, the same principles apply as much (if not more so) to arbitration as to settlements.

The Court's previous finding that judicial approval of private settlements is required is well-founded. *Gardner*, 2021 U.S. Dist. LEXIS 251859, at *2–3. "[D]istrict courts in the Sixth Circuit have repeatedly held that court approval is necessary for FLSA settlements. *Bernardez v. Firstsource Sols. USA, LLC*, Civil Action No. 3:17-cv-613, 2022 U.S. Dist. LEXIS 71531, at *8 (W.D. Ky. Apr. 19, 2022) (citing cases). "Outside of [the] oversight mechanisms [of DOL or Court approval], however, the circuits are largely in agreement that private settlements of FLSA claims are invalid. *Salim*, 2017 U.S. Dist. LEXIS 184252, at *12–13, *17. Private settlements compromising FLSA claims are unenforceable without the approval of a federal district court or the DOL:

> Stated differently, unless supervised by the Department of Labor or approved by a district court, any compromise, relinquishment, or other diminution of an employee's FLSA rights — by whatever mechanism undertaken or procured, even by a rule of procedure — is illusory, ineffective, and unenforceable, and the employee can ignore the entire episode, including an executed settlement agreement (exactly what happened in *Lynn's Food*) and immediately sue the employer to obtain whatever FLSA rights the employee earlier purported to compromise, relinquish, or otherwise diminish. Also, any release, confidentiality or non-disclosure agreement, or any other covenant or agreement granting the employer anything else of value in exchange for the FLSA wage is unenforceable. The FLSA commands that result, the Supreme Court confirms that result, *Lynn's*

> *Food* and similar cases expound that result, and a district court must enforce that result — no evasive gimmicks allowed.

Casso-Lopez, 335 F.R.D. at 461. Federal courts are uniquely situated to assess the mixed public and private protections at stake in wage and hour cases. An arbitration settlement is a totally private settlement of FLSA claims. If Plaintiff and Defendants hired a third-party lawyer to tell the Court to approve their FLSA settlement, the Court would still need to independently determine whether the settlement was a "fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Gardner*, 2021 U.S. Dist. LEXIS 251859, at *3 (quoting *Lynn's Food*).

"FLSA rights cannot be *abridged by contract* or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740 (emphasis added) (quoting *O'Neil*, 324 U.S. at 707). "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections" because "[i]f an exception to the Act were carved out… employers might be able to use superior bargaining power to coerce employees to… waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Alamo*, 471 U.S. at 302 (prohibiting employees from testifying that they worked on a voluntary basis); *see also Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015) ("[A]lthough employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections."); *Runyan*, 787 F.2d at 1043 n.6 (endorsing heightened scrutiny of FLSA settlements due to "the well-known problems arising from the unequal

bargaining positions of employers and employees and 'substandard wages and oppressive working hours'" which are implicated "to a significantly greater degree" in FLSA settlements).

Courts recognize that "the distinction between procedural and substantive rights is notoriously elusive." *Boaz*, 725 F.3d at 606 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). This places a "demanding" "obligation" on courts "to police FLSA settlements to ensure that they are fair and reasonable" *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 178 (S.D.N.Y. 2015) [hereinafter *Nights of Cabiria*]. That analysis "implicates both the rights of the settling employee and the interests of the public at large," both must be satisfied to ensure that the FLSA is enforced:

> To fully implement the policy embodied by the FLSA, the district should scrutinize the compromise in two steps. First, the court should consider whether the compromise is fair and reasonable to the employee (factors 'internal' to the compromise). If the compromise is reasonable to the employee, the court should inquire whether the compromise otherwise impermissibly frustrates implementation of the FLSA (factors 'external' to the compromise). The court should approve the compromise *only if* the compromise is reasonable to the employee *and furthers implementation of the FLSA in the workplace*.

Id. at 178–79 (emphasis added) (quoting *Dees*, 706 F. Supp. 2d at 1227).

This Court has previously recognized that there is a Circuit split on whether judicial approval is mandated for all types of FLSA settlements, and that "[t]his Circuit has not directly addressed the question, but the majority view is that judicial approval is required for FLSA collective action settlements brought under 29 U.S.C. § 216(b)." *Baker*, 2020 U.S. Dist. LEXIS 240695, at *18 n.1 (citing *Steele*, 172 F. Supp. 3d at 1026–29). It is the majority view for good reason, as "the unique purpose of the FLSA and the unequal bargaining power between employees and employers" counsel that "FLSA settlements require approval by either the Department of Labor or a court." *Steele*, 172 F. Supp. 3d 1024, 1026. Other federal district courts throughout

Tennessee require approval. *See, e.g.*, *Gardner*, 2021 U.S. Dist. LEXIS 251859, at *2; *Green*, 2014 U.S. Dist. LEXIS 83155, at *6–11; *Bartlow*, 2012 U.S. Dist. LEXIS 181808, at *3–4; *Mezger v. Price CPAs, PLLC*, Civil Action No. 3:08cv0163, 2008 U.S. Dist. LEXIS 133143, at *8–9 (M.D. Tenn. Apr. 21, 2008). Further, "district courts in the Sixth Circuit have repeatedly held that court approval is necessary for FLSA settlements." *Bernardez*, 2022 U.S. Dist. LEXIS 71531, at *8 (citing *Athan v. U.S. Steel Corp.*, 523 F. Supp. 3d 960, 965 (E.D. Mich. 2021)); *Lopez v. Silfex, Inc.*, No. 3:21-cv-61, 2021 U.S. Dist. LEXIS 232508, at *7–10 (S.D. Ohio Dec. 3, 2021).

The Second, Fourth, Seventh, Ninth, and Eleventh Circuits have required judicial approval of FLSA settlements. *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 205 (2d Cir. 2015); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 462–63 (4th Cir. 2007), *superseded by regulation on other grounds as recognized in*, *Whiting v. Johns Hopkins Hosp.*, 416 F. App'x 312 (4th Cir. 2011); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 306 (7th Cir. 1986); *Seminiano v. Xyris Enter.*, 602 F. App'x 682, 683 (9th Cir. 2015); *Nall v. Mal-Motels, Inc.*, 723 F.3d 1304, 1306–08 (11th Cir. 2013) (reaffirming *Lynn's Food*).

The Eighth Circuit disclaims a position, despite appearing to have endorsed *Lynn's Food*. *Barbee v. Big River Steel, LLC*, 927 F.3d 1024, 1026–27 (8th Cir. 2019) ("We have never taken a side on this issue."); *but see Copeland v. ABB, Inc.*, 521 F.3d 1010, 1014 (8th Cir. 2008).

The First, Third, Sixth, Tenth, and D.C. Circuits have not directly addressed the issue, but their district courts embrace *Lynn's Food*. *See, e.g., Anderson v. Team Prior, Inc.*, No. 2:19-cv-00452-NT, 2021 U.S. Dist. LEXIS 162626, at *13 (D. Me. Aug. 27, 2021); *Kane v. Ollie's Bargain Outlet Holdings, Inc.*, 2022 U.S. Dist. LEXIS 31113, at *3 (M.D. Pa. Feb. 22, 2022); *Athan*, 523 F. Supp. 3d at 964–65; *Aguilar v. Pepper Asian*, Civil Action No. 21-cv-02740-RM-NYW, 2022 U.S.

Dist. LEXIS 24278, at *23 n.2 (D. Colo. Feb. 10, 2022); *Carrillo v. Dandan Inc.*, 51 F. Supp. 3d 124, 130 (D.D.C. 2014).

Only the Fifth Circuit has explicitly permitted a private settlement of FLSA claims, and even then, it was under unique circumstances. *Martin v. Spring Break '83 Prods., Ltd. Liab. Co.*, 688 F.3d 247, 257 (5th Cir. 2012). Further, the Fifth Circuit later walked the *Martin* decision back. *See Bodle v. TXL Mortg. Corp.*, 788 F.3d 159, 163–65 (5th Cir. 2015) (discussing *Martin* and noting that "the union representative [in *Martin*] concluded it would be impossible to validate the number of hours claimed by the workers for unpaid wages" but concluded that "The general prohibition against FLSA waivers applies in this case, and the state court settlement release cannot be enforced against the plaintiffs' FLSA claims.").

4.2.3. At its core, arbitration is a means to resolve FLSA disputes.

It is black-letter law that an employee cannot bargain with her employer to be paid less than minimum wage. 29 U.S.C. § 206(a). Thus, an employee could not say "I agree to be paid $1 per hour." Such an "agreement" would have no effect. *Alamo*, 471 U.S. at 302; *Craig*, 823 F.3d at 388.

Based on the same principles, employees and employers cannot settle FLSA claims except for under the supervision of a court or the DOL. *Baker*, 2020 U.S. Dist. LEXIS 240695, at *17–18. To hold otherwise would allow waiver of FLSA by permitting employees and employers to "negotiate" for a sub-minimum wage—which is why an employee cannot say "I contend that my employer has paid me only $1 per hour. I will resolve any claims I have arising from this situation for an additional $1 per hour."

Arbitration presents an indirect version of that waiver. If permitted, and employee in arbitration effectively assigns the ability to compromise his or her claim to a third-party. It is the equivalent of saying "I know that I cannot agree to work for less than minimum wage. But, if this third-party says I can, then I will." That is no different from an employee saying, "I relinquish control of settling my own claim and, instead, assign it to a third-party—who is not advocating for my interests."

None of this passes muster under the FLSA. An employee can neither waive her right to a wage, nor assign to someone else the ability to waive that right. In the same way that an employee and employer cannot agree to flip a coin to decide whether the employee should be or was paid minimum wage, the parties cannot agree to have a third party make that decision.

Courts find it "necessary to ban private settlements" to prevent the "establish[ment of] sub-minimum wages." *Walton*, 786 F.2d at 306 (citing *Lynn's Food*).

Courts also prohibit employees represented by counsel from resolving their claims without court approval. *Casso-Lopez*, 335 F.R.D. at 461. The FLSA prevents purely private settlements to ensure that employees (and employers!) are not being taken advantage of:

> Based on the many 'stipulated' attempts at evasion submitted to me after *Dees*, either many FLSA plaintiff's lawyers unaccountably agree to these transparent and doomed devices with confidence that the court will reject the defendant's attempt, many plaintiff's lawyers are unaware of the employee's FLSA rights, or many plaintiff's lawyers are indifferent to the employee's FLSA rights (and choose, instead, the lawyer's quick payday over the employee's just payday). On the other hand, the willingness of defense lawyers to enter these putative settlements — perhaps accomplishing little or nothing for their client — might originate in an unawareness of the law explained in *Lynn's Food*, *Dees*, and elsewhere and might expose both lawyer and client to the same unpleasant surprise — another claim by the same plaintiff — experienced by counsel and client in *Lynn's Food*.

Id. More commonly, these settlements involve employers attempting to (in violation of the FLSA) obtain additional "side-deal" benefits:

> For example, the employer in an FLSA case might offer full monetary compensation to the employee for the FLSA claim but might require the employee to refrain from informing fellow employees about the result the employee obtained. Or the employer might require the employee to trim the shrubbery at the employer's home each weekend for a year. In either instance, the employee outwardly receives full monetary compensation for her unpaid wages, but effectively the additional term (the 'side deal') confers a partially offsetting benefit on the employer. To the extent that the employee receives a full wage but relinquishes something else of value, the agreement (even if exhibited to the court as a stipulation for 'full compensation' or an offer of judgment) involves a 'compromise,' and *Lynn's Food* requires judicial approval of the compromise.

Dees, 706 F. Supp. 2d at 1240 (citing *Silva v. Miller*, 307 F. App'x 349, 351 (11th Cir. 2009)).

Arbitration further frustrates the vindication of FLSA rights due to its secretive nature. In addition to protections for individual workers, Congress sought to protect "the public's independent interest in assuring that employees' wages are fair and thus do not endanger 'the national health and well-being.'" *O'Neil*, 324 U.S. at 706; *see also Joo v. Kitchen Table, Inc.*, 763 F. Supp. 2d 643, 645 (S.D.N.Y. 2011) (discussing the "private-public" character of FLSA rights and that the public has an "independent interest" in assuring that the FLSA is properly enforced).

"[V]indication of FLSA rights throughout the workplace is precisely the object Congress chose to preserve and foster through the FLSA." *Dees*, 706 F. Supp. 2d at 1244. That is why the "overwhelming majority of courts reject the proposition that FLSA settlements can be confidential." *Souza v. 65 St. Marks Bistro*, No. 15-CV-327, 2015 U.S. Dist. LEXIS 151144, at *13 (S.D.N.Y. Nov. 6, 2015). That is because "most" confidentiality provisions are "clearly designed to reduce the employer's exposure to having to pay FLSA wages to other employees, or having to litigate its obligation to pay other employees, by preventing other employees from learning of their

rights." *Klich v. Konrad Klimczak*, No. 21-cv-4812 (BMC), 2021 U.S. Dist. LEXIS 222230, at *10 (E.D.N.Y. Nov. 16, 2021). FLSA settlements "should not be filed under seal, except in the very limited circumstance where parties can make a substantial showing that their need to seal the agreement outweighs the strong presumption of public access that attaches to such judicial documents." *Green*, 2014 U.S. Dist. LEXIS 83155, at *11 (quoting *Bouzzi v. F & J Pine Rest., LLC*, 841 F. Supp. 2d 635, 639 (E.D.N.Y. 2012).

The rational for prohibiting arbitration of wage claims is similar to "[t]he rationale for rejecting confidential FLSA settlements… since '[s]ealing FLSA settlements from public scrutiny could thwart the public's independent interest in assuring that employees' wages are fair.'" *Nights of Cabiria*, 96 F. Supp. 3d at 178. "Preventing the employee's co-workers or the public from discovering the existence or value of their FLSA rights is an objective unworthy of implementation by a judicial seal, which is warranted only under 'extraordinary circumstances' typically absent in an FLSA case. Absent an 'overriding interest' in the preservation of some 'higher value,' the court should not abide the parties' request for a seal." *Dees*, 706 F. Supp. 2d at 1245–46. So too for arbitration.

There is nothing magical about an arbitrator. If two parties represented by counsel are not permitted to resolve their disputes without Court approval, then those parties cannot "agree" to have a third party do that which they cannot. It makes no difference that the arbitrator "decides" who is right and wrong in a dispute. The parties lack the power to assign resolving wage disputes to either themselves, a third party, or some other non-judicial (or non-DOL) method.

Because compromises of FLSA claims require judicial (or DOL) supervision and approval, employers and employees cannot simply agree to do so before an arbitrator. Thus, an agreement

purporting to bind an employee to the of arbitrator (or any other third-party that is not a Judge or the Secretary of Labor) regarding FLSA claims is unenforceable. Even if the arbitrator is permitted to hear the case, assess effects, and render decisions, a federal district court would need to conduct a full, *de novo* review of that decision before the settlement can be enforced. This would necessarily include discovery, arguments, briefing, and perhaps a hearing. Such a situation would fundamentally defeat the purpose of the arbitration, also rendering the agreement unenforceable.

4.3. The Defendants' forced arbitration contract fails because it is an unconscionable contract of adhesion.

Even if the FLSA permitted parties privately resolve disputes without judicial supervision, Defendants' arbitration contract is unconscionable and is therefore unenforceable.

Plaintiff recognizes, of course, that some courts have held that arbitration agreements are not unconscionable. But those decisions rest upon two flawed premises that require reexamination. First, the decisions hold that the employment relationship does not present an unduly coercive situation for a low-wage employee. Such a finding ignores reality, seeming to rest on the invalid doctrine of extreme deference arbitration, because *other than in the context of arbitration*, courts consistently recognize the coercive nature of the employment relationship, specially between a company and a minimum-wage worker. *Sundance* cautions against the creation of special standards that only apply in arbitration. *Sundance*, 142 S. Ct. at 1712. Second, the decisions assume that arbitration occurs in a fair, neutral, and effective forum. Now that there is evidence to test those assumptions, they are proving to be incorrect. In fact, the opposite is true. Arbitration is stacked

so heavily against employees that they are less likely to win arbitration cases and they recover lower damages.[23]

Arbitration prevents fair and reasonable resolutions of FLSA disputes because even if arbitration may generally be a suitable forum in other contexts, the "arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim" because, otherwise, "arbitration of the claim conflicts with the [FLSA]'s purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions." *Cf. Floss*, 211 F.3d at 313. As discussed throughout this brief, the arbitral forum's restrictions and incentive structures function to deny workers the ability to effectively protect and vindicate their FLSA rights. *See, e.g.*, Part 2, *supra*. The forum is effective only for companies as a limitation on FLSA liability. If the forum is not neutral and it has the same function as prohibiting an employee from asserting his or her rights—the only difference is an extra step.

The FAA is about "treating arbitration contracts like all others, not about fostering arbitration," "[i]f an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it." *Sundance*, 142 S. Ct. at 1713.

"In Tennessee, an adhesion contract is defined as 'a standardized form offered on what amounts to a "take it or leave it" basis, without affording the weaker party a realistic opportunity

[23] Alexander J.S. Clovin, *The growing use of mandatory arbitration*, Economic Policy Institute (September 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ (Exhibit 15); American Association for Justice, *The Truth About Forced Arbitration* (September 2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration (Exhibit 16).

to bargain, and under conditions whereby the weaker party can only obtain the desired product or service by submitting to the form of the contract.'" *Lansky v. Prot. One Alarm Monitoring, Inc.*, No. 2:17-cv-2883, 2018 U.S. Dist. LEXIS 103694, at *9 (W.D. Tenn. June 21, 2018).

An adhesion contract is not necessarily unenforceable—so long as it has no unconscionable or oppressive terms. *Buraczynski v. Eyring*, 919 S.W.2d 314, 316 (Tenn. 1996). But the Tennessee Supreme Court has warned that contracts to arbitrate "must be closely scrutinized to determine if unconscionable or oppressive terms are imposed." *Id.*

"[A] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and 'the existence of unfair terms in the contract.'" *Taylor v. Butler*, 142 S.W.3d 277, 285 (Tenn. 2004) (citing *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 1998)).

Like the arbitration contract in *Taylor*, Plaintiff Peacock's forced arbitration contract is a standardized contract form that was offered on a "take it or leave it" basis with no real opportunity to bargain. *Taylor*, 142 S.W.3d at 286; *see also* Doc. 19-3 at ¶ 4–5 ("First Order has required all delivery drivers to agree to mutually binding arbitration as a condition of their employment since approximately August of 2020.").

The "enforceability of contracts of adhesion generally depends upon whether the terms of the contract are beyond the reasonable expectations of an ordinary person, or oppressive or unconscionable. Courts will not enforce adhesion contracts which are oppressive to the weaker party or which serve to limit the obligations and liability of the stronger party." *Taylor*, 142 S.W.3d at 286 (citing *Buraczynski*, 919 S.W.2d at 320).

Courts repeatedly recognize that the employment relationship is inherently coercive and subject to abuse on the part of employers. The most obvious example of this is the Fair Labor Standards Act. Courts have consistently recognized that the FLSA was necessary because of the superior, coercive bargaining power that employers hold over their employees. *See, e.g.*, *Alamo*, 471 U.S. at 302; *Runyan*, 787 F.2d at 1043 n.6. Despite these consistent holdings, seemingly in an effort to enforce arbitration agreements at all costs, courts will find that in arbitration there is no coercion and that an employee's bargaining position is on par with a company of any size and sophistication. *See Gilmer*, 500 U.S. at 26. Such findings do not match reality.

Courts have also recognized the coercive nature of employment relationships and the danger of employers unduly interfering with a class because of the power that the employment relationship grants employers. *See, e.g.*, *Crosby v. Stage Stores, Inc.*, 377 F.Supp.3d 882, 889 (M.D. Tenn. 2019) (citing cases) ("[T]he potential for coercion and abuse of the class action is especially high when there is an ongoing business relationship between the two parties, particularly when that relationship is one of employer to employee."); *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1203 (11th Cir. 1985) (discussing the potentially "irreparable" dangers of "[u]nsupervised, unilateral communications with the plaintiff class" and defense counsel); *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662, 666 (E.D. Pa. Apr. 9, 2001) ("If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined."); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("Where the defendant is the current employer of putative class

members who are at-will employees, the risk of coercion is particularly high; indeed, there may in fact be some inherent coercion in such a situation.").

That inherently unbalanced relationship is why employers are able force employees to sign arbitration agreements in the first place. The agreements serve only to the detriment of employees; thus, there is no rational reason for them to sign the agreements but-for the employer's superior bargaining power. Plaintiff (and his co-workers that he seeks to represent) are minimum wage pizza delivery drivers. Doc. 21-2 at ¶ 22. They deliver drivers are required to sign arbitration agreements to secure employment. Doc. 19-3 at ¶ 4. Drivers lack specialized training or education—certainly not in law—and many delivery drivers possess only a high school degree (or less). In contrast, Defendants operate a sophisticated business enterprise across multiple states, possess highly competent attorneys, hold all the negotiating power, and present form arbitration contracts to delivery drivers on a take-it-or-leave-it basis without explanation as just another document in their on-boarding process. *See id.* at ¶ 5. There is a "vast disparity" of bargaining power. *Scovill v. WSYX/ABC, Sinclair Broad. Grp., Inc.*, 425 F.3d 1012, 1018 (6th Cir. 2005). Plaintiff's arbitration contract, and others like it, come solely as a result of Defendants' superior bargaining power—no negotiation or *real* bargaining took place.

Defendants' arbitration contract is one-sided and serves entirely to benefit Defendants. It is so favorable to Defendants that they can even change it at a whim. *See* Part 4.1; Doc. 20 at PageID 129. Undoubtedly, Defendants know the substantial, liability-limiting benefits (for them) of arbitration. That is why the use it.

First, consider the benefits commonly touted by courts, which include the ability to "forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private

dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.*, 559 U.S. at 685. In the eyes of the courts, a major *benefit* is the *absence* of class and collective litigation. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011). All those benefits inure to Defendants' benefit—not Plaintiff or the other delivery drivers. It is certainly more efficient, speedy and less costly for Defendants to fight a few arbitrations (with decision-makers incentivized to favor employers) and maybe pay out a few drivers rather than litigate a class action where they might be required to pay all their drivers what they are owed. As discussed throughout this brief, and specifically at Part 2, *supra*, Defendants have numerous procedural, institutional, and strategic advantages that render AAA arbitrations of FLSA disputes fundamentally unfair.

Second, the agreement only benefits Defendants because Defendants are the only ones who will ever use it. What claims will a pizza company ever have against a delivery driver? Employment (and especially wage and hour) lawsuits are a one-way street. As a result, the Parties' "mutual" agreement to arbitration is a massive concession for the employee, while the employer concedes nothing. Further, Defendants maintain the ability to litigate suspected breaches of confidentiality and intellectual property disputes in Court. Doc. 20 at PageID 127.

Third, the FLSA has both a public and a private component, making it necessary to assess fairness not only to Plaintiff Peacock *and* the other drivers. *See* Part 4.2.1, *supra*. Each driver who is permitted to waive their FLSA rights and is prevented from learning about Defendants' illegal pay practices serves to suppress wages and promote the very "evil" that the FLSA was enacted to prevent. *Alamo*, 471 U.S. at 302; *Overnight Motor Transp. Co.*, 316 U.S. at 578.

Defendants are attempting to use forced arbitrations to avoid being required to follow the FLSA—except on a handful of occasions by individuals like the named Plaintiff—by requiring their delivery drivers to waive FLSA protections in order to work. The circumstances present here demonstrate an unconscionable contract of adhesion that should not be enforced.

5. The Defendants' attempt to force a sub-minimum wage worker to pay their attorneys' fees constitutes retaliation in violation of the FLSA.

Unsatisfied with their attempt to systematically prevent their sub-minimum wage workers from vindicating their FLSA rights, Defendants go further by seeking to force a minimum wage employee to pay their bills too. Doc. 28 at Page 14.

First, this is simply improper. Defendants are not entitled to fees when Plaintiffs present non-frivolous arguments. *See, e.g., Isuzu Motors v. Thermo King Corp.*, No. 05-2174, 2006 U.S. Dist. LEXIS 55215, at *7–8 (D. Minn. Aug. 7, 2006); *Hammond v. Floor & Decor Outlets of Am., Inc.*, No. 3:19-cv-01099, 2020 U.S. Dist. LEXIS 145254, at *15 n.4 (M.D. Tenn. Aug. 12, 2020) ("The fee-shifting provision strikes the court upon cursory review as unconscionable, but resolution of that question must be left for another day."); *Pruteanu v. Team Select Home Care of Mo., Inc.*, No. 4:18-CV-01640, 2019 U.S. Dist. LEXIS 220889, at *18 (E.D. Mo. Nov. 26, 2019); *see also Brown v. City of Royal Oak*, 202 F. App'x 62, 69 (6th Cir. 2006) (finding "the district court was entitled to deny attorneys' fees after considering the merits of" "a non-frivolous legal argument"); *Shelton v. Pappas Rests.*, No. 1:21-cv-470, 2022 U.S. Dist. LEXIS 9023, at *19 (S.D. Ohio Jan. 18, 2022) (finding "refusal to agree to stay this matter and submit to arbitration does not rise to the level of improper conduct contemplated by 28 U.S.C. § 1927… [plaintiff's] initial challenge to the arbitration agreement was at least colorable. Therefore, attorneys' fees and costs should not be imposed").

Second, the FLSA prohibits "discriminat[ion] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." 29 U.S.C. § 215(a)(3). Defendants are entitled to argue against Plaintiff, but they are not entitled to punish him for asserting his FLSA rights by sticking him with Defendants' attorney's fees. To the extent that the Court enforces Defendants' arbitration contract at all, it should not enforce the fee-shifting provision at Doc. 41-1 ¶ C.3. against a sub-minimum wage worker.

Third, Defendants' attempt to seek this fee and its inclusion in the arbitration contract further demonstrates its unconscionability. Prevailing on their motion to compel would already result in vast savings for Defendants, who will not be held accountable for underpaying the delivery drivers who never receive notice of this action. Any fee award would be excessive and would cause a chilling effect as future Plaintiffs would—because of the Court—fear to challenge arbitration agreements in the future. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) (noting the danger of the "chilling effect" caused by prohibitions that fall *just* short of prohibitions on the exercise of a right and citing cases).

Fourth, at minimum, Defendants' request for fees should be denied as a matter of equity because it would be inequitable to force a low-wage worker, seeking minimum wages, to incur an enormous financial penalty for asserting his rights.

Whatever the reasoning, the Court should not enforce Defendants' destructive request for fees.

6. Conclusion

Plaintiff asks the Court to deny Defendants' motion and permit Plaintiff to litigate his claims because doing so is proper for multiple, independently sufficient reasons.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that the above document was filed on August 3, 2022, through the Court's ECF system, which will provide notice to all parties.

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