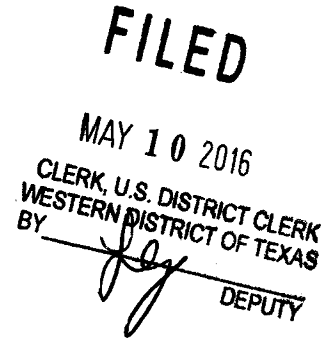

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

BRIAN DISMUKE, Individually and on behalf of all others similarly situated, ***Plaintiff,***	§ § §	
v.	§ §	**NO. MO:16-CV-00023-RAJ**
MCCLINTON ENERGY GROUP, L. L. C., SURF-FRAC WELLHEAD EQUIPMENT COMPANY, INC., and TONY MCCLINTON, Individually and as Officer and Director of McClinton and SWECO, ***Defendants.***	§ § § § § § § §	

ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DENYING PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION

BEFORE THE COURT is Plaintiff Brian Dismuke's ("Plaintiff") Motion for Conditional Certification (Doc. 9), Defendants McClinton Energy Group, L.L.C., Surf-Frac Wellhead Equipment Company, Inc., and Tony McClinton's (collectively, "Defendants") Motion to Dismiss Plaintiff's Amended Complaint and to Compel Arbitration of Plaintiff's Claims (Doc. 15), and Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 20). Defendants move to require Plaintiff to arbitrate his Fair Labor Standards Act ("FLSA") claims because he signed an Arbitration Agreement. (Doc. 15-1). After careful consideration of the Parties' briefing and the relevant law, Defendants' Motions to Compel Arbitration and Motions to Dismiss (Docs. 15, 20) shall be **GRANTED**. Finally, Plaintiff's Motion for Conditional Certification shall be **DENIED** for the reasons set forth below. (Doc. 9).

I. BACKGROUND

Plaintiff, individually and on behalf of all others similarly situated, filed this action against Defendants alleging violations of the FLSA and overtime compensation claims. (Doc. 1). Plaintiff was hired by Defendants in March of 2009. (Doc. 17 at 4). On June 5, 2015,

Plaintiff signed an Arbitration Agreement, agreeing to arbitrate all claims arising out of his employment with Defendants. (Doc. 15-1). The Arbitration Agreement provides that disputes between Plaintiff and his employer, Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Co., Inc., must be submitted to binding arbitration, including claims that arise out of the employment relationship. (*Id.*). Defendant Tony McClinton signed the Arbitration Agreement on behalf of Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Co., Inc. (*Id.*).

To avoid arbitration, Plaintiff has filed a Second Amended and Substitute Complaint removing McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. as Defendants in this case. (Doc. 18 at 1). Therefore, Plaintiff contends Defendants' Motion to Compel Arbitration is moot because the only remaining Defendant, Tony McClinton, was not a party to the Arbitration Agreement. (*Id.*). Defendants maintain that *In re Merrill Lunch Trust Company FSB*, 235 S.W.3d 185 (Tex. 2007), requires this Court to compel arbitration regardless of the fact that Tony McClinton is the only remaining named Defendant. (Doc. 19 at 2).

Significantly, Plaintiff does not challenge the enforceability of the Arbitration Agreement against Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. (*Id.*). Plaintiff has not submitted any opposing affidavit or otherwise admissible evidence to controvert the fact that there is a valid agreement to arbitrate as shown by Defendants' Motion to Compel Arbitration and supporting affidavit. (Doc. 15). Accordingly, there are no genuine issues of material fact related to the making of the Arbitration Agreement, and there is no dispute that Plaintiff's FLSA claims against Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. are within the scope of the Arbitration Agreement. The only remaining issue before the Court is a question of law: namely,

whether Defendant Tony McClinton can enforce the Arbitration Agreement against Plaintiff. As such, the Court finds that this matter is suitable for disposition without an evidentiary hearing.

On May 5, 2016, Defendant Tony McClinton filed a Motion to Dismiss Plaintiff's Second Amended and Substituted Complaint and to Compel Arbitration of Plaintiff's Claims for many of the same reasons raised in Defendants' original motion to compel arbitration. (Doc. 20). On May 6, 2016, Plaintiff filed a response in opposition to Defendant Tony McClinton's Motion to Dismiss and Compel Arbitration. (Doc. 22). Therein, Plaintiff reiterates his argument that Defendant Tony McClinton cannot compel arbitration because he has been sued "as an independently liable employer[.]" (*Id.* at 1).

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (noting that there is a strong policy in favor of arbitration under the FAA). All doubts concerning the arbitrability of claims should be resolved in favor of arbitration. *Wash. Mut. Fin. Grp., L.L.C. v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004). Defendants move to compel arbitration under 9 U.S.C. §§ 2 & 4. (Doc. 15). A court must order the parties to arbitrate issues covered by a valid arbitration agreement, and the FAA "leaves no place" for the court to exercise discretion. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The court "perform[s] a two-step inquiry to determine whether to compel a party to arbitrate: first whether parties agreed to arbitrate and, second, whether federal statute or policy renders the claims nonarbitrable." *Dealer v. Comput. Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 886 (5th Cir. 2009). The first step is divided "into two more questions: whether a

valid agreement to arbitrate exists and whether the dispute falls within the agreement." *Id.* The court applies state law to decide contract validity. *First Options v. Kaplan*, 514 U.S. 938, 944 (1995). As a matter of federal law, "arbitration agreements and clauses are to be enforced *unless* they are invalid under principles of state law that govern all contracts." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (emphasis in original).

III. DISCUSSION

The claims at issue in this case are subject to a mandatory arbitration clause. (Doc. 15-1). Specifically, Plaintiff and Defendants entered into an Arbitration Agreement on June 5, 2015, agreeing to arbitrate all claims arising out of Plaintiff's employment with Defendants. (*Id.*). According to the Arbitration Agreement, arbitration is the exclusive remedy for any dispute relating to Plaintiff's wages or compensation. (*Id.*). Thus, Plaintiff's overtime compensation claims under the FLSA are within the scope of the Arbitration Agreement. Both Plaintiff and Defendant Tony McClinton, on behalf of Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc., signed the Arbitration Agreement. (*Id.*). Because there is a valid agreement to arbitrate between the Parties, the Court shall grant Defendants' Motion to Compel Arbitration.

Under Texas state law, "parties to an arbitration agreement may not evade arbitration through artful pleading, such as by naming individual agents of the party to the arbitration clause and suing them in their individual capacity." *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 188 (Tex. 2007). Arbitration agreements would be rendered illusory if "the choice between suing the corporation or suing the workers determine[d] whether an arbitration agreement [was] binding." *Id.* at 188–89. "When contracting parties agree to arbitrate all disputes . . . they generally intend to include disputes about their agents' actions because as a general rule, the

actions of a corporate agent on behalf of the corporation are deemed the corporation's acts." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006) (internal quotation marks and citations omitted). "If arbitration clauses only apply to contractual signatories," then every officer and agent would be required to "either sign the contract or be listed as a third-party beneficiary" in order to enforce the principal's arbitration agreements. *Id.* However, such a requirement would not place arbitration agreements on equal footing with other contracts. *Id.*

In the case *In re Merrill Lynch*, the plaintiffs, who had signed agreements to arbitrate claims against Merrill Lynch relating to their brokerage accounts, sued a Merrill Lynch broker who did not sign the agreements. 235 S.W.3d at 189. Regardless, the Texas Supreme Court granted the broker's motion to compel arbitration because the plaintiffs' claims were in substance claims against the signatory brokerage firm. *Id.* at 190. Likewise, Plaintiff cannot evade arbitration in the present case simply by removing Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. from his Second Amended Complaint and suing only Defendant Tony McClinton in his individual capacity.

Defendant Tony McClinton is an officer, director and owner of McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Co., Inc. (Doc. 19 at 5). Moreover, Plaintiff's FLSA claims against Defendant Tony McClinton arise out of Plaintiff's employment relationship with Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. Lastly, Plaintiff brought his claims for overtime compensation against Defendants as joint employers.[1] (Doc. 6). Therefore, the Court is of the opinion that Plaintiff's claims against Defendant Tony McClinton are in substance claims against Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. *In re*

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[1] The FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

Merrill Lynch, 235 S.W.3d at 190. The fact that Defendant Tony McClinton signed the Arbitration Agreement on behalf of Defendants McClinton Energy Group, L.L.C. and Surf-Frac Wellhead Equipment Company, Inc. evidences the agency relationship between these joint employers. Thus, Plaintiff cannot avoid the Arbitration Agreement invoked by Defendant Tony McClinton.

A. Enforceability of the Arbitration Agreement

There is a strong presumption in favor of arbitration and a party seeking to invalidate an arbitration agreement bears the burden of establishing its invalidity. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Here, Plaintiff has not raised any ground at law or in equity to revoke or invalidate the Arbitration Agreement. Moreover, Plaintiff has failed to articulate any basis to find the Arbitration Agreement unenforceable. As such, Plaintiff has not overcome the presumption in favor of arbitration, and the Arbitration Agreement signed by Plaintiff and Defendant Tony McClinton is "valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2.

In applying state contract law to determine whether an agreement to arbitrate is valid and enforceable, a court considers only "issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967). "An arbitration agreement covering statutory claims is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may effectively vindicate his statutory rights." *In re Poly–Am., L.P.*, 262 S.W.3d 337, 349 (Tex. 2008) (internal quotation marks and citations omitted).

The Arbitration Agreement in this case waives Plaintiff's and Defendants' rights "to a trial before a judge or jury in federal or state court in favor of arbitration[.]" (Doc. 15-1). As stated by the United States Court of Appeals for the Fifth Circuit, "there is nothing in the FLSA's text or legislative history" precluding arbitration. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297 (5th Cir. 2004). In addition, the Arbitration Agreement signed by Plaintiff contains the following Class Action Waiver:

> **It is the intent of the parties that any dispute covered by this Agreement will be arbitrated on an individual basis, and, unless prohibited by applicable law, the parties mutually waive their right to bring, maintain, participate in, opt into, or receive money from, any class, collective, or representative proceeding.** Further, no dispute between Employee and the Company may be brought in arbitration on behalf of other employees as a class or collective action or other representative proceeding.

(Doc. 15-1) (emphasis in original).

In enforcing an arbitration agreement, the Fifth Circuit has previously rejected the argument that the "inability to proceed collectively deprives [plaintiff] of substantive rights under the FLSA." *Carter v.*, 362 F.3d at 298. Furthermore, the Supreme Court has enforced arbitration clauses that expressly waive the right to proceed collectively in court and in the arbitral forum. *Am. Express Co. v. Italian Colors Rest.*, — U.S. —, 133 S.Ct. 2304, 2310 (2013); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (enforcing class action waiver in arbitration agreement to bar ADEA collective action, which incorporates the FLSA collective action statute). The right to bring FLSA claims as a collective action is a procedural rather than substantive right. *D.R. Horton v. N.L.R.B.*, 737 F.3d 344, 357 (5th Cir. 2013) ("The use of class action procedures though, is not a substantive right."). Accordingly, the class action waiver does not render the Arbitration Agreement signed by Plaintiff unenforceable. Because

there is no federal statute or policy that renders Plaintiff's FLSA claims nonarbitrable, Defendants' Motion to Compel Arbitration shall be granted.

B. Class Certification

Preliminary issues in arbitration cases include gateway disputes, which typically require judicial determination, and procedural questions, which are to be reviewed by the arbitrator. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–53 (2003); *Robinson v. J & K Admin. Mgmt. Servs.*, Inc., — F.3d —, 2016 WL 1077102, at *2 (5th Cir. 2016). The arbitrability of disputes, or the determination of whether the agreement applies to the parties' claims, is generally a gateway issue to be determined by the courts. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). The Supreme Court of the United States has held that procedural questions, which grow out of the dispute and bear on its final disposition, presumptively are for the arbitrator, not the judge, to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

The Fifth Circuit has ruled that "arbitrators should decide whether class arbitration is available or forbidden" when an agreement includes broad coverage language. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Personnel of Tex. Inc.,* 343 F.3d 355, 363 (5th Cir. 2003). For example, the availability of class or collective arbitration is an issue to be determined by the arbitrator when the agreement includes a contract clause submitting "all disputes, claims, or controversies arising or relating to" the agreement to arbitration. *Id.* at 359. Accordingly, the threshold question of whether collective arbitration is available is deferred to arbitration where the agreement espouses the parties' intent to do so. *Howsam*, 537 U.S. at 83.

In this case, the Arbitration Agreement states that arbitrable disputes include any claims made by Plaintiff "that arise out of, or are related to, [Plaintiff's] employment . . . wages or

compensation, benefits, leaves of absences, accommodation for a disability, or termination of employment." (Doc. 15-1). The Arbitration Agreement does not clearly and unmistakably provide that the arbitrator should decide the question of whether class or collective arbitration is available. (*Id.*). Rather, the Arbitration Agreement signed by Plaintiff expressly states that "any claim that all or part of the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator." (*Id.*). Accordingly, the validity of the Class Action Waiver is a gateway issue to be determined by this Court. (*Id.*).

As previously discussed, the right to litigate collectively under the FLSA is a procedural right subject to waiver. *Carter,* 362 F.3d at 298. In *Carter*, the Fifth Circuit analyzed the validity of a collective action waiver in the context of an arbitration clause and held that the FLSA does not provide for a non-waivable, substantive right to bring a collective action. *Id.* Thus, Plaintiff validly waived his ability to participate in collective action litigation by signing the Arbitration Agreement. (Doc. 15-1). Moreover, the waiver of the right to participate in a collective action is conspicuous, as it is contained in bold print in the Arbitration Agreement. (Doc. 15-1). Because Plaintiff seeks to represent opt-in plaintiffs collectively, his FLSA claims fall within the scope of the Class Action Waiver. Accordingly, the Court determines that the Class Action Waiver is enforceable and **DENIES** Plaintiff's Motion for Conditional Certification. (Doc. 9).

IV. CONCLUSION

Based on the foregoing analysis, the Court is of the opinion that Defendants' Motion to Dismiss and to Compel Arbitration and Defendant Tony McClinton's Motion to Dismiss and to

Compel Arbitration of Plaintiff's Claims shall be **GRANTED** (Docs. 15, 20) and Plaintiff's Motion for Conditional Certification shall be **DENIED** (Doc. 9).

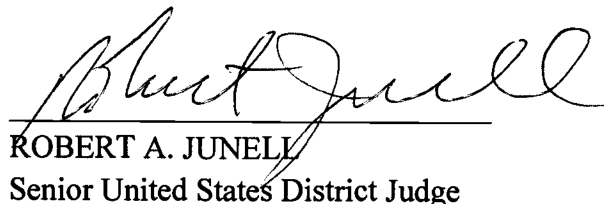
Therefore, it is **ORDERED** that Defendants McClinton Energy Group, L.L.C., Surf-Frac Wellhead Equipment Company, Inc., and Tony McClinton's Motion to Compel Arbitration is hereby **GRANTED** (Docs. 15, 20) and this action is **DISMISSED WITHOUT PREJUDICE** pending arbitration.[2] The Parties are **ORDERED** to arbitrate their claims in the manner provided for in the Arbitration Agreement, pursuant to 9 U.S.C. § 4. The Court's dismissal does not affect the ability of either party to apply to any appropriate court for entry of a judgment upon an arbitration award. 9 U.S.C. § 9.

It is further **ORDERED** that Plaintiff's Motion for Conditional Certification is **DENIED.** (Doc. 9).

It is finally **ORDERED** that the Clerk of the Court shall close this matter

It is so **ORDERED.**

SIGNED this 10 day of May 2016.



ROBERT A. JUNELL
Senior United States District Judge

[2] The FAA explicitly contemplates stays pending arbitration. 9 U.S.C. § 3. However, the Court concludes that all of Plaintiff's claims arise from the employment relationship with Defendants and are therefore arbitrable. Accordingly, a stay in this case would serve no purpose.