UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALPHEAUS E. MARCUS,

Plaintiff,

-against-

OSCAR COLLINS, et al.,

Defendants.

16-CV-4221 (GBD) (BCM)

MEMORANDUM AND ORDER

BARBARA MOSES, United States Magistrate Judge.

Defendants move to compel arbitration of plaintiff's employment discrimination claims pursuant to a collective bargaining agreement. Because defendants have not established that plaintiff was bound by a written agreement to arbitrate, the motion is DENIED.[1]

I. BACKGROUND

Between March 11, 2015 and March 1, 2016, pro se plaintiff Alpheaus Marcus was

[1] Although the Second Circuit has not yet addressed the issue, a number of well-reasoned District Court decisions within this Circuit have concluded that a motion to compel arbitration is non-dispositive, and therefore that a Magistrate Judge may decide the motion pursuant to 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) rather than issue a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). *See, e.g.*, *Cumming v. Indep. Health Ass'n, Inc.*, 2014 WL 3533460, at *1 (W.D.N.Y. July 16, 2014); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 399 n.1 (S.D.N.Y. 2011), *rev'd on other grounds sub nom. Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013). The First and Third Circuits, which are the only two Courts of Appeal to have decided the issue, have both held that orders granting or denying motions to compel arbitration and stay litigation pending arbitration are non-dispositive. *See Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 134 (3d Cir. 2014) ("we see no exercise of Article III power when a Magistrate Judge rules on a motion to compel arbitration"); *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 14 (1st Cir. 2010) ("A federal court's ruling on a motion to stay litigation pending arbitration is not dispositive of either the case or any claim or defense within it."). Here, defendants moved to compel arbitration and to "dismiss or alternatively stay this action pending arbitration." Def. Mem. of Law, dated Oct. 18, 2016 (Dkt. No. 21), at 1. Since I have determined to deny the motion to compel arbitration, however, I do not reach the question whether to dismiss or stay the case. The request for dismissal – as an alternative form of relief available only if the motion to compel arbitration is granted – therefore does not affect the non-dispositive nature of this order.

employed by defendant Related Management Company, LP (Related) at the Hunter's Point South housing development in Long Island City, New York, where he worked as a porter. Compl. (Dkt. No. 2), ¶¶ 4, 11; Decl. of David Pomales, dated Oct. 18, 2016 (Dkt. No. 19), ¶ 8.[2] Plaintiff worked in two different buildings within the development, known as Hunter's Point South Crossing (Crossing) and Hunter's Point South Commons (Commons). Compl. ¶¶ 4, 15, 18, 29. After filing a charge with the New York State Department of Human Rights and receiving a right-to-sue notice from the federal Equal Employment Opportunity Commission, Marcus filed this action on June 6, 2016, against Related and several Related employees, alleging race-based discrimination and retaliation. Compl. ¶¶ 1-2, 5-9, 26-27, 30. Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and other federal statutes.

A. Defendants' Motion

On October 18, 2016, in lieu of an answer, defendants filed a motion to compel arbitration and to dismiss or stay the case pursuant to sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3-4. Defendants argue that plaintiff was and is a member of the Service Employees International Union Local 32BJ (the Union), and is therefore bound by a collective bargaining agreement (CBA) that requires arbitration of all discrimination claims arising from his employment with Related. *See* Def. Mem. of Law, at 1-2. The CBA (Pomales Decl. Ex. B) was entered into in 2014 between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB), which is a multi-employer association representing building owners and managers in

[2] The Complaint lists "Related Management Corp." as a defendant, but plaintiff's pay statements, which he submitted in opposition to the motion to compel arbitration, identify his employer as Related Management Company, LP. Pl. Resp., filed Nov. 15, 2016 (Dkt. No. 26), Ex. A. *See also* Pomales Decl. ¶ 8 (Related Management Company LP "serves as the managing agent of the Hunters Point South buildings").

collective bargaining with labor unions. Pomales Decl. ¶¶ 2, 4-5. Related is a member of the RAB. *Id*. ¶ 2. The CBA covers unionized porters and other building services workers who are employed by RAB members in the New York City area at buildings that are "committed to this Agreement." CBA art. I ¶ 1.

The CBA provides, among other things, that all discrimination claims, including claims brought under Title VII, are subject to mandatory grievance and arbitration procedures "as [the] sole and exclusive remedy for violations." *See* CBA arts. V-VI; *id*. art. XIX ¶ 23. The parties do not dispute the terms or the scope of the CBA's arbitration provisions, which have been previously construed to require arbitration of claims similar to those asserted here. *See, e.g.*, *Hamzaraj v. ABM Janitorial Ne., Inc.*, 2016 WL 3571387, at *4 (S.D.N.Y. June 27, 2016) (collecting cases). Rather, the parties dispute two interrelated questions: whether and when Crossing and Commons were "committed" to the CBA – such that the CBA covered unionized employees at plaintiff's workplace – and whether and when plaintiff himself became a Union member. Plaintiff cannot be compelled to arbitrate unless both of these things occurred before March 1, 2016.

B. The Evidence

The parties are agreed that on March 11, 2015, when Marcus was hired, Hunter's Point South was still under construction – and therefore not yet committed to the CBA – and plaintiff was not a Union member. Compl. ¶ 11; Pomales Decl., dated Nov. 22, 2016 (Dkt. No. 27), ¶ 8 (hereafter Pomales Reply Decl.). On November 10, 2015 – by which time both Crossing and Commons had been "opened," Compl. ¶¶ 18, 21-22 – plaintiff executed a one-page "Application for Membership" and "Payroll Deduction Authorization" form (Application). Pomales Decl. Ex. D. The "application" portion reads, in relevant part:

> I hereby request and accept membership in the Local 32BJ Service Employees International Union ("the Union"), and authorize the Union to represent me, to negotiate on my behalf, and to conclude any and all agreements as to wages, hours and other conditions of employment. I understand that in order to establish and maintain membership in good standing, I am obligated to pay initiation fees, monthly dues, and amounts which may be levied by the Union as fees or assessments in accordance with the Union's Constitution and By-Laws, which I may pay by authorized payroll deductions or by remitting payment directly to the Union.

The "payroll deduction" portion reads, in relevant part:

> I hereby authorize my Employer(s) to deduct from my compensation (including vacation and other leave benefits), irrespective of my present or future membership status in the Union, amounts equivalent to initiation fees, monthly dues, and amounts which may be levied as fees or assessments, in accordance with the Local 32BJ Service Employees International Union Constitution and By-Laws. If for any reason, my Employer fails to make a deduction, I authorize the Employer to make such deduction in a subsequent payroll period.

The parties are also agreed that no Union initiation fees, monthly dues, or other Union-related fees or assessments were ever deducted from plaintiff's paychecks while he was employed by Related. *See* Pl. Resp. Ex. A; Def. Reply Mem. of Law, filed Nov. 22, 2016 (Dkt. No. 28), at 5. Nor is there any evidence that Marcus paid Union dues through any other mechanism, or indeed that he was ever invoiced for Union dues, issued a Union membership card, or offered or enrolled in any Union programs or benefits.

On January 3, 2016, plaintiff "commenced unpaid leave due to a medical condition and did not return to active employment status." Pomales Reply Decl. ¶ 12. In a letter dated March 1, 2016, Related informed plaintiff that he had exhausted his leave and was being placed on "inactive status" effective immediately, meaning that he would no longer be paid but was free to reapply for a job at Related. Pl. Resp. Ex. B; Pomales Reply Decl. Ex. B.

That same day – March 1, 2016 – Related "assented" to the CBA on behalf of both Crossing and Commons. It did so by executing two copies of a form entitled "2014 Apartment Building Agreement Assent" (Assent), one for each building, addressed to the RAB. The forms

are undated but state, in pertinent part: "We hereby assent as of March 1, 2016 to the terms of the [CBA] . . . and authorize you to file this assent on our behalf with the Union." Pomales Decl. Ex. C. In addition, Related applied for residential membership in the RAB on behalf of both buildings. The membership application forms, which are also undated, state that Related "hereby authorize[s] the RAB to commit this company to be bound for the remainder of the term of the current [CBA] between [the Union] and the RAB." *Id.*

C. Defendants' Contentions

Lacking direct evidence that Crossing or Commons was "committed" to the CBA during plaintiff's employment – or that Marcus was a member of the Union during that period – defendants nonetheless contend that this Court should compel him to arbitrate his discrimination claims pursuant to the CBA. Their argument proceeds as follows:

(1) Pursuant to a contract known as the Related New Development Agreement (NDA), Pomales Decl. Ex. A, a residential building operated by Related became a Newly Constructed Facility once temporary certificates of occupancy (TCOs) were issued for 100% of the apartment units at the site. NDA ¶ A; Pomales Reply Decl. ¶ 7. This occurred at "the Hunters Point South buildings," presumably meaning both Crossing and Commons, "by early November 2015." Pomales Reply Decl. ¶ 8.

(2) Thereafter, "from the date the Union provide[d] a showing that a majority of a representative complement of the workers at the new site have selected the Union as their bargaining representative," a Transition Period commenced, during which

employees at the Newly Constructed Facility were "covered by" the CBA. NDA ¶¶ E, F; Pomales Reply Decl. ¶ 7.[3]

(3) "[B]y early November 2015," the Union "had obtained executed Union membership agreements from a sufficient number of employees at Hunters Point South, including from Plaintiff . . . to demonstrate that a majority of the employees had selected the Union as their bargaining representative," thus commencing the Transition Period and establishing that "Hunters Point South employees were 'covered by the terms of the [CBA].'" Pomales Reply Decl. ¶ 8.

(4) The CBA contains a "Union Shop" requirement, meaning that all employees "were required to be members of the Union in order to work for Related." *Id.*; *see also* CBA art. I ¶ 3. "Indeed, the [CBA] does not even permit Related to employ Plaintiff at the building unless he was a member of the Union." Pomales Reply Decl. ¶ 3.

(5) Therefore, plaintiff was a Union member on and after November 10, 2015, when he signed his Application, regardless of whether or when Related deducted Union dues from his paycheck. *Id.* "Once the Union demonstrated that it represented a majority of employees at Hunter's Point South and Plaintiff executed his Agreement with the Union" (by which Pomales means the Application), "Plaintiff's Union membership was effective and no other processes or procedures, such as dues deductions, were necessary to trigger Plaintiff's membership in the Union." *Id.* ¶ 9.

[3] The Transition Period lasts for 60 months, during which the CBA applies in full to existing employees but some of its terms are modified with respect to newly-hired employees. NDA ¶¶ E, F.

(6) Related's Assents, dated March 1, 2016, "merely serve[ ] as formal recognition between Related and the RAB that employees at a designated site will continue to be governed by the terms of the CBA they have been operating under during the [T]ransition [P]eriod." *Id.* ¶ 10.

(7) Marcus has never "taken any action to withdraw from membership in the Union or to revoke his signed agreement authorizing Related to deduct Union dues from his pay." *Id.* ¶ 15.

The evidence as to each of these points, however, is problematic.

First, the copy of the NDA submitted to the Court by defendants, dated "___ day of February, 2013," is executed only by the Union, not by Related or the RAB. Moreover, the NDA contains an exception for "residential facilities where the majority of the units are income restricted." NDA ¶ I. In such facilities, "the Union and [Related] shall meet and negotiate the terms of the bargaining agreement applicable to that site." *Id.* Defendants do not address the income-restriction issue in their papers, although publicly-available information suggests that Hunter's Point South may fall into that exception.[4]

Second, Pomales does not explain how he knows that "by early November 2015, the Union had obtained executed Union membership agreements from a sufficient number of employees at Hunters Point South, including from Plaintiff . . . to demonstrate that a majority of the employees had selected the Union as their bargaining representative." Pomales Reply Decl. ¶

[4] *See* Related Companies, "Hunters Point South," http://www.related.com/our-company/properties/160/HUNTERS-POINT-SOUTH (last visited Dec. 28, 2016) (Hunter's Point South was designed to provide affordable rental apartments for "low to moderate to middle income" tenants); Related Management Company, "Frequently Asked Questions," Hunter's Point South Living, http://www.hunterspointsouthliving.com/faq.aspx (last visited Dec. 28, 2016) (applicants for apartments at Hunter's Point South are required to meet income and household size requirements and must certify that their incomes meet those requirements).

8. Pomales does not work for the Union; he works for Related as a Human Resources Generalist. *Id*. ¶ 1. And while he claims generally to have personal knowledge of all facts to which he attests, *id*., he does not explain the source of his knowledge as to the Union's effort to obtain membership agreements. Nor does he provide any supporting detail or attach any documentation. The lack of documentation is particularly troubling given that, under the express terms of the NDA, the Transition Period begins when "the Union provides a showing" that a sufficient number of workers at the new site have selected the Union as their bargaining agent. NDA ¶ E. There is no evidence in defendants' motion papers that the Union ever made such a "showing" – much less a copy of whatever showing was made – and therefore no evidence that the CBA covered Hunter's Point South at any time before Related formally assented to such coverage "as of March 1, 2016." Pomales Decl. Ex. C.[5]

Similarly, Pomales does not disclose the basis, if any, for his knowledge of the internal processes or procedures required "to trigger Plaintiff's membership in the Union." Pomales Reply Decl. ¶ 9. Defendants have not submitted any Union membership records, any internal Union rules or procedures, or any declarations from Union officials indicating that the mere act of signing an Application – without paying any dues or fees – could be sufficient to confer Union membership on the plaintiff. Pomales's bald assertion that Marcus became a Union member on November 10, 2015 is thus unsupported by any other evidence in the record. Moreover, it contradicts the language of the Application itself: "I understand that in order to establish and

[5] Defendants do not explain why Related did not assent to CBA coverage until March 1, 2016 – the same day plaintiff lost his job – if, as they contend, the Transition Period began almost four months earlier. Moreover, defendants' contention that the Assents merely served as "formal recognition" that the Hunter's Point South buildings would "continue" to be governed by the CBA, Pomales Reply Decl. ¶ 10, is inconsistent with the language of the documents themselves, which state that Related assents "as of March 1, 2016" to the CBA. Neither the Assents nor the accompanying (undated) RAB membership applications contain any language that even hints at retroactive effect.

maintain membership in good standing, I am obligated to pay initiation fees, monthly dues, and amounts which may be levied by the Union as fees or assessments in accordance with the Union's Constitution and By-Laws." Pomales Decl. Ex. D.[6]

Defendants' alternative argument – that since the CBA contains a Union Shop requirement, Marcus was required to become a Union member the moment his work site was committed to the CBA – is also inconsistent with the documentary record. Under the CBA, the Union Shop requirement becomes "effective" fifteen days after "the Union files with the RAB and the Employer a claim that a majority of the employees in a building are members of or have made application for membership in the Union." CBA art. I ¶ 4. Once there is "agreement or determination" that a majority of the employees have joined or applied to the Union, the employees have 30 days to become Union members "as a condition of employment." *Id*. art. I ¶ 3. The employer, for its part, must furnish the Union and the RAB with a complete list of "all employees covered by this Agreement," and must deduct Union dues and fees "from the pay of each employee from whom it receives written authorization," beginning with "the first full pay period worked by each employee following the receipt of the authorization." *Id.* art. I ¶¶ 9, 11. If the employer fails to deduct dues as required, it must pay interest to the Union, at the rate of one percent per month, unless it can demonstrate that "the delay was for good cause due to circumstances beyond its control." *Id*. art. I ¶ 11.

There is no evidence in the record showing when the Union filed a "claim" with Related and the RAB, as required by CBA art. I ¶ 4, sufficient to make the Union Shop requirement effective 15 days thereafter – or when there was an "agreement" or "determination" of that fact,

[6] Plaintiff's Application includes a line labeled "staff signature," bearing a hand-written signature and the date 12/22/15. Pomales Decl. Ex. D. The form does not specify, and defendants do not explain, whether the signatory was a member of the Union staff or the employer's staff. Nor do defendants explain the significance, if any, of the date.

which would in turn require that all employees become Union members within the next 30 days. Nor is there any evidence that plaintiff's name was on any list furnished to the Union by Related in compliance with art. I ¶ 9.

As noted above, the parties agree that Related never deducted any Union dues or fees from plaintiff's paychecks.[7] Defendants' only explanation for this lapse – which would be a breach of CBA art. I ¶ 11 if, as they contend, plaintiff became a Union member when he signed his Application – is that "in practice, dues deductions do not begin until Related files the appropriate applications and assents with the RAB." Pomales Reply Decl. ¶ 10. Since the Assents were not filed until the day Marcus was placed on inactive status, Pomales explains, and since he was "not receiving wages" at that time, Related was "unable to apply Union dues deductions to Plaintiff's pay." *Id.* ¶ 13. Defendants' implicit argument appears to be that even though it breached its own express duties under the CBA, the Court should assume that plaintiff fulfilled his corresponding duty to become a Union member, and therefore should hold him to all of the obligations attendant upon that assumed status, including the obligation to arbitrate.

It is true, as defendants point out, that once the Union Shop requirement went into effect, the CBA would not "permit Related to employ Plaintiff at the building unless he was a member of the Union." Pomales Reply Decl. ¶ 3; *see* CBA art. I ¶ 5 (on request of the Union, employer must discharge employee "if he/she has not met the requirements of this Article"). Related's failure to fire Marcus under this provision does not, however, mean that he was a Union member. It could just as easily mean that the Union Shop requirement had not yet gone into effect (CBA art. I ¶¶ 3-4), or that Related had not yet provided the Union with the mandated list of employees required to become Union members (*id.* art. I ¶ 9), or that the Union neglected to request the

[7] There is no evidence in the record as to whether Related paid interest on the sums it failed to deduct pursuant to art. I ¶ 11.

discharge of noncomplying employees (art. I ¶ 5), or even that the Union made the request but Related ignored it – just as, by its own admission, it ignored the contractual requirement that it deduct Union dues from employee paychecks and instead followed an undocumented "practice" of delaying such deductions until it filed the necessary Assents. Pomales Reply Decl. ¶ 10.

Finally, defendants cannot rely on their assertion, made through Pomales, that Marcus has never "taken any action to withdraw from membership in the Union or to revoke his signed agreement authorizing Related to deduct Union dues from his pay." Pomales Reply Decl. ¶ 15. No such action would be required unless plaintiff had first become a Union member. Moreover, Pomales does not indicate how he acquired personal knowledge of what the plaintiff did not do regarding his assumed Union membership.

D. The Hearing

On November 29, 2016, I heard argument on defendants' motion (and on a letter-motion by plaintiff to disqualify defendants' counsel, Dkt. No. 23, which I denied from the bench). During the hearing, Marcus informed the Court that he never considered grieving his discrimination claims because as far as he knew he was never in the Union. He added, in response to a question from the bench, that if he had been in the Union he would have "probably took that route." Defendants, for their part, acknowledged that they never asked plaintiff if he wished to arbitrate his claims. At the conclusion of the hearing, I directed the parties to meet and confer to discuss voluntary arbitration. On December 14, 2016, defendants submitted a letter (Dkt. No. 30) informing me that Marcus would not arbitrate voluntarily.[8]

[8] The letter also contained new factual assertions and legal argument regarding plaintiff's alleged Union membership, including the assertion that the General Counsel of the Union "informed us," on an unspecified date after November 29, that "the Union considers Plaintiff a member of the bargaining unit covered by the CBA as of March 1, 2016, regardless of the fact that Plaintiff did not pay Union dues." I have disregarded this and related assertions contained in the December 14, 2016 letter, both because I did not authorize post-hearing briefing and because, even if the

II. DISCUSSION

A. Legal Standards

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Sections 3 and 4 of the FAA require a district court to stay the litigation of claims subject to an arbitration agreement and to compel the arbitration of those claims upon the application of either party to the agreement. *Id.* §§ 3, 4. If all of the claims are referred to arbitration, a stay of judicial proceedings is mandatory. *Katz v. Cellco P'ship*, 794 F.3d 341, 347 (2d Cir. 2015); *Hamzaraj*, 2011 WL 3571387, at *5.

In determining whether to compel arbitration, courts engage in a four-step analysis, asking: "(1) whether the parties entered into an agreement to arbitrate; (2) if so, the scope of that agreement; (3) if federal statutory claims are asserted, whether Congress intended those claims to be nonarbitrable; and (4) if some, but not all, claims are subject to arbitration, whether to stay the balance of the proceedings pending arbitration." *Begonja v. Vornado Realty Trust*, 159 F. Supp. 3d 402, 408-09 (S.D.N.Y. 2016) (citing *Guyden v. Aetna, Inc.*, 544 F.3d 376, 382 (2d Cir. 2008)); *see also Fleming v. J. Crew*, 2016 WL 6208570, at *3 (S.D.N.Y. Oct. 21, 2016) (quoting *J.M. Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004)).

The issue here is the first step of the analysis: whether the parties ever "agreed to arbitrate." *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 75-76 (2d Cir. 1998). This is the "threshold question" facing any court considering a motion to compel under the FAA, *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012), because parties cannot be "required to

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submission had been timely and under oath, the statements concerning the Union's views would be inadmissible hearsay. I have also disregarded plaintiff's unsworn statements, made during the November 29, 2016 hearing, that when he called the Union a week earlier to request clarification of his status, "they had never heard of me."

arbitrate when they have not agreed to." *Clarendon Nat'l Ins. Co. v. Lan*, 152 F. Supp. 2d 506, 514 (S.D.N.Y. 2001) (citing *Volt Information Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). *See also Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 369 (2d Cir. 2003) ("the law . . . requires that parties actually agree to arbitration before it will order them to arbitrate a dispute").

A party seeking to compel arbitration under the FAA bears the burden of "mak[ing] a *prima facie* initial showing that an agreement to arbitrate existed." *Moton v. Maplebear Inc.*, 2016 WL 616343, at *4 (S.D.N.Y. Feb. 9, 2016) (quoting *Hines v. Overstock.com, Inc.*, 380 Fed. App'x 22, 24 (2d Cir. 2010) (summary order)). "As the moving party, defendants bear the burden of proving written agreements obligating [plaintiff] to arbitrate." *Rothstein v. Fung*, 2004 WL 1151568, at *1 (S.D.N.Y. May 24, 2004).

If the moving party demonstrates the existence of an arbitration agreement "by a showing of evidentiary facts," *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995), the burden shifts to the party "seeking to avoid arbitration" to "show[] the agreement to be inapplicable or invalid.'" *Sajdlowska v. Guardian Serv. Indus., Inc.*, 2016 WL 7015755, at *4 (S.D.N.Y. Dec. 1, 2016) (citing *Harrington v. Atl. Sounding Co., Inc.*, 602 F.3d 113, 124 (2d Cir. 2010)).

If the moving party fails to make an adequate initial showing, based on competent evidence, the motion to compel arbitration must be denied. Thus, in *Mayfield v. Asta Funding, Inc.*, 95 F. Supp. 3d 685 (S.D.N.Y. 2015), *appeal withdrawn*, 2d Cir. 15-1254 (Oct. 5, 2015), the court denied defendants' motion to compel arbitration where they could not produce the agreements actually signed by plaintiffs and instead relied on "sample contracts" from the relevant time period, supplemented by a declaration from a corporate witness asserting that the

missing contracts also mandated arbitration. *Id.* at 693-94. Noting that the witness had no "personal knowledge of Plaintiffs' alleged accounts or the terms and conditions that governed them," the court held that his declaration "does nothing to cure Defendants' primary evidentiary deficiency." *Id.* at 694. *See also Dreyfuss v. Etelecare Glob. Sols.-US, Inc.*, 349 Fed. App'x 551, 553 (2d Cir. 2009) (summary order) (affirming denial of motion to compel arbitration where moving party could not produce a complete copy of the arbitration agreement that plaintiff allegedly signed and therefore never "met its burden of proving the existence of a valid arbitration agreement"); *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1330-32 (11th Cir. 2016) (Kaplan, J. sitting by designation) (affirming denial of motion to compel arbitration where moving party's affidavits as to existence of agreement to arbitrate were not based on personal knowledge or supported by documents).[9]

"Whether or not the parties have agreed to arbitrate is a question of state contract law." *Schnabel*, 697 F.3d at 119; *accord First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Lang v. First Am. Title Ins. Co.*, 2012 WL 5221605, at *2 (W.D.N.Y. Oct. 22, 2012) ("a party may not be compelled under the FAA to submit to arbitration 'unless there is a contractual basis

[9] The FAA provides that "[i]f the making of the arbitration agreement . . . be in issue, the [district] court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. To put the making of the arbitration agreement "in issue," however, the moving party must meet its *prima facie* burden. If the moving party's papers "fail to carry [its] initial burden to demonstrate the existence of an arbitration agreement," the motion should be denied. *Hines*, 380 Fed. App'x at 24-25 (affirming denial of motion to compel arbitration where defendants relied on arbitration clause in website's "terms and conditions" but failed to show that plaintiff had knowledge of those terms or an opportunity to see them prior to "'accepting' them by accessing the website"); *see also Begonja*, 159 F. Supp. 3d at 409 (moving party must make *prima facie* showing before burden shifts to opposing party "to put the making of th[e] agreement 'in issue'") (quoting *Hines*, 380 Fed. App'x at 24).

for concluding that the party agreed to do so'") (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010)). Thus, the FAA's presumption in favor of arbitrability, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration") (emphasis added), has no application to the threshold question of whether an arbitration agreement *exists*. *Bazemore*, 827 F.2d at 1329 ("the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made") (quoting *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1116 (11th Cir. 2014)); *Dreyfuss*, 349 Fed. App'x at 553 (presumption does not apply where "the issue is whether the two pages of [the alleged arbitration agreement] which are in the record are sufficient to constitute an enforceable agreement"); *Begonja*, 159 F. Supp. 3d at 413 ("the presumption of arbitrability does not bear on the threshold issue of whether the parties entered into a binding agreement to arbitrate at all").

The parties do not address the issue of which state's law should apply to the question of contract formation. However, all relevant events occurred in New York, plaintiff is a New York resident, and Related is alleged to be New York corporation. *See* Compl. ¶¶ 4-11. There is no indication that any other state's law should apply.

Under New York law, a party seeking arbitration must prove the existence of a valid arbitration agreement by a "preponderance of the evidence." *Fleming*, 2016 WL 6208570, at *3 (quoting *Couch v. AT&T Servs., Inc.*, 2014 WL 7424093, at *3 (E.D.N.Y. Dec. 31, 2014)). It is "'well settled' under New York law that arbitration will not be compelled absent the parties' 'clear, explicit and unequivocal agreement to arbitrate.'" *Manigault v. Macy's East, LLC*, 318 Fed. App'x 6, 7-8 (2d Cir. 2009) (summary order) (quoting *Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144, 863 N.Y.S.2d 391, 393 (2008)).

B. Application

Defendants, who "bear the burden of proving written agreements obligating [plaintiff] to arbitrate," *Rothstein*, 2004 WL 1151568, at *1, do not suggest that Marcus agreed individually to arbitrate his claims. Rather, they contend that the CBA applied to all Union members working at Crossing and Commons prior to the termination of plaintiff's employment; that plaintiff was or must have been a member of the Union; and therefore that he is bound by the CBA, including its arbitration provisions. However, they lack direct evidence that the CBA covered employees at Crossing and Commons at any time before Related assented to its terms "as of March 1, 2016." Pomales Decl. Ex. C. Pomales Reply Decl. ¶ 14 & Ex. B. They also lack direct evidence of plaintiff's Union membership beyond his November 10, 2015 Application, Pomales Decl. Ex. D, which states on its face that membership is conditioned on dues payments that never occurred.

Consequently, defendants have attempted to meet their burden through a complex chain of proof held together, at many crucial links, only by assumptions and inferences that are inconsistent with the underlying documents or by sweeping factual assertions, made by Pomales, concerning matters as to which there is no reason to believe that a Related Human Resources Generalist has the necessary personal knowledge. It bears repeating that although defendants must establish plaintiff's Union membership, their motion papers do not include any Union membership records. Nor have they submitted any declarations or other admissible evidence from Union officials with knowledge of the organization's membership procedures in general or plaintiff's status in particular. "[T]hose failures are quite important," *Bazemore*, 827 F.3d at 1327, because defendants must offer "competent evidence," *id*. at 1334, to address the "threshold question" raised by their motion. *Schnabel*, 697 F.3d at 118. *See also Mayfield*, 95 F. Supp. 3d at 694 (declaration of corporate employee lacking personal knowledge "does nothing to cure

Defendants' primary evidentiary deficiency on the motion," which is their failure to produce "admissible and probative evidence" to establish existence of binding agreement to arbitrate).

Any one of the weak links in defendants' chain of proof would jeopardize their motion. Taken together, they are fatal. In the face of the unsigned NDA, the unexplained income-restriction issue, the lack of *any* evidence (competent or otherwise) as to when the Union made the required "showing" under NDA ¶ E to commence the Transition Period, and the March 1, 2016 date on the Assent, I cannot conclude that the CBA applied to either Crossing or Commons during plaintiff's employment with Related. Similarly, given the language of the Application that Marcus signed (requiring payment of Union dues and fees as a condition of membership), the lack of *competent* evidence as to any other or different membership rules applied by the Union, the lack of any evidence as to when the Union made the necessary "claim" under CBA art. 1 ¶ 4 to trigger the Union Shop requirement, Related's admitted failure to deduct any Union dues or fees from plaintiff's paycheck (which would have been required if he were a Union member), the lack of any other indicia of dues payments, and the complete absence of any evidence from the Union itself, defendants cannot show that plaintiff was a Union member while employed by Related.[10]

[10] Defendants cite *Colpo v. Gen. Teamsters Local Union 326*, 659 F.2d 399 (3d Cir. 1981), and its progeny, for the proposition that Related's failure to deduct Union dues from plaintiff's paycheck "had no impact on his Union membership status." Def. Reply Mem. at 5. In *Colpo*, however, it was undisputed that plaintiff was "a member of Local 326." *Id*. at 400. The question was whether he should be disqualified from running for President of Local 326 as a result of his employer's failure to deduct union dues from a paycheck almost two years prior to his nomination. *Id*. at 400-01. The Third Circuit held that section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), protected Lewis from being declared ineligible as a result of an employer default. *Id*. *See also Chao v. Local 311, Nat'l Postal Mail Handlers Union*, 174 F. Supp. 2d 489, 493 (N.D. Tex. 2001) (long-time union member could not be disqualified as a candidate for union office due to employer's failure to deduct union dues from a single paycheck 18 months earlier); *Dole v. Local 512, Int'l. Bhd. of Teamsters*, 730 F. Supp. 1562, 1566-68 (M.D. Fla. 1990) (three union members were entitled to have their votes counted in union election despite employer's error in failing to deduct dues from prior

CONCLUSION

Defendants bear the burden of making an initial *prima facie* showing of "evidentiary facts" demonstrating the existence of a valid arbitration agreement binding on the plaintiff. *Oppenheimer & Co.*, 56 F.3d at 358; *see also Hines*, 380 Fed. App'x at 24-25. Defendants have failed to meet their burden. Consequently, their motion to compel arbitration is DENIED. The Clerk of the Court is respectfully directed to mail a copy of this order to the plaintiff.

Dated: New York, New York
December 30, 2016

SO ORDERED.

BARBARA MOSES
United States Magistrate Judge

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paychecks). These cases do not stand for the broad principle that defendants ascribe to them, but only for the much narrower rule that an employer's failure to deduct union dues from the paycheck of an employee who is a union member cannot be used to deprive that employee of his rights under the union constitution and bylaws.