UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOAN AMBROSIO, et al.,

Plaintiffs,

v.

COGENT COMMUNICATIONS, INC.,

Defendant.

Case No. 14-cv-02182-RS

ORDER DENYING MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Defendant Cogent Communications, Inc. ("Cogent") seeks to shift this conflict from one venue to another, and thus moves to compel 145 class members to submit their claims to arbitration. It seeks also to dismiss or stay these claims pending arbitration, and moves to amend the class and collective action definitions. Plaintiffs do not dispute the arbitration agreements, if enforceable, encompass their claims. They argue instead either that Cogent has waived its rights or that the agreements cannot be enforced.

For the reasons that follow, the motion to compel arbitration is denied. Cogent did not represent in any filing before this Court that it intended to compel arbitration until more than nineteen (19) months had passed since answering, and more than twenty (20) months since the case commenced. Given it sat on its contractual rights as to a named plaintiff, and waited nearly two years to reveal its intent regarding the absent class, Cogent has waived any preexisting rights it might have had to compel arbitration.

II. FACTUAL BACKGROUND

In December 2011, three former employees filed a complaint in the Southern District of Texas alleging Cogent failed to pay overtime in violation of the Fair Labor Standards Act

("FLSA"), 29 U.S.C. § 201 *et seq.* *Lagos, et al. v. Cogent Communications, Inc.*, No. H-11-4523 (Filed Dec. 21, 2011). The *Lagos* court conditionally certified a nationwide collective action, and Joan Ambrosio—a named plaintiff here—joined the case on January 7, 2013. Up to that point, Cogent's practice was to provide its California-based sales employees the option to sign a release with a mandatory arbitration clause upon termination from employment ("pre-April 2013 agreement").[1] Szott Decl. ¶ 4. That changed around April 2013 as Cogent updated its voluntary release to add a new waiver of the employee's right to participate in a class or collective action ("post-April 2013 agreement").[2]

Cogent likewise began requiring new hires to sign a contract ("new hire agreement") with a mandatory arbitration clause, a class action waiver, and a waiver of the right to participate in a collective action.[3] Unlike the other agreements, the contract for new hires states "claims filed and proceeding in court prior to the date of th[e] Agreement" are "**not** covered by th[e] Agreement and shall therefore be resolved in any appropriate forum."

As these changes were implemented, *Lagos* continued. Following discovery and an opt-in period, Cogent moved for decertification, and correspondingly moved to compel arbitration as to

[1] Section 8.1 of the pre-April 2013 agreement requires arbitration of "all claims, disputes, and/or controversies, whether or not arising out of Employee's employment or termination, or arising out of the terms of this Agreement, that Cogent may have against Employee, or that Employee may have against Cogent." Szott Decl. Ex. A. It continues "[t]he American Arbitration Association ("AAA") shall have jurisdiction over any such dispute, and it shall be governed by, and in accordance with, the Rules and Procedures of the AAA." *Id.* Lastly, it provides "[t]he Claims covered by this Arbitration provision include, but are not limited to, claims for wages or other compensation due." *Id.*

[2] Cogent introduced separate release agreements for employees under and over the age of forty. Szott Decl. ¶ 4. The post-April 2013 release agreements apply to "all claims, disputes, and/or controversies, whether or not arising out of Employee's employment or termination, or arising out of the terms of this Agreement and their interpretation, that Cogent may have against Employee, or that Employee may have against Cogent." Szott Decl. Ex. B.

[3] The agreement covers "disputes or claims between [the] Employee and [Cogent], that may arise out of or relate to [the] Employee's recruitment, employment or separation from employment with [Cogent]." Szott Decl. Ex. C. The waiver provides: "[t]o the extent permitted by law, all covered claims under this Agreement must be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class, collective or representative proceeding." *Id.*

multiple opt-in plaintiffs. Cogent, notably, did not seek to compel Ambrosio to arbitrate her claim, even though she had signed a voluntary release following her termination. The Texas district court eventually decertified the nationwide class on March 12, 2014, and denied as moot Cogent's pending motion to compel arbitration. Olivier Decl. ¶ 6.

This action followed on May 12, 2014, asserting similar violations on behalf of California employees. Cogent answered a month later asserting approximately thirty affirmative defenses, among them, that the claims are barred because plaintiffs agreed to arbitrate all disputes arising out of their employment. Dkt. No. 6. Cogent thereafter moved for judgment on the pleadings arguing the *Lagos* decertification order barred this action on grounds of collateral estoppel. Dkt. No. 12. Cogent stipulated to an extension of the briefing deadlines and the associated hearing date. Dkt. No. 17. The motion was denied on September 22, 2014, obliging the parties to file a case management statement.

The parties reportedly conducted the Rule 26(f) conference by email and over the phone, and found "[n]o issues presently exist as to personal jurisdiction or venue." Dkt. No. 26 at 1:16. The anticipated motions section does not indicate Cogent was expecting to file a motion to compel arbitration at any time in this matter. Indeed, Cogent specifically represents it would move to decertify or seek summary judgment if certification were to be granted. Nor was arbitration mentioned in the discovery plan the parties presented in the statement. Cogent said it would instead defend plaintiffs' anticipated motions for class and collective certification. Cogent discussed its intention to serve written discovery and depose all of the named plaintiffs. Cogent also agreed any written discovery responses, deposition testimony, or documents it produced in *Lagos* could be used in this matter. Though there was no formal bifurcation, the parties requested discovery proceed in two "informal" phases—one prior to certification and another in the event of certification.[4] The subsequent scheduling order established discovery limits, set a timeline for

[4] Indeed, it is this Court's general practice not to impose a formal bifurcation of class and merits discovery in part so as to obviate needless discovery motion practice. The record reflects the Court's general practice was followed in this case.

briefing on certification, and set a date for the motions to be heard.

Discovery commenced. Though its duty was to disclose information it would use to support its defenses, Cogent neither identified any witnesses nor provided any documents related to arbitration. The parties entered into a stipulated protective order in December 2014. Months later, Cogent responded to plaintiffs' interrogatories, noting Ambrosio "executed an agreement to submit to binding arbitration all employment disputes." Olivier Decl. ¶ 10, Ex. C. Cogent's "General Objections" added "[b]y responding to these interrogatories, [Cogent] is not waiving the right to enforce or compel arbitration with any named plaintiff or putative class member. [Cogent] expressly reserves such right." *Id.* As to facts that support its affirmative defenses, Cogent responded "certain putative class members have executed releases" and "arbitration agreements with Defendant." *Id.*

In March 2015, Cogent produced a release with an arbitration clause signed by Ambrosio. Plaintiffs then requested "[a]ll agreements to arbitrate signed by any putative class members." *Id.* ¶ 12, Ex. E. Cogent responded such information "is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence given the case is in its pre-certification stage." *Id.* Cogent insisted "[c]ompanywide discovery prior to class or collective action certification concerning any and all potential putative class members is unreasonable, inappropriate, and unduly burdensome." *Id.* That said, on August 26, 2015, Cogent supplemented its responses by producing three unsigned, undated agreements containing arbitration clauses. *Id.* ¶ 13.

On August 28, 2015, after stipulating four times to delay the certification hearing, Cogent moved to dismiss with prejudice the complaint as to three plaintiffs who failed to appear for their depositions.[5] Dkt. No. 45. That same day, plaintiffs moved for class and collective action certification. Cogent's subsequent response—on October 16, 2015—argued plaintiffs could not

[5] Ironically, Cogent argued their conduct "runs contrary to the public policy of promoting just, speedy, and inexpensive determinations of cases," and noted "this case is already more than one year old." Dkt. No. 46 at 4:3–4, 4:7. Cogent further observed an involuntary dismissal is "an adjudication of the merits and bars further litigation of the claims asserted." *Id.* at 6 n.2.

represent adequately class members who had signed arbitration agreements, and notice should not dispatch to those specific putative class members. Cogent had yet to produce an arbitration agreement actually signed by a putative class member, though a declaration indicated it used arbitration agreements, and blank copies were attached.[6] *See* Dkt. No. 65. Cogent then stipulated to modify the briefing and hearing schedule for certification,[7] and further agreed to toll the statute of limitations on the FLSA claims of putative opt-in plaintiffs.

The parties filed another case management statement while these motions were pending, and Cogent elected once again not to raise arbitration as an issue in the statement. Cogent specifically indicated it had no issues regarding "venue at this time." Dkt. No. 77 at 1:13–14. It further represented it would file "a motion to decertify" should certification be granted, and also anticipated "filing motions for summary judgment on Plaintiffs' claims." Dkt. No. 77 at 2:11–15. Cogent reported it responded to two sets of requests for productions and two sets of interrogatories, defended the depositions of two Rule 30(b)(6) witnesses, and deposed thirteen of sixteen named plaintiffs. The parties requested another conference after the ruling on certification.

At the certification hearing, Cogent revealed—for the first time in these proceedings—roughly 100 putative class members had signed an arbitration agreement. It leveraged this statement to argue the named plaintiffs could not represent adequately the absent class, but did not indicate it would move to compel arbitration as to these putative class members. On January 4, 2016, Cogent's motion to dismiss was granted, as well as plaintiffs' motions for class and collective action certification. Dkt. No. 80. Two weeks later, Cogent moved for a stay and to certify for interlocutory review the January 4, 2016, order on certification. It simultaneously sought permission from the Circuit to appeal Rule 23 certification, and its appellate brief indicated it was preparing a motion to compel arbitration as to absent class members. Both requests for

[6] Cogent was also presuming its arbitration agreements were enforceable—the subject of this order.

[7] Cogent also moved to extend the page limits governing its opposition, and sought leave to file an opposition to plaintiffs' motion to strike. *See* Dkt. Nos. 60, 74.

interlocutory review ultimately were denied.

The parties filed a case management statement on January 28, 2016. This time, Cogent made clear it intended to bring a motion to compel arbitration as to class members who signed arbitration agreements. Dkt. No. 94. The parties also proposed dates to govern the remainder of this action. A further scheduling order memorialized the agreement following the denial of Cogent's requests for interlocutory review.

Finally, on March 11, 2016, Cogent produced signed arbitration agreements, and the promised motion to compel arbitration was filed two weeks hence. Cogent submits 145 class members signed arbitration agreements, and 117 signed a contract containing a class and collective action waiver.[8]

III. DISCUSSION

The Federal Arbitration Act makes an agreement to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "a liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted). Thus, "a party seeking to avoid enforcement of an arbitration agreement can only invoke a defense that would be available to a party seeking to avoid the enforcement of any contract." *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1010 (9th Cir. 2005). Recent Supreme Court opinions have given broad effect to arbitration agreements. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012); *Concepcion*, 563 U.S. at 352.

Here, the task "is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. Keybank, Nat'l*

[8] Specifically, twenty-nine (29) class members signed the pre-April 2013 agreement, 104 signed the new hire agreement, and twenty-nine (29) signed the post-April 2013 agreement, although there is some overlap. Four individuals signed the post-April 2013 release while this litigation was pending. Opp'n at 14:23–25. As of March 8, 2016, the total class consisted of 283 members. *Id.* ¶ 2.

Ass'n, 718 F.3d 1052, 1058 (9th Cir. 2013) (internal quotation marks omitted). Importantly, the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* at 1058.

Plaintiffs do not dispute the agreements, if enforceable, encompass the claims at issue.[9] They argue instead the agreements cannot be enforced on five distinct grounds; namely, that: (1) Cogent has waived its right to compel arbitration; (2) the new hire clause expressly excludes claims filed before the date the clause was signed; (3) Cogent omitted material facts employees should have known when signing the agreements; (4) the agreements violate the Norris-LaGuardia Act and the National Labor Relations Act; and (5) an arbitrator should decide if the pre-April 2013 agreement bars representative arbitrations. As Cogent has waived its right to compel arbitration, these additional issues need not be reached.

A. Waiver

Plaintiffs' first attack is that Cogent waived any right it had to compel arbitration. To prove a waiver of arbitration, a party must demonstrate: "(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986). Given waiver of the right to arbitrate is disfavored, plaintiffs bear "a heavy burden of proof." *Id.* Any doubts as to waiver are resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

1. Knowledge of an existing right to compel arbitration.

Plaintiffs have no trouble demonstrating Cogent's knowledge of its right to compel arbitration. Indeed, "[s]ince the beginning of the litigation," Cogent submits it "has raised the arbitration issue with plaintiffs and this Court," Dkt. No. 112 at 6:13–14, as evidenced by the

[9] Plaintiffs assert an FLSA claim for unpaid overtime, *see* 29 U.S.C. § 216(b), and three additional claims under California state law: failure to pay overtime, Cal. Labor Code §§ 510, 1194; failure to pay wages due and owing, Cal. Labor Code §§ 200–03; and violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code, § 17200 *et seq.* Each arbitration clause squarely encompasses these claims.

affirmative defense in its answer that plaintiffs agreed to arbitrate their disputes. *See* Dkt. No. 6. What is more, Cogent moved to compel arbitration as to several opt-in plaintiffs in *Lagos*. Accordingly, it plainly was on notice such a motion likely was available in the instant case. In short, plaintiffs demonstrate adequately Cogent's knowledge of its right to compel arbitration.

2. Acts inconsistent with that existing right.

"There is no concrete test to determine whether a party has engaged in acts that are inconsistent with its right to arbitrate." *Martin v. Yasuda*, --- F.3d ---, 2016 WL 3924381, at *5 (9th Cir. July 21, 2016). The element is satisfied, however, "when a party chooses to delay his right to compel arbitration by actively litigating his case to take advantage of being in federal court." *Id.*

The Ninth Circuit's recent opinion in *Martin* provides some guidance for this inquiry. It found "extended silence and delay in moving for arbitration may indicate a 'conscious decision to continue to seek judicial judgment on the merits of [the] arbitrable claims,' which would be inconsistent with a right to arbitrate." *Id.* (quoting *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988). Further, even "[a] statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Id.* "This is especially true when parties state well into the litigation that they do not intend to move to compel arbitration." *Id.* As one guidepost, "seeking a decision on the merits of an issue may satisfy this element," but "filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act." *Id.* At bottom, courts must assess whether "the *totality* of the[] [movant's] actions satisfies this element." *Id.* (emphasis added).

Looking at the totality of Cogent's actions, it has engaged in conduct inconsistent with its known right to arbitrate. To begin, Cogent did not represent in any filing before this Court that it intended to compel arbitration until more than nineteen (19) months had passed since answering the complaint, and more than twenty (20) months since the case commenced.[10] True, it included

[10] Cogent first suggested it would move to compel arbitration on January 19, 2016, when it filed an appellate brief as an exhibit to its motion to certify for interlocutory review the January 4, 2016,

boilerplate in its answer and discovery responses reserving its right to arbitrate, but a reservation of rights does not attest those rights will be asserted, and is insufficient in light of *Martin*.

Meanwhile, Cogent actively participated in efforts to structure this litigation, and outlined a detailed plan that excluded a motion to compel arbitration. In particular, the October 2014 case management statement proposed a blueprint for discovery, but made no mention of arbitration and reported "[n]o issues presently exist as to personal jurisdiction or venue." Dkt. No. 26 at 1:16. Cogent's anticipated motions section did not indicate it would move to compel arbitration at any time. To the contrary, Cogent said it would move to decertify or seek summary judgment if certification were to be granted. After discovery commenced, Cogent's disclosures did not identify any witnesses or documents regarding arbitration. When it eventually produced Ambrosio's arbitration agreement, Cogent did not correspondingly move to compel her to arbitrate. In December 2015—fully nineteen months after the case began—Cogent reiterated it would seek decertification or summary judgment upon certification, but made absolutely no mention of compelling arbitration. Though not quite as explicit as in *Martin*, this is largely akin to "stat[ing] well into the litigation" that Cogent "d[id] not intend to move to compel arbitration." 2016 WL 3924381 at *5.

Before filing its eventual motion, Cogent entered into a protective order, responded to two sets of requests for production and two sets of interrogatories, defended the depositions of two Rule 30(b)(6) witnesses, and deposed all thirteen named plaintiffs. It also stipulated that any written discovery responses, deposition testimony, or documents produced in *Lagos* could be used in this matter, knowing it had served written discovery on the named plaintiffs in connection with *Lagos*. *See* Olivier Decl. ¶ 14 (Dkt. No. 120); Madriz Decl. ¶ 2 (Dkt. No. 64). It is not clear the

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order. *See* Dkt. No. 83, Ex. A. That brief said Cogent was "preparing" a motion to compel arbitration. *Id.* at 8. The first filing directed at *this* Court indicating Cogent would move to compel arbitration was the January 28, 2016, case management statement. Cogent also raised arbitration as an issue in opposing certification, but even that was over sixteen (16) months after the case was filed, and in any event is insignificant after *Martin*. 2016 WL 3924381 at *5 (holding a party's statement that it has a right to arbitration in "motions is not enough to defeat a claim of waiver").

full scope of this discovery would be permitted in the arbitral forum.[11] *See* Olivier Decl. ¶ 20, Ex. H.

As for motions, Cogent sought judgment on the pleadings, filed a motion to dismiss on grounds of collateral estoppel, defended plaintiffs' motions for class and collective action certification, moved for an interlocutory appeal under 28 U.S.C. § 1292(b), sought permission from the Circuit to appeal the Rule 23 certification order, and moved to stay these proceedings. Only after these efforts resolved in plaintiffs' favor did Cogent produce signed arbitration agreements, and represent to plaintiffs that it affirmatively would move to compel arbitration. Though no act in isolation necessarily crosses the requisite threshold for this element, the totality of Cogent's conduct is inconsistent with its eleventh hour assertion of its right to arbitrate.

Martin reinforces this conclusion. There, the defendant spent seventeen months (three less than here) litigating the matter, which "included devoting considerable time and effort to a joint stipulation structuring the litigation, filing a motion to dismiss on a key merits issue, entering into a protective order, answering discovery, and preparing for and conducting a deposition." 2016 WL 3924381 at *6 (internal quotation marks omitted). The Ninth Circuit found the "totality of these actions" was inconsistent with the known right to arbitrate. *Id.* Importantly, Cogent engaged in most of these acts, and in some respects its conduct was even more egregious.

Cogent responds by invoking *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07–1827SI, 2011 WL 1753784 (N.D. Cal. May 9, 2011). There, the defendants failed to mention arbitration until after certification, but the court declined to find waiver because it found they could not move to compel absent class members to arbitrate until the case was certified. *Id.* at *4. Simply put, *TFT-LCD* is unpersuasive here. Foremost, Cogent could have asserted its intent to compel arbitration much earlier in these proceedings, even if it could not have filed the

[11] The American Arbitration Association's ("AAA") rules governing employment disputes provide "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." Olivier Decl. ¶ 20.

corresponding motion as to absent class members until certification. Sanctioning Cogent's conduct at this late juncture would effectively undermine the purpose of proceeding to arbitration—to manage and quickly resolve disagreements at low cost and with as little adverse impact as possible on the parties. Further, *TFT-LCD* referred to its own decision as "extremely close," and a factor that was "critical[]" to the court's reasoning is simply missing here. *Id.* In particular, the *TFT-LCD* court found it persuasive that "defendants seek to enforce arbitration agreements only against unnamed class members and do not seek to enforce any arbitration agreement against the named plaintiffs." *Id.* Cogent not only moves to compel a named plaintiff, Joan Ambrosio, to arbitrate her claims, but has known from day one she signed such an agreement, and waited twenty-two months to assert its right. Cogent's conduct arguably signaled to the plaintiffs it would not assert any of its preexisting rights to arbitrate, especially in light of the fact that its professed plan for the litigation did not include a motion to compel arbitration. At bottom, Cogent has long known of its rights as to named plaintiff Joan Ambrosio and members of the putative class, but it waited almost two years to reveal its intent to assert those rights, and acted plainly inconsistent with their exercise. Cogent's conduct in its totality satisfies this element.

3. Prejudice to plaintiffs.

To establish prejudice, plaintiffs must show "that, as a result of the defendants having delayed seeking arbitration, they have incurred costs that they would not otherwise have incurred," "they would be forced to relitigate an issue on the merits on which they have already prevailed," or "that the defendants have received an advantage from litigating in federal court that they would not have received in arbitration." *Martin*, 2016 WL 3924381 at *6.

Here, plaintiffs demonstrate adequately they have suffered prejudice. They submit they would have made different strategic decisions had Cogent timely evinced its intent to compel named plaintiff Joan Ambrosio and half the class to arbitration. Olivier Decl. ¶ 22. They may have insisted on an early settlement conference, decided not to pursue either conditional or class

certification, or made different decisions with respect to conducting discovery or filing motions.[12] *Id.* Importantly, *Martin* invoked approvingly a decision holding the different choices that would have been made had plaintiffs known the case was going to arbitration were contributing factors to a finding of prejudice. *See* 2016 WL 3924381 at *7 (citing *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1068 (C.D. Cal. 2011)). It also appears likely, though not certain, the full scope of discovery agreed to and propounded in this Court would not be available in total to Cogent in individual AAA arbitrations. Further, "even if the parties exchanged the same information in court as they would have in arbitration, the process of doing so in federal court likely cost far more than determining the answer to the same question in arbitration." *Martin*, 2016 WL 3924381 at *7. Next, granting Cogent's motion would bar Ambrosio and many class members from pursuing their claims collectively, notwithstanding that issue was litigated extensively and resolved in their favor in these proceedings.[13] Lastly, plaintiffs expended significant costs in attorney and party time structuring this litigation, as evidenced in the voluminous case management history spanning almost two years. Though granting Cogent's motion would not waste all of these costs, given half the class would remain, there is little question Cogent's failure to evince its intent caused costs and delay that would not otherwise have arisen had it timely announced or acted consistent with its preexisting right to arbitrate. Instead, Cogent sat on its contractual rights as to Ambrosio, a named plaintiff, month after month, and waited nearly two years before divulging its true plan as to the newly certified class members. Adding it all up, plaintiffs adequately demonstrate prejudice.

V. CONCLUSION

"A party may not delay seeking arbitration until after the district court rules against it in whole or in part; nor may it belatedly change its mind after first electing to proceed in what it

[12] Cogent further contributed to this prejudice by refusing to respond to plaintiffs' request for arbitration agreements signed by putative class members. While the case was in the pre-certification stage, there was never any formal bi-furcation of discovery.

[13] It is not clear whether this is true as to the pre-April 2013 release, which does not explicitly bar representative actions. Cogent, however, nonetheless insists that agreement prohibits class arbitration.

believed to be a more favorable forum." *Martin*, 2016 WL 3924381 at *8. Here, Cogent slept on its rights, hid its intentions, and accordingly waived its preexisting rights to arbitrate. Its motion to compel arbitration is therefore denied. Cogent's corresponding request to amend the class and collective action definitions is denied as moot.

IT IS SO ORDERED.

Dated: August 5, 2016

RICHARD SEEBORG
United States District Judge