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No. 101370-1
[Court of Appeals No. 82659-0-I]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. 82659-0-I
King County Superior Court No. 20-2-14563-7 KNT

JUSTIN L. OAKLEY, individually and on behalf of all those similarly situated,

Plaintiff-Respondent,

v.

DOMINO'S PIZZA LLC, a foreign limited liability company,

Defendant-Appellant.

APPELLANT'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ARGUMENT 2

A. The Decision correctly held the FAA provisions are severable and Respondent is required to arbitrate his claims under Washington law. 2

B. If the Court grants the Cross-Petition, it should also grant the Petition. 8

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Gates v. TF Final Mile, LLC,
2020 WL 2026987 (N.D. Ga. Apr. 27, 2020) 7

Oakley v. Domino's Pizza LLC,
516 P.3d 1237 (Wn. Ct. App. 2022) 1, 2, 3, 4

Owner-Operator Independent Drivers Ass'n v. C.R. England, Inc., 325 F. Supp. 2d 1252 (D. Utah 2004) 7

Rittmann v. Amazon.com, Inc.,
383 F. Supp. 3d 1196 (W.D. Wash. 2019) 6

Rittmann v. Amazon.com, Inc.,
971 F.3d 904 (9th Cir. 2020) 5, 6, 7, 8

W. Daily Transp., LLC v. Vasquez,
457 S.W.3d 458 (Tex. App. 2014) 7

Ward v. Express Messenger Sys., Inc.,
413 F. Supp. 3d 1079 (D. Colo. 2019) 7

Statutes

Federal Arbitration Act .... *passim*

Other Authorities

RAP 13.4(b) 3

I. INTRODUCTION

Defendant-Appellant Domino's Pizza, LLC ("Domino's") hereby replies solely to Respondent's Cross-Petition for Review in his Response to Appellants Petition for Review ("Cross-Petition" or "Cross-Pet."). Respondent seeks review of the portion of the decision of Division I of the Court of Appeals, *Oakley v. Domino's Pizza LLC*, 516 P.3d 1237 (Wn. Ct. App. 2022) (the "Decision" or "Op.") holding that because the parties' arbitration agreement (the "Agreement") permitted the severability of the Federal Arbitration Act provisions, Washington law governed the Agreement. Review of this issue is not appropriate because the Decision correctly applied well-established Washington law permitting Courts to read governing law into a contract silent as to choice-of-law. To the extent this Court decides to grant the Cross-Petition, it should also grant Domino's' Petition due to the intertwined nature of the issues involved in both petitions.

II. STATEMENT OF FACTS

In addition to the arbitration provisions discussed extensively in the parties' prior briefing, as relevant here, the Agreement includes a severability clause, which states:

> Should any term or provision, or portion thereof, be declared void or unenforceable or deemed in contravention of law, it shall be severed and/or modified by the arbitrator or court and the remainder of this agreement shall be enforceable…

CP 267. The Decision "conclude[d] that the reference to the FAA [in the arbitration agreement] is severable and that Washington law governs the arbitration agreement." Op. 11-12.

III. ARGUMENT

A. The Decision correctly held the FAA provisions are severable and Respondent is required to arbitrate his claims under Washington law.

The Decision correctly held the Agreement's FAA provisions were severable and that, once severed, Washington law governed the Agreement.

As a threshold matter, Respondent does not indicate the authority pursuant to which he brings his Cross-Petition. The

Cross-Petition does not cite to a provision under RAP 13.4(b) or otherwise provide authority for seeking review, and it fails for that reason alone. Nonetheless, the Decision's choice-of-law holding does not "conflict with a decision of the Supreme Court" or Court of Appeals, does not involve "a significant question of law under the Constitution of the State of Washington or of the United States," and does not "involve[] an issue of substantial public interest that should be determined by the Supreme Court." *See* RAP 13.4(b).

The Decision correctly recognizes that Washington law governs the Agreement in the event the FAA does not. The Agreement's severability clause states: "[s]hould ***any*** term or provision, ***or portion thereof***, be declared null and void or unenforceable or deemed in contravention of law, it shall be severed and/or modified by the arbitrator or court and the remainder of this agreement ***shall be enforceable*** … ." CP 267 (emphasis added). Therefore, in light of the Decision's holding that the FAA's transportation worker exemption applies, then,

according to the express terms of the parties' Agreement, the Court must sever or modify the language in the Agreement that references the FAA and enforce the remainder.

As the Decision noted, "'[c]ourts are generally loath to upset the terms of an agreement and strive to give effect to the intent of the parties.'" Op. 12 (citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 320, 103 P.3d 753 (2004)). The mere existence of the Agreement's severability clause indicates both parties intended to arbitrate any dispute related to Respondent's employment—regardless of the governing law. This is especially true where, as is the case here, the arbitration provisions are the gravamen of the agreement rather than a portion of a larger contract. If the FAA language is severed, the Agreement reads: "[B]oth the Company and Employee agree that any claim, dispute, and/or controversy that the Employee or the Company may have against the other shall be submitted to and determined exclusively by binding arbitration." *See* CP 266. This reading expresses the intent of the parties when they entered

into the Agreement—that all claims relating to Respondent's employment should be subject to binding arbitration.

Respondent does not deny Washington law permits Courts to read the governing law into the contract rather than declare a particular provision void merely because there is no stipulated choice-of-law provision. Rather, Respondent relies on *Rittmann*, while mischaracterizing the Agreement, to argue "[w]here the parties agreed that one law would govern and **not another**, the court cannot rewrite the agreement to alter their intent regarding the governing statute." Cross-Pet. 27 (emphasis added). *Rittmann* is inapposite here. The *Rittman* Court held the FAA's transportation worker exemption applied, preventing arbitration under the FAA, and the Court declined to sever the FAA choice-of-law clause. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 920 (9th Cir. 2020). However, it refused to do so due to the choice-of-law language in that agreement, which specifically stated: "These Terms are governed by the law of the state of Washington without regard to its conflict of laws principles, **except for**

Section 11 of this Agreement [the arbitration provision], which is governed by the Federal Arbitration Act and applicable federal law." *Id.* (emphasis added). Based solely on this specific language, the Court reasoned that, even if it were to sever the FAA language, the agreement was still clear that state law would not apply. *Id.* at 920-21. In fact, the district court in *Rittmann* specifically pointed out that the arbitration agreement at issue was different from an agreement—such as the Domino's Agreement—that was ***silent*** as to choice-of-law: "if the parties intended Washington law to apply if the FAA was found to be inapplicable, they would have said so ***or even remained silent on the issue***." *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1203 (W.D. Wash. 2019) (emphasis added).

Contrary to the agreement in *Rittmann* and Respondent's mischaracterization of his own Agreement here, the Agreement does not explicitly preclude Washington law from applying to its arbitration provision, as the Agreement is simply silent as to the choice of law and does not contain an express prohibition against

Washington law. There is, therefore, no language in the Agreement precluding the application of Washington law here.[1]

Respondent's reliance on *Rittmann* to argue the FAA provision is only severable if found "'void or unenforceable or … in contravention of law'" is also misplaced. Cross-Pet. 26 (citing CP 267). First, though the *Rittmann* Court declined to sever the FAA choice of law provision, it reached its decision in part because the provision was **not** declared to be *unconscionable*. 971 F.3d at 920 n. 10. By contrast, the parties

[1] For the same reason, Respondent's reliance on *Gates v. TF Final Mile, LLC* is misplaced. Cr.-Pet. 27-28. There too, the arbitration agreement at issue contained an express provision that state law applied *except* with respect to the arbitration provision. *Gates*, 2020 WL 2026987 (N.D. Ga. Apr. 27, 2020); *Gates*, Case No. 1:16-CV-0341-RWS (N.D. Ga.), at Dkt. No. 15 (Def.' Mot. to Dismiss or Stay Proceedings and Compel Arbitration). Respondent relies on several other inapposite cases. Cross-Pet. 28. In *W. Daily Transp., LLC v. Vasquez*, the court decided not to rely on state law in interpreting an agreement containing an FAA choice-of-law provision *before* deciding the applicability of the FAA's transportation worker exemption, and thus had no opportunity to assess if state law applied *after* the FAA choice of law provision was severed. 457 S.W.3d 458, 463 (Tex. App. 2014). The court in *Owner-Operator Independent Drivers Ass'n v. C.R. England, Inc.* held state law did not apply because the claims at issue were "purely federal." 325 F. Supp. 2d 1252, 1260 (D. Utah 2004). By contrast, here, Respondent brings solely state law claims under Washington's employment laws. CP 4. The Court in *Ward v. Express Messenger Sys., Inc.* did not even consider state law as an alternative to the FAA choice of law provision, 413 F. Supp. 3d 1079 (D. Colo. 2019), because the parties did not argue state law should apply in lieu of the FAA in the event the transportation worker exemption applied. *Ward v. Express Messenger Sys., Inc.*, Case No. 17-cv-2005-NYW (D. Colo. 2005) at Dkt. Nos. 93 (Def.'s Mot. to Dismiss and Compel Arbitration), 97 (Def.'s Reply).

here have never argued the choice of law provision is unconscionable, and Respondent goes so far as to call it enforceable. Respondent's Brief (Oct. 11, 2021) at 30. Second, the *Rittmann* choice-of-law clause ***expressly precluded*** Washington law from applying to the arbitration provision. 971 F.3d at 920. Such is not the case here.

B. If the Court grants the Cross-Petition, it should also grant the Petition.

Though the Cross-Petition should be denied, should the Court grant it, it should also grant Domino's' Petition. The issue of whether Washington law governs the Agreement absent the FAA provisions is intertwined with the question of unconscionability under Washington's laws. If the Court were to determine Washington law can govern the Agreement, it would also have to resolve the question of whether employment class action waivers are unconscionable under state law. In other words, resolution of the issue raised in the Cross-Petition requires resolution of the issue raised in the Petition.

IV. CONCLUSION

The Cross-Petition should be denied, or, if granted, granted only together with a grant of the Petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief contains 1,518 words, in compliance with the word limits set forth in RAP 18.17.

Respectfully submitted this 28th day of November, 2022.

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Attorneys for Defendant-Appellant Domino's Pizza, LLC

CERTIFICATE OF SERVICE

I declare that on November 28, 2022, I caused a true and correct copy of the foregoing **APPELLANT'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION** to be served on the following in the manner indicated:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 28th day of November, 2022.

s/ Paige Plassmeyer
Paige Plassmeyer, Legal Practice Specialist

No. 101370-1
[Court of Appeals No. 82659-0-I]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. 82659-0-I
King County Superior Court No. 20-2-14563-7 KNT

JUSTIN L. OAKLEY, individually and on behalf of all those similarly situated,

Plaintiff-Respondent,

v.

DOMINO'S PIZZA LLC, a foreign limited liability company,

Defendant-Appellant.

APPELLANT'S APPENDIX TO REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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INDEX TO APPELLANT'S STATEMENT OF UNPUBLISHED NON-WASHINGTON AUTHORITIES

Appendix Pages

Gates v. TF Final Mile, LLC,
2020 WL 2026987 (N.D. Ga. Apr. 27, 2020) .... App. 1-7

Respectfully submitted this 28th day of November, 2022.

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2020 WL 2026987
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

Bruce GATES, on behalf of himself
and those similarly situated, Plaintiffs,
v.
TF FINAL MILE, LLC, f/k/a Dynamex
Operations East, LLC, Defendant.

Civil Action No. 1:16-CV-0341-RWS
|
Signed 04/27/2020

Synopsis

Background: Delivery drivers brought action against logistics company, alleging unpaid minimum and overtime wages in violation of the Fair Labor Standards Act (FLSA). The United States District Court for the Northern District of Georgia, Richard W. Story, J., 2016 WL 11587246, granted company's motion to dismiss and compel arbitration, pursuant to arbitration provisions in their independent contractor agreements, and drivers appealed. The Court of Appeals, 775 Fed.Appx. 665, reversed and remanded. On remand, company again moved to dismiss or stay proceedings and compel arbitration.

Holdings: The District Court, Richard W. Story, J., held that:

delivery drivers were "transportation workers" within the meaning of the Federal Arbitration Act (FAA), and thus, arbitration provision of drivers' independent contractor agreements were not enforceable under the FAA, and

choice of law provision in agreements, designating Georgia law as the controlling law, did not provide a basis for enforcing arbitration provision in agreements.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Subject Matter Jurisdiction; Motion to Compel Arbitration.

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ORDER

RICHARD W. STORY, United States District Judge

***1** This matter is before the Court on Defendant's Amended Motion to Dismiss or Stay Proceedings and Compel Arbitration, pursuant to Rules 12(b)(1) and 12(b)(6), and all related filings. [Docs. 47, 51, 54]. This case was remanded [Doc. 38] from the Eleventh Circuit Court of Appeals in light of intervening law, namely, New Prime Inc. v. Oliveira, ––– U.S. ––––, 139 S. Ct. 532, 202 L.Ed.2d 536 (2019). For the reasons set forth herein, the Court finds that, under New Prime, Plaintiffs are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, as transportation workers and, therefore, cannot be compelled to arbitrate.

Factual Background

Plaintiffs, all "same-day delivery/courier drivers[,]" commenced this civil action against their former employer, Defendant TF Final Mile, LLC, alleging unpaid minimum and overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* [Doc. 1].

Defendant and each individual Plaintiff respectively executed Independent Contractor Agreements for Transportation Services ("Agreement"). [Doc. 47-1, Exhibit A].[1] Section/Paragraph 16 of the Agreement contains an Arbitration Provision applicable to, *inter alia*:

> (1) disputes arising out of or related to this agreement; (2) disputes arising out of or related to Contractor's

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> relationship with [TF Final Mile f/k/a] Dynamex, ... (3) disputes arising out of or relating to the interpretation or application of this Arbitration Provision[.] ... This Arbitration Provision also applies, without limitation, to disputes regarding any city, county, state or federal wage-hour law, ... [including the] Fair Labor Standards Act.

[Doc. 15-1 at 2].[2] The Arbitration Provision further states (also in bold, capital letters), "**BY AGREEING TO ARBITRATE ALL SUCH DISPUTES, THE PARTIES TO THIS AGREEMENT AGREE THAT ALL SUCH DISPUTES WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL.**" Id.

There is a separate "Class Action Waiver," wherein each Plaintiff and TF Final Mile agree "**TO BRING ANY DISPUTE IN ARBITRATION ON AN INDIVIDUAL BASIS ONLY AND NOT ON A CLASS, COLLECTIVE, ... ACTION BASIS.**" Id.

November 2016 Order Compelling Arbitration

In the November 29, 2016, Order, and prior to New Prime, this Court found that the narrow exception under the FAA being asserted by Plaintiffs did not apply. [Doc. 32]. More specifically, the Court analyzed the language and terms of the agreement that governed the parties' business relationship and the evidence of record and concluded that Plaintiffs were independent contractors rather than employees of Defendant. As such, the Court held that the parties' agreement was not a "contract of employment" as contemplated by 9 U.S.C. § 1. Although the undersigned discussed whether Plaintiffs could be considered "transportation workers" for purposes of § 1, the Court did not decide the issue. [Doc. 32 at 6-7 (noting that sufficient evidence existed to support Plaintiffs' argument but stating that "this issue need not be resolved")].[3]

***2** The Supreme Court held in New Prime that 9 U.S.C. § 1 applies to employer-employee agreements as well as independent contractor agreements because, at the time Congress passed the FAA, "contract[s] of employment" included independent contractor agreements. New Prime Inc., 139 S. Ct. at 539-44. Under New Prime, the Court's original rationale for finding that § 1 did not apply and for compelling arbitration is no longer supported.

Following remand, the Court directed the parties to submit amended briefing taking New Prime into consideration. [Doc. 41]. In its amended motion, Defendant reiterates its original position that, under Eleventh Circuit precedent, not all drivers are properly characterized as "transportation workers" such that they are exempt from the FAA. [Doc. 47-1, *passim*]. And see Hill v. Rent-A-Center, Inc., 398 F.3d 1286, 1290 (11th Cir. 2005) (accounts manager who made deliveries of furniture and appliances across state lines was not a transportation worker for purposes of FAA). Defendant emphasizes that it is Plaintiffs' burden to establish that they benefit from the exception. [Doc. 54 at 2 (citing Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC, 2015 WL 2408477 at *5 (S.D. Ga. May 20, 2015) (citation omitted))]. Alternatively, Defendant contends that the Georgia Arbitration Code ("GAC"), O.G.C.A. § 9-9-2(c), Georgia contract law, and principles of equity require enforcement of the Arbitration Provision because the Agreement includes a choice of law provision requiring application of Georgia law. [Doc. 47-1 at 2, 18-24; Doc. 54 at 2].

In response, Plaintiffs contend that they "make final-mile deliveries of interstate goods." [Doc. 51 at 2]. Plaintiffs argue that Defendant's website touts its national delivery system as able to reach the vast majority of the North American population within one day, and that Plaintiffs and the other drivers within the putative collective are the drivers charged with transporting these items in the flow of interstate commerce. [Doc. 51 at 2-3].

Analysis

Under Section 2 of the Federal Arbitration Act, "a written agreement to arbitrate 'in any maritime transaction or a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983)) (quoting 9 U.S.C. § 2). The FAA is "a

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congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. The FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act[,]" ... [and] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Id. (citations omitted).

Plaintiffs do not contend that the Agreement and/or the Arbitration Provision itself is invalid or that the parties' dispute is beyond the scope of the Arbitration Provision if deemed applicable. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 3355, 87 L.Ed.2d 444 (1985) (describing two-step inquiry for evaluating whether arbitration agreement must be enforced; first, whether parties agreed to arbitrate and secondly, "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims"); see also Shubert v. Scope Products, Inc., 2011 WL 3204677, at *2 (N.D. Ga. July 27, 2011) (quoting Lomax v. Woodmen of the World Life Ins. Soc'y, 228 F. Supp. 2d 1360, 1362 (N.D. Ga. 2002)). Plaintiffs rely solely on their contention that they are exempt from FAA coverage under § 1.

***3** Section 1 of the FAA "exempts from coverage any arbitration agreement contained in 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in ... interstate commerce.' " Hill, 398 F.3d at 1288. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L.Ed.2d 234 (2001), the Supreme Court construed the phrase "any other class of workers engaged in ... interstate commerce" as limited to transportation workers engaged in ... interstate commerce." Id. at 1310-11 (relying on statutory text in construing narrowly and observing that phrase is found within the context of a residual provision following identification of two specific categories of workers; noting that "engaged in commerce" is more narrow than either "affecting commerce" or "involving commerce"). As explained by the Supreme Court:

> The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47.17 (1991); see also Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129, 111 S. Ct. 1156, 113 L.Ed.2d 95 (1991). Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it[.]

Circuit City Stores, Inc., 121 S. Ct. at 1308-09.[4] The Supreme Court rejected respondent's argument that it would attribute an irrational intent to Congress to exclude from the FAA " 'those employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925' " in light of the "permissible inference that the employment contracts of the classes of workers in § 1 were excluded from the FAA precisely because of Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them." Id. at 1312 (emphasis in original) (noting the existence of grievance procedures for railroad employees under federal law at the time FAA was adopted). "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods" was noted. Id.

The Supreme Court did not define "transportation worker." Ward v. Express Messenger Systems, Inc., 413 F. Supp. 3d 1079, 1085 (D. Colo. 2019). In Hill, the Eleventh Circuit limited application of § 1 to transportation workers that " 'actually engage' in the transportation of goods in interstate commerce" and are also "employed in the transportation industry." 398 F.3d at 1290 ("it is apparent Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry"). As explained in Hill, Congress focused on exempting "a class of workers in the transportation industry, rather than ... workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." 398 F.3d at 1289-90; and see Hamrick v. Partsfleet, LLC, 411 F. Supp. 3d 1298, 1301 (M.D. Fla. 2019) (applying

Hill). "Differentiating transportation workers from those who only incidentally aid in the transport of goods is a fact intensive inquiry." OEP Holdings, LLC v. Akhondi, 570 S.W.3d 774, 778 (2018).

***4** The relevant case law establishes that employment by a transportation company does not always render the employee a "transportation worker" within the meaning of the FAA. See generally, Bell v. Ryan Transp. Service, Inc., 176 F. Supp. 3d 1251, 1256-57 (D. Kan. 2016) (applying Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352-53 (8th Cir. 2005) (customer representative for "carrier of general commodities by truck" was not considered a transportation worker for purposes of FAA and not exempt by § 1 where plaintiff helped to coordinate the flow of freight in interstate commerce, yet, plaintiff did not directly transport goods, did not handle packages or freight, had no direct responsibility for transporting freight, and did not operate any vehicles for defendant)). [5]

However, in cases with facts similar to the present case, courts have found workers to be engaged in the transportation of goods in interstate commerce for purposes of the FAA. In Hamrick, the court held that the transportation of goods in interstate commerce by a group of local delivery drivers was not merely incidental to plaintiffs' employment such that plaintiffs were exempt by § 1. 411 F. Supp. 3d at 1302. It was undisputed in Hamrick that plaintiffs "act as delivery agents on behalf of [d]efendants and deliver packages that have traveled in the stream of interstate commerce ... [and] that [p]laintiffs predominantly make local deliveries and rarely cross state lines in the ordinary course of their employment. Id. at 1301. The court noted that there was no evidence that plaintiffs delivered goods made by local merchants and stated that "the goods at issue in this case originate in interstate commerce and are delivered, untransformed, to their destination by [p]laintiffs."

In Ward, the court also applied § 1 to a plaintiff group of regional delivery drivers given plaintiffs were "all drivers in the transportation industry, and[,] though they may not have transported goods across state lines, they directly engaged in the movement of goods in interstate commerce." 413 F. Supp. 3d at 1085. The facts in Ward are analogous to the facts described here. More specifically, the court explained as follows:

> Plaintiffs are all drivers for J & B and delivered OnTrac shipments in Colorado, using either their own vehicle or one provided by [d]efendants.... OnTrac is a Delaware corporation that "provides regional same-day and overnight package delivery services within Arizona, California, Nevada, Oregon, Washington, Utah, Colorado[,] and Idaho" for customers such as Amazon, Staples, and various pharmaceutical companies.... J & B is a Colorado corporation that "provides regional same-day and overnight package delivery services for OnTrac's [sic] customers within Colorado," and has expended its operations into New Mexico, Wyoming, and Minnesota....
>
> ***5** Based on the foregoing, I find that [p]laintiffs work in the transportation industry, are directly responsible for transporting goods in interstate commerce, handle goods that travel in interstate commerce, use vehicles that are vital to the commercial enterprises of [d]efendants, are employees that would disrupt the flow of interstate commerce if they went on strike, and cannot perform their job duties without the use of their own or [d]efendants' vehicles. This is sufficient to deem [p]laintiffs transportation workers....

Id. at 1086–87 (citations omitted). Significantly, the court stated, "This is so even in the absence of any indication that Plaintiffs transported goods across state lines." Id. (citing Diaz v. Michigan Logistics Inc., 167 F. Supp. 3d 375, 380 n.3 (E.D.N.Y. 2016) ("Plaintiffs sufficiently allege that they were engaged in interstate transportation, notwithstanding that they did not actually drive across state lines, as Plaintiffs were directly responsible for transporting and handling automotive parts that allegedly moved in interstate commerce—the heart of Defendants' business."

Like the facts in Hamrick and Ward, although Plaintiffs rarely cross state lines, Plaintiffs' work is not incidental to the transportation of goods in interstate commerce. As previously discussed, Plaintiffs "make final-mile deliveries of interstate goods." [Doc. 51 at 2]. Thus, Plaintiffs are directly engaged in the handling and transportation of goods that have moved in interstate commerce, and Plaintiffs rely on and use vehicles to perform their duties – vehicles that are "vital to the commercial enterprise[ ] of Defendant[ ]." Ward, 413 F. Supp. 3d at 1086-87; and see Lenz, 431 F.3d at 352.

Plaintiffs make it possible for Defendant to market itself as a national delivery system able to reach the vast majority of the North American population within one day. [Doc. 51 at 2-3].

The Court finds these authorities persuasive and concludes that Plaintiffs are exempt as transportation workers. Accordingly, Section 16 of the Agreement is not enforceable under the FAA.

Enforceability Under Georgia State Law

Alternatively, Defendant contends that the GAC, O.G.C.A. § 9-9-2(c), Georgia contract law, and principles of equity require enforcement of the Arbitration Provision because the Agreement includes a choice of law provision designating Georgia as the controlling law. [Doc. 47-1 at 2, 18-24; Doc. 54 at 2]. Plaintiffs object to consideration of any of the state law arguments advanced by Defendant, and point out that, on its face, the Agreement contains no reference to the GAC and only identifies the FAA as the enforcement mechanism for arbitration. [Doc. 51 at 3].

Previously, the Court did not discuss or rely upon Defendant's GAC argument because it was deemed untimely as raised by Defendant for the first time in its reply brief. [Doc. 32 at 1]. Because both of the parties have been able to address the argument in their post-remand briefs, the Court will address it now. The Court finds that the unambiguous language in the Agreement precludes enforcement under the GAC.

Although the validity of an arbitration agreement is generally governed by the FAA, state law generally governs whether an enforceable contract or agreement to arbitrate exists. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367–68 (11th Cir. 2005); Goshawk Dedicated v. Portsmouth Settlement Co. I, 466 F. Supp. 2d 1293, 1298 (N.D. Ga. 2006) (citations omitted) ("courts examining threshold questions of contractual formation must apply state law in determining whether an agreement to arbitrate exists"). "The federal policy in favor of arbitration still controls even when applying state law." McBride v. Gamestop, Inc., 2011 WL 578821, at *3 (N.D. Ga. Feb. 8, 2011) (citing Caley, 428 F.3d at 1368) (citing Cooper v. MRM Inv. Co., 367 F.3d 493, 498 (6th Cir.2004) (stating that the "federal policy favoring arbitration, however, is taken into consideration even in applying ordinary state law")); Honig v. Comcast of Georgia I, LLC, 537 F. Supp. 2d 1277, 1282–83 (N.D. Ga. 2008).

***6** The Court follows well established Georgia law in construing the Agreement.

> [T]he construction of contracts involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury. The existence or nonexistence of an ambiguity is a question of law for the court. If the court determines that an ambiguity exists, however, a jury question does not automatically arise, but rather the court must first attempt to resolve the ambiguity by applying the rules of construction in OCGA § 13–2–2.

Barrett v. Britt, 319 Ga. App. 118, 122, 736 S.E.2d 148, 151–52 (2012) (internal citations and punctuation omitted); and see UniFund Fin. Corp. v. Donaghue, 288 Ga. App. 81, 653 S.E.2d 513, 515 (2007) ("Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.")

Section 15, immediately precedes the Arbitration Provision and provides:

> GOVERNING LAW: The laws of the state of residence of the Contractor, without regard to the conflicts of laws

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> principles thereof, shall govern this Agreement, including its construction and interpretation, the rights and remedies of the parties hereunder, and all claims, controversies or disputes (whether arising in contract or tort) between the parties. The parties voluntarily agree to waive any right to a trial by jury in any suit filed hereunder and agree to resolve any dispute pursuant to the terms of Section 16 below.

[Agreement ¶ 15]. The Arbitration Provision does not reference the GAC and expressly states, "This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*...." [Agreement ¶ 16].

To the extent that Defendant relies on the choice of law provision to compel arbitration under state law, the Court finds no legal basis for Defendant's proposed interpretation of the Agreement.[6] The language within the Arbitration Provision concerning the governing law, namely, "the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*," is explicit and unequivocal, and the Court finds it unambiguous. [Agreement ¶ 16]. See Hamrick, 411 F. Supp. 3d at 1302. Section16 provides no alternative to arbitration consistent with the FAA and no other avenue for either party to enforce the agreement to arbitrate. There is no mention of the GAC, resorting to state contract law or equity. " 'It is the function of the court to construe the contract as written and not to make a new contract for the parties.' " Kirby v. Anthem, Inc., 2019 WL 2004128, at **4–5 (N.D. Ga. March 21, 2019) (quoting Georgia Magnetic Imaging v. Greene Cty. Hosp. Auth., 219 Ga. App. 502, 504, 466 S.E.2d 41 (1995)). The parties are bound by the terms of their agreement.

***7** Looking to the language of Section 15, there is likewise no mention of the GAC or resorting to state contract law in the event that the FAA is later deemed not to apply. Indeed, Section 15 expressly states that the "parties voluntarily agree to waive any right to a trial by jury in any suit filed hereunder and agree to resolve any dispute *pursuant to the terms of Section 16* ...." [Agreement ¶ 15 (emphasis added)]. Again, the language of the written agreement is unambiguous. Section 15 directs the parties to the Arbitration Provision at Section 16, which is unenforceable.

As for any alleged ambiguity that may exist given Section 15 (or arguable need for reconciliation with the Arbitration Provision), the Court properly resorts to the rules of contract construction. See Barrett, 319 Ga. App. at 122, 736 S.E.2d 148. Pursuant to Georgia law, "when a provision specifically addresses the issue in question, it prevails over any conflicting general language." Deep Six v. Abernathy, 246 Ga. App. 71, 74, 538 S.E.2d 886 (2000); see also Amin v. Mercedes-Benz USA, LLC, 301 F. Supp. 3d 1277, 1286 (N.D. Ga. 2018) ("In construing contracts, a specific provision will prevail over a general one.") (citation and internal quotation marks omitted). Here, the Arbitration Provision at Section 16 specifically speaks to the parties' agreement to arbitrate under the FAA. In contrast, the choice of law provision at Section 15 speaks more generally about Georgia as the governing law with respect to the Agreement's "construction and interpretation, the rights and remedies of the parties hereunder, and all claims, controversies or disputes (whether arising in contract or tort) between the parties." [Agreement ¶ 15]. And this Court has, in fact, applied Georgia law in construing the parties' Agreement.[7] Under Georgia law, when the terms of an agreement are unambiguous, "the contract alone" supplies the intention of the parties. UniFund Fin. Corp., 653 S.E.2d at 515; see also Amin, 301 F. Supp. 3d at 1285 (citation omitted).

The parties are bound by the terms of their Agreement and, notwithstanding the federal and state policies both favoring arbitration of disputes, the Court declines Defendant's invitation to venture outside of the unambiguous terms of the written Agreement to compel arbitration.

The Court also finds that Defendant fares no better in equity.

Conclusion

In conclusion, because the Court finds that Plaintiffs are transportation workers as contemplated by Section 1 of the FAA, the Arbitration Provision at Section 16 within the Agreement is unenforceable and Plaintiffs cannot be compelled to arbitrate.

It is hereby **ORDERED** that Defendants' Amended Motion to Dismiss or Stay Proceedings and Compel Arbitration [Doc. 47] is **DENIED**.

The parties are required to file their Joint Preliminary Report and Discovery Plan within **fourteen (14) days.**

SO ORDERED this 27th day of April, 2020.

All Citations

--- F.Supp.3d ----, 2020 WL 2026987

Footnotes

1 It is undisputed that the Agreement has a choice of law provision indicating that the Agreement is governed by "[t]he laws of the state of residence of the Contractor" (i.e., Georgia law). [Agreement ¶ 15].

2 This section is entitled Arbitration Provision and is in bold, underlined, and all capital letters. Each individual Plaintiff executed a separate acknowledgement of the Arbitration Provision and was provided an opportunity to opt out within thirty (30) days. Defendant points out that the Arbitration Provision consists of three (3) pages and fourteen (14) separate sub-paragraphs. [Doc. 54 at 4].

3 For example, the Court observed as follows:

> Plaintiffs participate in the final step in the interstate transportation of goods. While it is true that Plaintiffs themselves rarely cross state lines, the goods they deliver have often recently crossed state lines to arrive at locations such as Defendant's warehouses, from which Plaintiffs retrieve them for final delivery. Defendant is a national company that represents that it can provide the final stage of transportation of goods in interstate commerce.

[Doc. 32 at 6-7].

4 The Supreme Court did not rely on legislative history but described the sparse history that did exist as problematic and absent debate by elected officials as to the meaning of the Section 1 exclusion. Id. at 1311.

5 In Lenz, the Eighth Circuit identified a non-exclusive list of eight factors to consider when determining applicability of § 1, which include: "whether the employee works in the transportation industry; whether the employee is directly responsible for transporting goods in interstate commerce; whether the employee handles goods that travel interstate; whether the employee supervises employees who are themselves transportation workers; whether like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; whether the vehicle itself is vital to the commercial enterprise of the employer; whether a strike by the employee would disrupt interstate commerce; and the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties." Lenz, 431 F.3d at 352.

6 Defendant asserts a severability argument as an alternative to enforcing arbitration under the FAA. [Doc. 54 at 9-10 (Subsection 16(h) & Section 19 allow unenforceable provisions to be severed)].

7 In doing so, the undersigned has not construed the Agreement against the Defendant as the drafter. [Agreement ¶ 21].

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