UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JULIO VELAZQUEZ,
and DEYSI TROCONIS,
individually and on behalf of all similarly situated individuals,

Plaintiff,

vs. **Case No. 8:16-cv-00948-T-27-AEP**

CORPORATE TRANSIT OF AMERICA, INC.
d/b/a CORPORATE BANK TRANSIT OF KENTUCKY, INC.,
and SUBCONTRACTING CONCEPTS, LLC.,

Defendants.
_____/

ORDER

BEFORE THE COURT are Defendant Subcontracting Concepts, LLC's ("SCI") Motion to Compel Arbitration and Dismiss, or in the Alternative, to Stay Proceedings (Dkt. 23), Plaintiffs' Response (Dkt. 27), and SCI's Reply (Dkt. 32). Defendant's motion is **GRANTED**.

I. Background

Plaintiffs Julio Velazquez and Deysi Troconis filed this purported class action against Defendants asserting five employment related claims, including overtime violations, minimum wage violations under federal and state law, violations under Florida's Deceptive and Unfair Trade Practices Act, and fraudulent filing of information returns under 26 U.SC. § 7434(a) (Dkt. 1). Plaintiffs provide courier and delivery services for Corporate Bank Transit Kentucky, Inc. (CTA).[1]

[1] The Defendants in this case are Corporate Transit of America, Inc., Corporate Bank Transit of Kentucky, Inc. ("CTA"), and Subcontracting Concepts, LLC ("SCI"), collectively ("Defendants"). CTA is in the business of managing transportation networks and provides delivery services to third-party clients. SCI is a third-party administrator in the business of providing drivers to third-party clients for courier services. (Dkt. 1 ¶ 1).

(Dkt. 1 ¶ 1). They allege that Defendants unlawfully classified them, and others, as independent contractors to avoid paying minimum wage and overtime compensation.[1] (Dkt. 1 ¶¶ 3,4). SCI moves to compel arbitration under the Owner/Operator Agreements signed by both Plaintiffs, which provide that "[a]ll other disputes, claims, questions, or differences . . . shall be finally settled by arbitration in accordance with the Federal Arbitration Act."[2] (Dkt. 24-1 at 6). The Agreement also includes a class action waiver clause which SCI contends bars this purported class action. (Dkt. 27).

Plaintiffs contend their claims are not subject to arbitration because the FAA exempts contracts of employment for transportation workers. Further, they argue that the class action waiver violates the National Labor Relations Act ("NLRA") and that the arbitration agreements are unconscionable. (Dkt. 27). SCI contends that Plaintiffs are independent contractors for purposes of the FAA, and therefore fall outside the exemption for transportation workers, and that in any event, under New York law, Plaintiffs' claims are subject to mandatory arbitration.

II. Standard

Arbitration is a matter of contract, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010), and federal courts are to place arbitration clauses "on equal footing with other contracts." *Solymar Invs., Ltd. v. Banco Santander, S.A.*, 672 F.3d 981, 988 (11th Cir. 2012) (citing *Rent-A-Center*, 561 U.S. at 67). Under the Federal Arbitration Act ("FAA"), a written arbitration agreement "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. "This provision 'reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract.'"

[1] The Complaint asserts claims on behalf of Velazquez only for violations of the Fair Labor Standards Act and the Florida Minimum Wage Act. The remaining claims, violations of the Florida Deceptive and Unfair Trade Practices Act, Fraudulent Filing of Returns Under 26 U.S.C. § 7434(a), and unjust enrichment, are brought on behalf of both Plaintiffs and the putative class.

[2] The Clerk has entered default against Defendant CTA. (Dkt. 18).

Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1349 (11th Cir. 2014) (*quoting AT & T Mobility LLC v. Concepcion*, —— U.S. ——, ——, 131 S.Ct. 1740, 1745 (2011)) (quotation marks and citation omitted); *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). Importantly, arbitration agreements are to be rigorously enforced *according to their terms. Am. Express Co. v. Italian Colors Restaurant*, ——U.S. ——, ——, 133 S.Ct. 2304, 2309 (2013) (emphasis added).

III. Discussion

Under the FAA, a party seeking to compel arbitration must demonstrate that "(a) the plaintiff entered into a written arbitration agreement that is enforceable 'under ordinary state-law' contract principles and (b) the claims before the court fall within the scope of that agreement." *Lambert v. Austin Ind.*, 544 F.3d 1192, 1195 (11th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) ("state law governs whether an enforceable contract or agreement to arbitrate exists"). In determining whether a claim is subject to arbitration, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

A. FAA Exemption

Although the FAA establishes a strong presumption in favor of arbitration, *Moses H. Cone Memorial Hosp.* 460 U.S. at 24, it carves out an exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Plaintiffs contend that they fall under this exemption. Notwithstanding, since the Owner/Operator agreements they signed do not constitute *contracts of employment*, the exemption in Section 1 of the FAA is inapplicable. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119, 121

S. Ct. 1302, 1311, 149 L. Ed. 2d 234 (2001) ("Section 1 exempts from the FAA only *contracts of employment* of transportation workers.") (emphasis added).

The FAA provides little guidance on the definition of a "contract of employment." Accordingly, courts have employed different approaches to determine whether an employment relationship exists for purposes of Section 1 of the FAA. Some courts employ a categorical approach, examining federal law governing motor carriers, including 49 U.S.C. § 14102 and C.F.R. § 376.12(c)(1).[1] Other courts use common law agency principles. *See Bell v. Atlantic Trucking Co., Inc.*, No. 3:09-cv-406-J-32MCR, 2009 WL 4730564 at *4-5 (M.D. Fla. Dec. 7 2009) (" Assuming, without deciding, that the categorical approach in *Gagnon* is suspect, the Court looks to the common law of agency to analyze whether [Plaintiff] is an independent contractor or an employee.")

Plaintiffs contend that § 14102 categorically establishes an employer/employee relationship between them and CTA, arguing they are "drivers within the meaning of . . . 9 U.S.C.A. § 1," citing cases involving truck drivers. (Dkt. 27 at 3). SCI counters that this argument ignores 49 C.F.R. § 376.12(c)(4), which provides that "[a]n independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. §14102 and attendant administrative requirements."

Plaintiffs do not allege in the complaint that SCI leases the vehicles they drive. Nor do their Agreements suggest that the vehicles are leased by SCI.[2] To the contrary, the Agreements expressly

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[1] *Compare Gagnon v. Service Trucking Inc.*, F.Supp.2d 1361, 1365 (M.D. Fla. 2003) (vacated pursuant to settlement) (finding that 49 U.S.C. § 14102 and C.F.R. § 376.12(c)(1) create a statutory employer-employee relationship between truck drivers and motor carriers under Section 1 of the FAA) *with Davis v. Larson Moving & Storage Co.*, Civ. No. 08-1408(JNE/JJG), 2008 WL 4755835 (D. Minn. Oct. 27, 2008) (rejecting *Gagnon* because it failed to consider 49 C.F.R. § 376.12(c)(4), which provides that "[n]othing in the provisions . . . of this section is intended to affect whether the lessor or driver provided by the lessor . . . is an independent contractor or an employee of the authorized carrier lessee.") *and Owner-Operator Indep. Drivers Ass'n., Inc. v. United Van Lines, LLC.*, No. 4:06CV219JCH, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006) (same).

[2] *See* 49 C.F.R. § 376.11 (providing that "the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions: (a) Lease. There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.11 ....").

contemplate that Plaintiffs would drive their personal vehicles when providing courier and delivery services for SCI, and that they would be responsible for the expenses associated with the vehicles, including insurance. (Dkts. 24-1 at 2, 7, 24-2 at 2, 7). Accordingly, Section 14102 does not apply and common law agency principles will determine whether an employment relationship was created by the Owner/Operator Agreements.

The common law agency test focuses primarily on the "'hiring party's right to control the manner and means by which the product is accomplished.'" *Bell*, 2009 WL 4730564 at *4 (quoting *Comm. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). Factors to be considered include:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751; *see also Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992) (utilizing same factors in determining whether employment or independent contractor relationship exists). In considering these factors, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 323.

Here, most of these factors support a finding that Plaintiffs are independent contractors, as opposed to employees.[1] As noted, Plaintiffs use their own vehicles when making deliveries (Dkt. 24-1 ¶¶ 1-2). They are responsible for all repairs and upkeep of their vehicles when performing under

[1] According to Plaintiffs, "CTA provides such services as bank courier services, local and national deliveries, fixed route work, mail pick-up and delivery, bank deposits, and lock box pick up for third-party clients." (Dkt. 1 ¶ 37).

the Owner/Operator Agreements (Id. at ¶¶ 4, 9). They are responsible for all expenses associated with a delivery such as: fuel, tolls, oil, garaging, and parking, as well as office rent, overhead, salaries and any other business expenses necessary to successfully perform services for the customers (Id. at ¶ 9). They are required to pay estimated federal and state income taxes and are required to maintain insurance to cover accidents that may occur during a delivery (Id. at ¶ 6). They are free to select their own routes and the order in which they perform deliveries (Id. at ¶ 14). They have the ability to reject or accept assignments from prospective customers (Id. at ¶ 16). And, the Agreement expressly states that no employer/employee relationship has been created (Id. at ¶ 6). Finally, and significantly, under the Owner/Operator Agreements, SCI has no control over the means and method by which Plaintiffs perform services. SCI does not withhold taxes, provides no benefits, and does not pay incidental expenses.

Accordingly, I find that the Owner/Operator Agreements do not create an employment relationship between Plaintiffs and SCI for purposes of the FAA's Section I exemption. Applying common law agency principles, Plaintiffs are independent contractors rather than employees of SCI.

B. Class Action Waiver Clause

Plaintiffs challenge the class action waiver clause in the Owner/Operator Agreements, which prohibits Plaintiffs from joining or consolidating claims in arbitration or arbitrating any claims as a representative member of a class. (*See, e.g.*, Dkt. 24-1 at 6) They argue that under the NLRA, they have a substantive right to engage in concerted activities. *See* 29 U.S.C. § 157 ("[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of . . . other mutual aid or protection."). (Dkt. 27). Plaintiffs' contentions are not persuasive.

Under the NLRA, "[t]he term 'employee' shall include any employee, . . . but shall not include any individual having the status of an independent contractor." 29 U.S.C. § 152(3). And "[i]t is well settled that the common law of agency governs status determinations." *Crew One Prods., Inc. v. N.L.R.B.*, 811 F.3d 1305, 1310 (11th Cir. 2016) (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256, 88 S.Ct. 988, 990, 19 L.Ed.2d 1083 (1968)). As discussed, Plaintiffs are independent contractors rather than employees of SCI and therefore the class action waiver clause does not violate the NLRA.

C. Unconscionability

A contract is unconscionable under New York law when it is "'so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable [sic] according to its literal terms.'" *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 121 (2nd Cir. 2010) (quoting *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 828 (N.Y. 1988)).[1] A party asserting unconscionability must establish that the agreement is both procedurally and substantively unconscionable to prevail. *Id.*

"'The procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract [, per se.]'" *Id.* (quoting *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983).[2] Plaintiffs concede that the Agreement is not procedurally unconscionable, relying solely on substantive unconscionability in challenging the enforceability of the arbitration clause.

[1] Because the doctrine of unconscionability is a creature of state common law, New York law, which both parties agree applies to this case, will govern.

[2] "Normally, 'procedural and substantive unconscionablity operate on a sliding scale; the more questionable the meaningless of choice, the less imbalance in a contract's terms should be tolerated and vice versa.'" *Ciago v. Ameriquest Mortgage Co.*, 295 F.Supp2d 324, 328 (S.D.N.Y. 2003) (internal citations omitted). And there are exceptional cases where a provision in a contract is so outrageous that it is rendered unenforceable based solely on substantive unconscionability. *Gillman*, 534 N.E.2d at 829.

Remedial restrictions in arbitration clauses

A party agreeing to arbitrate statutory claims does not "forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1029 (11th Cir. 2003)(quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)); *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).[1] Remedial restrictions in an arbitration clause which deny meaningful statutory relief may, however, in the absence of a severability clause, invalidate the entire arbitration clause. *See Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998).

Citing no authority, Plaintiffs contend that the arbitration clause in the Owner/Operator Agreements is substantively unconscionable because it eliminates fee shifting if they prevail on their FLSA, FDUPTA and IRS claims, as well as equitable relief under their unjust enrichment claim (Dkt. 27 at p. 15).[2] Plaintiffs point out that the arbitration clause provides only for the recovery of "actual monetary damages," and that all parties would bear their own attorneys' fees and costs (*see* Dkt. 21-1, p. 6).[3]

Without deciding whether the remedial restrictions Plaintiffs complain of are invalid, Circuit precedent instructs that when an arbitration clause includes a severability clause, the arbitration clause remains enforceable, regardless of the validity of the remedial restrictions. *Anders v.*

[1] Claims arising under a statute designed to advance important social policies may be arbitrated because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, 111 S.Ct. 1647.

[2] Under the FLSA, FDUPTA, and 26 U.S.C. § 7434, the prevailing party is entitled to recover attorney's fees and costs. 29 U.S.C. § 216(b); Fla. Stat.§ 501.2105; 26 U.S.C § 7434(b)(2)-(3).

[3] The arbitration clause provides: "The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. All parties shall bear their own costs for arbitration and no attorney's fees or other costs shall be granted to either party." (*See, e.g.*, Dkt. 24-1 at 6).

Hometown Mortg. Servs., Inc., 346 F.3d 1024, 1032 (11th Cir. 2003) ("Because any invalid provisions are severable, the underlying claims are to be arbitrated regardless of the validity of the remedial restrictions."). And the validity of the remedial restrictions is to be determined by the arbitrator. *Id.* at 1032 ("[A] arbitrator and not a court should decide the validity of the remedial restriction provisions.").

Here, the Owner/Operator Agreements include a severability clause that "evidences the parties' intent to enforce the remainder of the agreement in the event any portion is deemed invalid." *Id.* at 1031. That clause will save the arbitration agreement, even if the remedial restrictions Plaintiffs complain of are determined to be invalid. *Id.* ("If the severability provision is given effect, it means . . . the remainder of the arbitration agreement survives any invalidity of its remedial restrictions.").

Whether the severability clause in this case is to be given effect is a question of state law. *Id.* at 1032. Under New York law, when an arbitration agreement includes a severability clause, "the appropriate remedy is to sever the improper provision of the agreement, rather than void the entire agreement." *Brady v. Williams Capital Group, L.P.*, 878 N.Y. S.2d 693, 701 (N.Y App. Div. 2009); *See Matter of Schreiber v. K-Sea Transp. Corp.*, 879 N.E.2d 733 (N.Y. 2007).

Accordingly, SCI's Motion to Compel Arbitration (Dkt. 2) is **GRANTED**. Plaintiffs' claims against Defendant SCI are **STAYED** pending arbitration.

DONE AND ORDERED this 19th day of December, 2016.

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record