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

SAMUEL PEACOCK, ***on behalf of himself and those similarly situated,***	)	
Plaintiff,	)	
v.	)	**Case No.: 2:22-cv-02315-SHM-tmp**
FIRST ORDER PIZZA, LLC, TY TURNER, JAMES HOLMES, DOE CORPORATION 1-10, and JOHN DOE 1-10,	)	
Defendants.	)	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AND COMPEL ARBITRATION

I. INTRODUCTION.

Plaintiff's Response in Opposition to Defendants First Order Pizza, LLC's ("First Order"), Ty Turner's ("Turner"), and James Holmes' ("Holmes") (collectively, "Defendants") Motion to Dismiss and Compel Arbitration contends that the Court should not compel his claims to arbitration because (1) First Order's ability to terminate or modify the procedures outlined in the Agreement renders First Order's mutual promise to arbitrate illusory; (2) FLSA claims are categorically immune from mandatory arbitration; and (3) the arbitration agreement is unconscionable. The fundamental flaw in Plaintiff's position, however, is that each of his arguments are based on cherry-picked language in the Agreement, contradicted by multiple decades' worth of well-established Supreme and Circuit Court precedent, unsupported by any

evidence pertaining to or concerning *Plaintiff*, or all of the above. In contravention of his own arguments, Plaintiff asks this Court to ignore binding Supreme Court precedent and adopt a novel standard for FLSA claims that has never been adopted by any court. Plaintiff's arguments are unavailing, and the Court should grant Defendants' Motion.

II. ARGUMENT.

A. Plaintiff Failed to Demonstrate Plaintiff's Agreement is Not Supported by Sufficient Consideration.

In consideration for Plaintiff's execution of the mutual Arbitration Agreement (the "Agreement"), Defendants promised to arbitrate their claims against Plaintiff and First Order employed Plaintiff and paid him wages. [D.E. 20; D.E. 19-3 ¶ 10]. Plaintiff disingenuously claims a single line in the Agreement, which provides "[t]he Company may terminate or modify these procedures at any time[]," renders the first promise illusory and the Agreement unenforceable for lack of consideration. [D.E. 32, p.18]. Plaintiff's deceptive focus on reading this single line in a vacuum fails to acknowledge the limiting language immediately following this statement render any such reading unfeasible. The full provision on which Plaintiff relies provides:

> 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.

[D.E. 20 (emphasis added)].

A promise is illusory when it "essentially promises nothing at all, or allow[s] the promisor to decide whether or not to perform the promised act." *Walker v. Ryan's Family Steak Houses*, 289 F.Supp.2d 916, 929 (M.D. Tenn. 2003). Here, First Order retains no such right "to decide whether or not to perform its promised act" to arbitrate claims against *Plaintiff*. *Id.* Rather, when read in full, it is undeniably clear First Order's ability to modify or terminate the procedures outlined in the Agreement, and any such modification or termination by First Order, would have no effect whatsoever *on Plaintiff's Agreement* or the Agreement of *any employee* executed prior to such actions. *Cf. Day v. Fortune Hi-Tech Mktg., Inc.*, 536 F. App'x 600, 604 (6th Cir. 2013) (finding no consideration where "Defendant was not bound *by any particular provision* of the [plaintiff-employee's] contract because at any point, including immediately after acceptance, Defendant could have changed any clause without any recourse" (emphasis added)).Rather, regardless of any termination or modification implemented by First Order, Defendants would remain obligated to perform its promise to arbitrate their claims *against Plaintiff* in accordance with the terms of and procedures in *Plaintiff's Agreement* and the provision cited by Plaintiff does not provides First Order with any right to relieve itself of this obligation. *See Floss*, 211 F.3d at 315 ("[A]n illusory promise arises when a promisor retains the right to decide *whether or not to perform the promised act*." (emphasis added)). Therefore, the promise is not illusory.

Additionally, the Sixth Circuit has held *Floss, on which Plaintiff almost entirely relies,* is not controlling when applied to an arbitration agreement *between*

an employer and employee where *the parties mutually agreed to arbitrate*. *See Brubaker v. Barrett*, 801 F. Supp. 2d 743, 753 (E.D. Tenn. 2011) ("[T]he Court of Appeals emphasized that the arbitration agreement in *Floss* was between an employee and a third-party arbitration service, not between an employee and an employer. Notably, the employer in *Floss* did not agree to submit its own claims to arbitration." (citing *Howell v. Rivergate Toyota, Inc.*, 144 F. App'x 475, 480 (6th Cir.2005)). Instead, here, the "promise [made] – that both parties agree to submit their claims to arbitration – provides a basis for consideration. Regardless of whether the Arbitration Agreement allows [the employer] to unilaterally amend it, the fact that [the employer] has agreed to submit its own claims to arbitration distinguishes it from *Floss*." *Id.* at 753-54 (emphasis added) (finding a "unilateral amendment clause is not an illusory promise"); *Wilks v. Pep Boys*, 241 F.Supp.2d 860, 863 (M.D. Tenn.2003) (finding plaintiffs' claims that the arbitration agreement constitutes an 'illusory promise' are without merit" where "[b]oth parties are bound to arbitrate claims arising in their relationship."); *Crowe v. BE & K, Inc.*, No. 2:09–CV–873, 2010 WL 1640884, at *4 (S.D. Ohio Apr. 22, 2010) (holding a clause in an arbitration agreement allowing an employer to unilaterally amend the agreement was not illusory because the employer was obligated "to submit disputes they may have against employees to binding arbitration").

Further, Plaintiff fails to recognize, and does not challenge, the fact that Defendants made an additional promise in exchange for Plaintiff's execution of the Agreement – to employ Plaintiff and pay his wages – that provides sufficient

consideration for the Agreement in and of itself. [D.E. 19-3 ¶ 10] *See Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 33 (Tenn. 1984) (holding plaintiff's employment was sufficient consideration for non-competition agreement (citing *Ramsey v. Mutual Supply Co.*, 58 Tenn. App. 164, 427 S.W.2d 849 (1968) ("[E]mployment, even for an indefinite period of time, subject to termination at the option of the employer is sufficient consideration to support such a contract."))). Thus, even if First Order's promise to arbitrate any claims against Plaintiff could be construed as illusory, which Defendants deny, the Agreement is still supported by sufficient consideration.

B. Plaintiff Failed to Demonstrate that His FLSA Claims Should be Excluded from Arbitration.

Plaintiff contends, without any legal support, the Agreement is unenforceable because, in his view, FLSA claims are categorically immune from mandatory arbitration. Specifically, Plaintiff contends an agreement to arbitrate under the FAA abridges his non-waivable rights under the FLSA, based on his view FLSA claims can only be settled under the supervision of the Department of Labor or a court, making compelled arbitration of such claims illegal. Plaintiff outright challenges and decries as wrongly decided decades' worth of legal precedent and practice, from courts across all jurisdictions and levels, *including the Supreme Court*, that unmistakably establishes that FLSA claims are subject to arbitration. Remarkably, Plaintiff rests his argument solely on the *legally unsupported* notion that arbitration (before the American Arbitration Association, no less) is synonymous with private settlement between the parties. Moreover, he contends a judicial standard that is presently

subject to a circuit split (the Sixth Circuit has not directly spoken on the issue of requiring DOL or court approval of FLSA settlements) should supplant a conclusion unanimously reached by every Circuit Court to consider the question and confirmed by the Supreme Court — that FLSA claims are arbitrable.

1. As confirmed by overwhelming, well-established Supreme and Circuit Court precedent, FLSA claims are arbitrable.

Plaintiff is correct it is "undoubtedly true" that "courts and the Sixth Circuit have allowed arbitration of FLSA cases." [D.E. 32, p.20]. But what Plaintiff fails to mention is those "courts" include the United States Supreme Court, every Circuit Court to consider the question, and every district court that has encountered a request to compel arbitration of an FLSA wage claim over at least that same time, as confirmed by Plaintiff's inability to cite even *one* case concluding otherwise. Indeed, Plaintiff's general contention that the FLSA displaces the FAA is not a new one, and courts have examined various claimed conflicts between the two statutes only to find none every time. At this point, it is well-established FLSA claims are subject to arbitration, and Plaintiff's half-baked argument that the FLSA and FAA are irreconcilable is just another failed attempt by an employee to avoid arbitration of his claims because his attorneys would prefer to instead pursue a class or collective action.

Over thirty years ago, the Supreme Court proclaimed "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 107 (2001)

(confirming employment contracts are arbitrable under the FAA). Indeed, the Supreme Court reiterated its longstanding position that "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evidenced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* Plaintiff suggests such Congressional intent is evidenced because the FLSA purportedly does not permit private settlement of claims absent oversight from the DOL or a court. As the Supreme Court again explained in *Epic Systems Corporation v. Lewis*, however, Plaintiff's argument "faces a stout uphill climb." 138 S. Ct. 1612, 1624 (2018).

As the *Epic Systems* Court summarized:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The intention must be 'clear and manifest.' *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988).

Id. at 1624 (certain quotations omitted and citations truncated, alterations in original). The *Epic Systems* Court continued, noting, "[i]n many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the

[Federal] Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled)[.]" *Id.* at 1627 (emphasis in original).

Unsurprisingly, the *Epic Systems* Court kept that streak alive and upheld the validity of arbitration agreements containing class and collective action waivers against the argument that requiring individual arbitration proceedings violates the National Labor Relations Act ("NLRA") by barring employees from engaging in the "concerted activity" of pursing claims on a class or collective action basis. *Id.* at 1620. In doing so, however, the Court recognized that "[t]he employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act," and then questioned why the FLSA was not offered as the source of the potential conflict with the FAA. *Id.* at 1626. As the *Epic Systems* Court plainly recognized, that was because decades' old Supreme Court precedent, along with that of "every circuit to consider the question," has "held that the FLSA allows agreements for individualized arbitration." *Id.* at 1612 (citing *Nat'l Lab. Rels. Bd. v. Alternative Ent., Inc.*, 858 F.3d 393, 413 (6th Cir. 2017) (opinion of Sutton, J.) (collecting and citing cases). This includes the Sixth Circuit, as well as District Courts in Tennessee. *See Winn v. v. Tenet Healthcare Corp.*, No. 2:10-CV-02140, 2011 WL 294407, at *2 (W.D. Tenn. Jan. 27, 2011) (citing *Walker*, 400 F.3d at 387–88 (stating that statutory claims, including FLSA claims, are properly subject to arbitration); *Floss*, 211 F.3d at 313 (finding "no compelling reason for drawing a distinction between . . . statutes [that the Supreme Court has already held are subject

to arbitration] and the FLSA"); *Johnson v. Long John Silver's Rests.*, 320 F.Supp.2d 656, 661 (M.D. Tenn. 2004) ("Nowhere in the FLSA does Congress mandate a judicial forum"); *Fisher v. GE Medical Sys.*, 276 F.Supp.2d 891, 894 (M.D. Tenn.2003) (finding "[c]ontractual arbitration agreements are enforceable as to claims arising under the FLSA" and compelling arbitration).

Plaintiff, seemingly aware of the extensive precedent holding that FLSA claims are arbitrable but failing to mention that *Epic Systems* directly contradicts his argument, contends that he raises a new argument unaddressed by any of the courts to previously consider this issue, which he suggests should result in a finding contrary to every existing Supreme and Circuit Court decision. Plaintiff's position, however, faces several insurmountable hurdles. As an initial matter, the Supreme Court in *Epic Systems* recognized without any hesitation FLSA claims are subject to individual arbitration; this evidences the Supreme Court's approval of the widespread conclusion that FLSA claims are arbitrable. Indeed, how could the Supreme Court, or any court that considered the question, find arbitration class waivers are enforceable in the FLSA context without concluding, as a necessity, FLSA claims are themselves subject to arbitration? The answer is simple: they couldn't.

Moreover, even a cursory review of the support (or lack thereof) offered by Plaintiff reveals they offer nothing to challenge the foregone conclusion FLSA claims are arbitrable, as even the Circuits that announced a standard requiring judicial or DOL approval of FLSA settlements have themselves *expressly* permitted arbitration of FLSA claims. This includes the Eleventh Circuit, which authored the seminal case

on approval of FLSA settlements, *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982), as well as the Sixth Circuit, along with countless decisions from other Circuits and their districts routinely demonstrating enforcement of arbitration agreements involving FLSA and other employment claims. *See, e.g.*, *Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293, 296 (6th Cir. 2018) ("[B]ecause the FLSA does not 'clearly and manifestly' make arbitration agreements unenforceable, we hold that it does not displace the Arbitration Act's requirement that we enforce the employees' agreements as written."); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335-36 (11th Cir. 2014) ("Due to the absence of a contrary congressional command in the FLSA, we conclude plaintiffs' Arbitration Agreements are enforceable under the FAA, including their collective action waivers."). None of those courts construe their own precedent requiring approval of FLSA settlements as a prohibition against arbitration of FLSA claims, and for good reason: because cases concerning private *settlement* of FLSA claims have nothing to do with the forum for *resolution* of those claims by a neutral party.

And this conclusion is only further confirmed by Plaintiff's failure to cite *any* case or persuasive authority to support his contention that private settlement of FLSA claims and arbitration of those claims are indistinguishable concepts, whether in the context of the FLSA or otherwise. Instead, Plaintiff only offers his own musings, suggesting arbitration before a neutral third-party is no different than private settlement because (1) the neutral third-party is not an advocate for the employee's interests, which seemingly engrafts an employee advocacy requirement

into the FLSA found nowhere in the text of the statute or the relevant case law, and (2) agreeing to assign resolution of claims to a neutral arbitrator is apparently no different than the parties agreeing to flip a coin, which equates an act of random chance to a deliberation process controlled by a qualified attorney (or often a retired judge) under fair, reasonable, and thorough published rules and procedures. [D.E. 32, p.29-30]. None of Plaintiff's contentions make any logical sense, but certainly reflect his wholesale "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complaints," an attack the Supreme Court has repeatedly remarked to be "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30 (citing *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 480 (1989)).

Plaintiff's (or at least his counsel's) disdain for arbitration is only further reflected by his claim that arbitration's "secretive nature" frustrates the public's independent interest in assuring employees receive fair wages. [D.E. 32, p.30]. But again, a review of the case law provided by Plaintiff does not support the notion arbitration is an impermissible venue to resolve his substantive rights. Rather, those cases only support the requirement that a judicial record be generally open to the public, and neither arbitration nor the FAA interferes with that mandate. Instead, the FAA *endorses* that requirement by containing specific procedures for confirming, vacating, modifying, or correcting arbitration awards for purposes of effecting any party's judgment, which necessarily requires placing the would-be judicial record (the

arbitration award or order) into the public record, thereby fulfilling the public's interest in access to court records and assuring payment of fair wages. *See* 9 U.S.C. §§ 9-11. Win or lose, Plaintiff always has the option to confirm the arbitration award and place it in the public eye himself, nullifying his concerns of supposed "secrecy." *See David v. Kohler Co.*, No. 115CV01263STAJAY, 2019 WL 6719840, at *3 (W.D. Tenn. Dec. 10, 2019) ("The settlement agreement is now indisputably a court record by virtue of the parties' filing the agreement on the docket and their submission of the agreement on the record as part of their request for court approval.").

At bottom, pursuant to long-standing Supreme Court precedent, as expressly adopted by the Sixth Circuit, to demonstrate that the FLSA displaces the *prior-enacted* FAA, Plaintiff has the *high* burden to demonstrate that the federal wage statute includes a "clear and manifest" congressional intent to make individual arbitration agreements unenforceable. *Epic Systems*, 138 S. Ct. at 1624; *Williams v. Dearborn Motors 1, LLC*, No. 20-1351, 2021 WL 3854805, at *4 (6th Cir. Aug. 30, 2021) ("[A] general right to pursue a class action does not evidence a clear and manifest intent to displace the Arbitration Act." (citing *Epic Systems*, 138 S. Ct. at 1624)); *Adell v. Cellco P'ship*, No. 21-3570, 2022 WL 1487765, at *4 (6th Cir. May 11, 2022) ("[C]ourts must embrace 'the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.'") (quoting *Epic Systems*, 138 S. Ct. at 1624). Plaintiff failed in that effort, particularly as he relies on the requirement of FLSA oversight or approval that the Sixth Circuit has yet to adopt.

Moreover, "a clear and manifest" expression of legislative intent hardly exists where over half the Circuits have rejected the supposed statutory requirement for approval of FLSA settlements or did not feel the need to determine if it even exists, and the Supreme Court and Circuit Courts across the nation have never once suggested that the Eleventh Circuit opinion or its progeny created any conflict with the FAA.

Plaintiff asks the Court to upend decades worth of Supreme and Circuit Court precedent and district court practice on a thread-bare theory that has never been adopted by any court. The Court should decline the invitation and instead grant Defendants' Motion compelling individual arbitration of Plaintiff's claims and staying or dismissing this action.

C. Plaintiff Failed to Demonstrate that His Arbitration Agreement Was Unconscionable.

Plaintiff acknowledges the existence of an agreement to arbitrate and all the elements of contract formation (with the exception of consideration, as discussed above) but asserts the arbitration agreement is unconscionable because (1) First Order Pizza, Plaintiff's employer, was in a superior bargaining position; (2) the contract was presented on a take-it-or-leave-it basis; (3) the contract only benefits Defendants; and (4) the contract serves to suppress wages because of the confidential nature of arbitration. [Doc. 32, pp.32-37]. None of Plaintiff's arguments demonstrates unconscionability to set aside the parties' arbitration agreement, particularly as Plaintiff failed to provide any support demonstrating any hardship specific to *him*, as opposed to "minimum wage" earners generally.

1. There is no "extreme deference" standard for enforcement of arbitration agreements under the FAA.

As an initial matter, to restyle unconscionability arguments that have long been rejected by the Supreme Court and courts across every level, Plaintiff attempts to suggest that "judge-created" analysis of the FAA has created a standard of some kind of "extreme" or "excessive" deference to arbitration agreements. [D.E. 32, p.32 (suggesting that "extreme deference [to] arbitration" is the reason employment relationship is not considered "unduly coercive")]. Specifically, Plaintiff contends the Supreme Court and lower courts have "over-interpreted" the text and purpose of the FAA over the course of more than thirty years of remarkably consistent precedent and, in turn, created jurisprudence that "elevated" arbitration agreements "*above* normal contracts." [D.E. 32, p.11]. Plaintiff's argument concerning a "doctrine of extreme deference," however, is nothing more than a red herring meant to distract from the straightforward arbitrability analysis at issue in this case, particularly as his position is without any support.

Plaintiff's argument distilled is that Justice Brennan, writing for the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, impermissibly created the edict of a "liberal policy favoring arbitration," which Justice Marshall emboldened by authorizing the courts to "rigorously enforce" arbitration agreements, that Justices Blackmun, Rehnquist, White, Scalia, and Gorsuch, along with the remaining Justices on the respective majority, then blindly followed. [D.E. 32, pp.11-; 460 U.S. 1 (1983) (Brennan, J.); *Dean Witter*, 470 U.S. 213 (Marshall, J.); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614

(1985) (Blackmun, J.); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (Rehnquist, J.); *Gilmer*, 500 U.S. 20 (White, J.); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (Scalia, J.); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) (Scalia, J.); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (Scalia, J.); *Epic Sys.*, 138 S. Ct. 1612 (Gorsuch, J.). The argument ignores the deliberative process of the Supreme Court. But more importantly, it simply does not hold water.

First, Justice Brennan's conclusion that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements," was not conjured out of thin air as Plaintiff suggests. Rather, as revealed just through review of the case law flowing from the opinions discussed immediately after that sentence, the sentiment of a "liberal policy of promoting arbitration" was identified and adopted by federal circuit courts consistently across *decades* prior. *Moses H. Cone*, 460 U.S. at 24 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 421 (1967) (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959) (collecting cases in support of proposition that "[any] doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed."))).

Second, Justice Marshall's conclusion that "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had

entered," which required courts to "rigorously enforce agreements to arbitrate," is logically consistent, but also consistent with the legislative history cited by Justice Marshall in the text and two footnotes prior. *Dean Witter*, 470 U.S. at 220 & fn.20. And that the Court had to "assume" Congressional intent, even if that were true, is part and parcel of what the Supreme Court does if it is needed. Plaintiff only highlights the incompatibility of his position with that of the Supreme Court and proclaims that the highest court in the land misinterpreted the FAA every time it interpreted the statute. In turn, Plaintiff suggests this Court give him a break and review the instant Motion under a standard different from that announced by the Supreme Court, the Sixth Circuit, and adopted by district courts across the nation. The Court should decline the invitation, particularly because there is *no dispute* the FAA, as repeatedly held by the Supreme Court, merely placed arbitration agreements on the same footing as all other contracts and demands no different review as a result.

To that end, Plaintiff relies on the Supreme Court's recent decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1710 (2022) (hereinafter "Sundance") for his position that the courts are "require[d] 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,'" [D.E. 32 p.7 (quoting *Sundance*, 142 S. Ct. 1708, 1713-14)]. However, as recognized by Plaintiff, *Sundance* focused on a single issue of waiver of arbitration, specifically "an arbitration-specific waiver rule demanding a showing of prejudice" applied by the Eighth Circuit *Id.* at 1712. The *Sundance* decision was based, in relevant part, on the fact that courts do

not consider prejudice when assessing waiver issues in the context of non-arbitration contracts and agreements and the creation of the prejudice requirement amounted to invention of "special, arbitration-preferring procedural rules." *Id.* at 1713.

For the purposes of Defendants' Motion to Dismiss and Compel Arbitration, *Sundance* is not applicable, as Defendants have not asked the court to create *or follow* any "special, arbitration-preferring procedural rules." Rather, Defendants simply ask the Court to place the Agreement on the same footing as other contracts by following state law contract formation rules that apply to *all contracts* and longstanding *Supreme Court* and Sixth Circuit precedent governing the arbitrability of FLSA actions. Neither of which are displaced by the ruling in *Sundance.* In essence, Defendants ask the Court to do precisely what *Sundance* requires: "hold a party to its arbitration contract just as the court would to any other kind." *Id.* Whereas, Plaintiff defies his own argument by requesting the Court do precisely what *Sundance* forbids and subject the Agreement to "special" rules requiring "a more in-depth, skeptical, and searching analysis" of the Agreement based on Plaintiff's perceived unfairness of arbitration proceedings in defiance. [D.E. 32, p.13].

As succinctly summarized by the Sixth Circuit in *Stutler v. T.K. Constructors Inc.*:

> Congress enacted the FAA in 1925 pursuant to its power to regulate interstate commerce to ensure judicial enforcement of privately made agreements to arbitrate, and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate. . . . The FAA applies to a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. It

> sets forth a fundamental rule regarding enforcement of an arbitration clause: a written agreement to arbitrate shall be enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. In other words, whether an arbitration clause is enforceable is governed by state law. If no such defenses apply, an arbitration clause is generally enforceable under the FAA.

448 F.3d 343, 345 (6th Cir. 2006) (internal citations, quotations marks, and edits omitted). This is the standard *Moses H. Cone* and its progeny developed, which remains unchanged by *Sundance* and has been applied by the Sixth Circuit and courts across the nation for over three decades. This is the operative standard relevant to this Motion.

2. Plaintiff failed to demonstrate the Agreement is an adhesion contract.

Plaintiff claims the Agreement is an unenforceable contract of adhesion because it was offered to Plaintiff on a "take it or leave it basis" without the opportunity to bargain. [D.E. 32, p.33-32]. Contrary to Plaintiff's assertion, "[a] contract is not adhesive merely because it is a standardized form offered on a take-it-or-leave-it basis." *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 500 (6th Cir. 2004) (applying Tennessee law). Rather, Plaintiff fails to recognize the other quintessential element of an adhesion contract, which requires the contract be presented "under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Id.* (quotations omitted).

In support of this argument, Plaintiff relies on his claim that his Agreement is similar to that of the plaintiff in *Taylor v. Butler,* 142 S.W.3d 277, 285 (Tenn. 2004), in which the Tennessee Supreme Court found an arbitration agreement between a

car dealer and a customer to be an unenforceable contract of adhesion due to the agreement's requirement that the customer to submit any claims to arbitration while allowing the dealership to pursue claims in a judicial forum, which rendered the agreement unconscionable. The agreement in *Taylor is* not analogous to Plaintiff's agreement.

The Sixth Circuit has rejected arguments that arbitration agreements in the employment context are unenforceable as contracts of adhesion based on the same arguments lodged by Plaintiff. For example, in *Cooper*, the employer prepared the agreement, a standardized form, with no negotiation or input from the employee, it was presented to the employee on a take-it-or-leave-it basis along with other employment documents, and the employee was required to sign the agreement to be employed. 367 F.3d at 500-501. The Sixth Circuit rejected the employee-plaintiff's argument that the agreement was a contract of adhesion, finding "there must be evidence that [the employee] would be unable to find suitable employment if she refused to sign [the employer's] agreement." *Id.* at 502.

As a result, Plaintiff must show he would not have been able to find suitable other employment that would not have required him to sign a similar agreement. He has not done so.

3. Plaintiff failed to demonstrate that the arbitration agreement is unconscionable.

Even if the Agreement could be construed as a contract of adhesion, which Defendants deny, it is still enforceable under Tennessee law because Plaintiff cannot show the Agreement is unconscionable. *Id.* at 503. "An unconscionable contract is one

in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice." *Wofford v. M.J. Edwards & Sons Funeral Home Inc*, 490 S.W.3d 800, 818 (Tenn. Ct. App. 2015). Tennessee courts recognize two forms of unconscionability: "procedural unconscionability, which is an absence of the meaningful choice on the part of one of the parties" and "substantive unconscionability, which refers to contract terms which are unreasonably favorable to the other party." *Id.* In Tennessee, both procedural and substantive unconscionability must be established. *Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1274 (M.D. Tenn. 2020) (citing *Iysheh v. Cellular Sales of Tenn., LLC*, No. 05-1082, 2018 WL 2207122, at *5 (E.D. Tenn. 2018). However, generally, Tennessee Courts will not find a contract to be unconscionable unless the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other." *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984).

"Unconscionability is a factually-driven inquiry, and '[w]hether a particular contract is unconscionable is a question of law.'" *Stancil ex rel. Gentry v. Dominion Crossville, LLC*, No. E202101378COAR3CV, 2022 WL 3010499, at *5 (Tenn. Ct. App. July 29, 2022) (quoting *Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 498-99 (Tenn. Ct. App. 2008)). But as the Supreme Court cautioned, the generally applicable contract defense of unconscionability may not be applied in a manner that targets the existence of an agreement to arbitrate as the basis for

invalidating that agreement. *Concepcion*, 563 U.S. at 339-43, 348 (explaining that state law cannot "stand as an obstacle to the accomplishment of the FAA's objectives," by interfering with "the fundamental attributes of arbitration") Here, there is neither procedural nor substantive unconscionability in the parties' agreement to arbitrate.

a. Plaintiff failed to demonstrate procedural unconscionability.

Even if First Order Pizza was in a superior bargaining position when the parties entered into the Agreement days before Plaintiff's first shift on the job, neither the relative size of the parties nor the alleged "take-it-or-leave-it" nature of the Agreement demonstrates procedural unconscionability. "Under Tennessee law, a mere inequality between two parties to an agreement is not sufficient to find unconscionability." *Elliot v. NTAN, LLC*, No. 3:18-CV-00638, 2018 WL 6181351, at *5 (M.D. Tenn. Nov. 27, 2018); *see Cooper*, 367 F.3d at 504-505 (finding no unconscionability, even where the agreement was between a sophisticated employer and a low-level fast-food worker).

The Sixth Circuit has opined:

> While the district court's compassion for job applicants is laudable, under its approach "practically every condition of employment would be an adhesion contract which could not be enforced because it would have been presented to the employee by the employer in a situation of unequal bargaining power on a take it or leave it basis." . . . Such a result would contravene Congress's intent that employment disputes be subject to valid arbitration agreements, unless excepted by FAA § 1 or rendered unenforceable under state contract law.

Cooper, 367 F.3d at 505 (quoting *Matte Morrison v. Cir. City Stores, Inc.*, 70 F. Supp. 2d 815, 823 (S.D. Ohio 1999), *aff'd on other grounds*, 317 F.3d 646 (6th Cir. 2003)). Following this logic, the Sixth Circuit in *Elliot* has specifically held "an arbitration agreement in the employment context is not so unreasonable if the terms are mutual and the agreement is not aimed solely at limiting the liability of the employer." *Elliot*, 2018 WL 6181351, at *5.

Like the employee in *Elliot*, Plaintiff did not lack a "meaningful choice"; he had a choice, and he chose to execute the Agreement, along with First Order Pizza's remaining onboarding documents, to begin working as a delivery driver for First Order Pizza. *See Elliot*, 2018 WL 6181351, at *5. Having made that choice, Plaintiff cannot demonstrate procedural unconscionability by expressing regret over his decision years later. *See EEOC v. Frank's Nursery & Crafts*, 966 F. Supp. 500, 504 (E.D. Mich.1997), *rev'd on other grounds*, 177 F.3d 448 (6th Cir.1999) ("When a party . . . voluntarily agrees to something in an attempt to obtain employment, they are not being forced to do anything").

b. Plaintiff failed to establish substantive unconscionability.

Plaintiff likewise has failed to demonstrate substantive unconscionability. "A contract is substantively unconscionable, [ ] when its terms 'are beyond the reasonable expectations of an ordinary person, or oppressive.'" *Cooper*, 367 F.3d 493, 504 (6th Cir. 2004) (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn.1996)). Put simply, "[i]f the provisions are [ ] viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found

unconscionable." *Haun v. King*, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984). In the employment context, generally, this court has specifically held "[a]n arbitration agreement in an employment contract is not oppressive or beyond the reasonable expectations of an ordinary person." *Sharp v. Terminix Int'l, Inc.*, No. 218CV02072SHMDKV, 2018 WL 3520140, at *6 (W.D. Tenn. July 20, 2018) (citing *Cooper*, 367 F.3d at 504.).

Here, even a cursory review of the terms of the Agreement reveals no one-sidedness or unreasonable harshness, but rather provisions that either impose identical obligations and benefits on *both* parties or, if not identical, then favorable ones *for Plaintiff*. For instance, the arbitration agreement is not cost prohibitive, as under the AAA Employment Arbitration rules incorporated by the agreement, absent Plaintiff's post-arbitration agreement to pay, First Order Pizza is responsible for *all* costs of arbitration, except for an initial $300 non-refundable filing fee.[1] *See Sellers v. Macy's Retail Holdings, Inc.*, No. 2:12-CV-02496-SHL, 2014 WL 2826119, at *10 (W.D. Tenn. June 23, 2014) (finding employee's responsibility "for paying is the filing fee of one day's base pay or $125.00, whichever is less" not unconscionable).

In fact, the only argument raised by Plaintiff related to *term* of the Agreement is Plaintiff's claim that "Defendants maintain the ability to litigate suspected breaches of confidentiality and intellectual property disputes in Court." [D.E.32, p.37]. This is false. Plaintiff has again cherry-picked a few words from the Agreement without bringing the full provision and its meaning to the attention of the Court.

[1] *See* AAA Employment/Workplace Fee Schedule, https://www.adr.org/sites/default%20/files/Employment_Fee_Schedule.pdf.

Specifically, Plaintiff fails to acknowledge the provision allows Defendants to seek *injunctive relief* in court "*pending the appointment of the arbitrator or the arbitrator's determination of the merits of the controversy*." [D.E. 20 (emphasis added)]. A fair reading of the provision shows the only "litigation," as Plaintiff puts it, that Defendants may bring in Court is to seek injunctive relief to protect First Order's right *pending* initiation of arbitration. Defendants must still submit its potential claims to arbitration, just as Plaintiff must.

Otherwise, Plaintiff does not even argue the *terms* of the *contract* are harsh or one-sided, but rather that the *benefits* of the *arbitration process*, generally, favor First Order Pizza. That is, Plaintiff remarks that his Agreement is made somehow unconscionable because "Defendants are the only ones who will ever use it," since purportedly a pizza company will never have any claims against delivery drivers. [D.E. 32, p.37]. This is not an argument that supports unconscionability, nor is it even accurate or supportable. It takes no effort to envision a pizza company raising claims related to theft, conversion, or property or vehicle damage against a misbehaving delivery driver, all of which would be subject to arbitration under the Agreement. And regardless, the likelihood of one party invoking the terms of a contract has no bearing on whether the terms, themselves, are oppressive or unfair. Plaintiff cannot demonstrate substantive unconscionability.

D. If Even Alleged, Plaintiff Failed to Demonstrate That Arbitration Will Not Effectively Vindicate His Rights.

Throughout his brief, Plaintiff recounts a parade of horribles concerning the arbitral process, seemingly concluding that arbitration fails employees all over, but

then leaves the conclusion suspended in the prefatory "history" sections leading up to his central argument concerning invalidity of his Agreement. Plaintiff never definitively asserts the alleged arbitrator bias and claimed discovery limitations are issues for *his case*, but plainly suggests the Court consider and reflect on the content. In other words, Plaintiff asks the Court to speculate. None of these speculations show arbitration will not effectively vindicate his rights, his efforts fall woefully short.

Plaintiff begins with an attack on the neutrality of the arbitral forum because Plaintiff believes arbitrators have a general bias toward employers who serve as "repeat" customers. This line of argument has been soundly rejected by the Supreme Court, but is particularly inappropriate *here* given the protections the parties are afforded under the AAA and its rules pertaining to employment cases. *Gilmer*, 500 U.S. at 30 ("Gilmer first speculates that arbitration panels will be biased. However, '[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.'").

Under AAA's Employment Arbitration Rules and Mediation Procedures, arbitrators are required to be "experienced in the field of employment law" and have "no personal or financial interest in the results of the proceeding" or "relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias." [2] (*See* AAA Rules, at 15). Each party is allowed *unlimited* strikes from the list of arbitrators provided by AAA for purposes of ranking. (*See id.*). The arbitrators

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[2] *See* AAA Employment Arbitration Rules and Mediation Procedures, https://www.adr.org/sites/default/files/Employment-Rules-Web.pdf [hereinafter AAA Rules].

are required to disclose "any circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relation with the parties or their representatives." (*See id.* at 16). And, of course, "[t]he FAA also protects against bias, by providing that courts may overturn arbitration decisions where there was evident partiality or corruption in the arbitrators." *Gilmer*, 500 U.S. at 30.

Plaintiff next complains the discovery is insufficient because arbitrators lack the subpoena power to obtain pre-hearing discovery from non-parties. "It is unlikely, however, that [individual wage claims] require more extensive discovery than other claims that [the Supreme Court has] found to be arbitrable, such as RICO and antitrust claims." *Gilmer*, 500 U.S. at 31 (dismissing complaint concerning limited discovery with respect to arbitration of ADEA claims). But more importantly, a review of case law cited by Plaintiff reveals arbitrators *do* have the power to subpoena information from the non-parties, as "Section 7 of the FAA explicitly provides that an arbitrator "may summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case"' and "implicitly include[s] the authority to compel the production of documents for inspection by a party prior to the hearing." *Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc'ns of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999) (quoting 9 U.S.C. § 7). Plaintiff is not deprived of discovery as he claims.

Finally, Plaintiff claims the requirement of individualized arbitration fails to effectively vindicate his rights because it deprives him of the right to bring a class or collective action. The Supreme Court, together with every Circuit Court that considered the question, rejected that argument, and found nothing inappropriate about an agreement to resolve wage claims on an individual basis. *See Epic Systems*, 138 S. Ct. at 1626. And as Plaintiff's counsel are fully aware, that reality holds up in practice.

Ultimately, Plaintiff's contentions, and the general tenor of his Opposition, is an appeal to policy concerns that arbitration does not work for low-wage workers. As Justice Gorsuch correctly summarized in *Epic Systems*, however, that is not for the Court to address:

> While the dissent is no doubt right that class actions can enhance enforcement by "spreading the costs of litigation," it's also well known that they can unfairly "place pressure on the defendant to settle even unmeritorious claims," . . . . . . The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested . . . . This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives.

138 S. Ct. at 1632 (internal edits and citations omitted).

Plaintiff's reference to Congress' recent ban on arbitration of claims related to sexual assault and harassment only highlights his request is one best left for the legislature. Congress can recognize and act on curtailing any perceived ill effects of arbitration when it deems necessary, and that it took no steps over multiple decades

to address any claimed concerns raised by Plaintiff is a telling signal that Congress sees no error.

Accordingly, even though it appears Plaintiff does not actually suggest that *his* rights will not be vindicated based on the concerns he raises, but rather those of some hypothetical minimum wage earners, even if he did, he failed in that effort.

E. Plaintiff's Claims of Retaliation Are Specious, But Also Premature.

Plaintiff contends that Defendants are engaging in retaliation by seeking attorneys' fees they incurred in responding to his Complaint even though he refused to submit to arbitration after two weeks of consideration and deliberation and then proceeded to oppose Defendants' valid request with arguments that stand in direct opposition to over three decades of unwavering binding legal precedent and district court practice. Plaintiff did not oppose the agreement based on anything related to him or his specific circumstances, but because he or his counsel believe the Supreme Court, Sixth Circuit, and every other Circuit somehow got it wrong, and FLSA cases are not arbitrable after all.

Defendants should not be forced to litigate a routine request for arbitration based on an amalgamation of arguments that have *no* foothold in legal precedent or practice. Perhaps that requires "sticking [his attorneys] with Defendants' attorney's fees," but that is for the Court to determine.

In any event, Plaintiff's claim of retaliation is misplaced, particularly as it reflects neither a doctrine nor standard to oppose attorneys' fees, but a *private right of action* where he has the burden of proof under the law. Moreover, his arguments

in opposition to enforcement or the scope of the fee-shifting provision are best reserved for after the Court rules on the pending motions and takes up the issue of whether fees should be awarded to Defendants in the event Plaintiff's claims are compelled to arbitration.

III. CONCLUSION.

For the foregoing reasons, together with those set forth in its Memorandum of Law in Support of Defendants' Motion to Dismiss and Compel Arbitration, Defendants respectfully request an order: (1) compelling Plaintiff to arbitrate his claims on an individual basis in accordance with the Agreement; (2) dismissing this action pending resolution of arbitration of Plaintiff's claims; and (3) awarding Defendants the attorneys' fees and costs they incurred in responding to Plaintiff's Complaint, as provided in the Agreement, particularly in light of Plaintiff's refusal to voluntarily dismiss his claims and submit to arbitration.

Respectfully submitted on this, the 29th day of August, 2022.

/s/ Courtney Leyes
Courtney Leyes (TN Bar No. 034012)
FISHER & PHILLIPS LLP
3310 West End Avenue, Suite 500
Nashville, TN 37203
Telephone: (615) 488-2900
Facsimile: (615) 488-2928
Email: cleyes@fisherphillips.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I, Courtney Leyes, hereby certify that on this, the 29th day of August, 2022, I electronically filed the foregoing ***Defendants' Reply Brief in Support of its Motion to Dismiss and Compel Arbitration*** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following counsel of record:

David W. Garrison and Joshua A. Frank
BARRETT JOHNSTON MARTIN & GARRISON, LLC
Philips Plaza
414 Union Street, Suite 900
Nashville, TN 37219
dgarrison@barrettjohnston.com
jfrank@barrettjohnston.com

Andrew R. Biller, Andrew P. Kimble, and Riley E. Kane
BILLER & KIMBLE, LLC
8044 Montgomery Road, Suite 515
Cincinnati, OH 45236
abiller@billerkimble.com
akimble@billerkimble.com
rkane@billerkimble.com

/s/ Courtney Leyes
Courtney Leyes