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

CHARLES DREIBRODT, *Plaintiff,*	§	
	§	
v.	§	**No. MO:16-CV-00340-RAJ**
	§	
MCCLINTON ENERGY GROUP, LLC, and TONY MCCLINTON, *Defendants.*	§	

ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION

BEFORE THE COURT is Defendants McClinton Energy Group, LLC and Tony McClinton's (collectively, "Defendants") Motion to Dismiss Plaintiff's Original Complaint and to Compel Arbitration of Plaintiff's Claims. (Doc. 6). Defendants move to require Plaintiff to arbitrate his Fair Labor Standards Act ("FLSA") claims because he signed an Arbitration Agreement. (Doc. 6-3). After careful consideration of the Parties' briefing and the relevant law, the Court shall **GRANT** in part Defendants' Motion to Dismiss and **GRANT** Defendants' Motion to Compel Arbitration. (Doc. 6).

I. BACKGROUND

Plaintiff filed his Original Complaint on September 23, 2016, against Defendants seeking "to recover overtime compensation and all other available remedies" under the FLSA, 29 U.S.C. § 201, *et seq*. (Doc. 1). Defendants provide flow control and other oilfield services. (*Id.* at 3). Plaintiff was employed by Defendants as a flowback operator from September 2014 until September 2015 in and around Midland, Texas. (*Id.*). On May 26, 2015, Plaintiff signed an Arbitration Agreement containing "a provision which purports to require any employee asserting a claim against [Defendants] to pay half of the costs of any arbitration." (Doc. 1-1). The Arbitration Agreement states in pertinent part:

> To the extent required by applicable law, and only to this extent, the Company shall pay all costs uniquely attributable to arbitration, including the administrative fees and costs of the arbitrator. Otherwise, the Company and Employee shall split the arbitration fees.

(*Id.* at 3). Plaintiff contends fee-splitting provision is unenforceable and should be severed from the Arbitration Agreement or alternatively that the entire arbitration agreement should be found to be unenforceable. (Doc. 1 at 6).

On November 14, 2016, Defendants filed a Motion to Dismiss Plaintiff's Original Complaint and to Compel Arbitration of Plaintiff's Claims. (Doc. 6). Defendants argue that under the Arbitration Agreement, Plaintiff "and Defendants mutually waived their right to a trial before a judge or jury in state or federal court, and agreed that arbitration would be the exclusive remedy for any dispute arising out of [Plaintiff's] employment, including any dispute about [Plaintiff's] wages or compensation." (*Id.* at 3). The Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"). (Doc. 6-3).

On November 22, 2016, Plaintiff filed his Response to Defendants' Motion to Dismiss and to Compel Arbitration. (Doc. 8). Plaintiff explains that his request for a declaratory judgment "presents a highly specific, narrowly-framed issue for the Court to determine, which is whether the 'fee splitting' provision purporting to require [Plaintiff] to pay half of the costs of any arbitration is unenforceable as it effectively precludes [Plaintiff] with a forum because he cannot afford to pay such fees." (*Id.* at 1). This matter is now ready for disposition.

II. LEGAL STANDARD

Plaintiff does not dispute that the Arbitration Agreement is subject to the FAA. Defendants move to compel arbitration under § 4 of the FAA, which provides that, when a party petitions the court to compel arbitration under a written arbitration agreement, "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration

in accordance with the terms of the agreement." 9 U.S.C. § 4. 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 must order the parties to arbitrate issues covered by a valid arbitration agreement. *Id.*

A court first determines whether the parties agreed to arbitrate the dispute, which in turn requires two separate determinations: "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir. 2006) (citation omitted). The court applies state law to decide contract validity. *First Options v. Kaplan*, 514 U.S. 938, 944 (1995). "[A]s 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) (interpreting 9 U.S.C. § 2). State-law contract defenses, including fraud, duress, unconscionability, or waiver, may invalidate arbitration agreements. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.*, 781 F.2d 494, 497 (5th Cir. 1986) ("The right to arbitration, like any other contractual right, can be waived.")). Applying these defenses to invalidate arbitration clauses contravenes § 2 of the FAA if the defenses "apply only to arbitration or [ ] derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

The FAA "expresses a strong national policy favoring arbitration of disputes, and 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) (quotations omitted); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). The duty to arbitrate is one of contract; a court cannot compel parties to arbitrate issues they have not agreed to submit. *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir.1990) ("A party cannot be compelled to submit a dispute to arbitration unless there has been a contractual agreement to do so.").

The Supreme Court of the United States has recognized that "the existence of large arbitration costs could preclude a litigant. . . from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). A party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. In *Green Tree*, the Supreme Court concluded that the plaintiff failed to meet this burden despite her assertion that "arbitration costs are high and that she did not have the resources to arbitrate." *Id.* at 91 n. 6. Although the plaintiff in *Green Tree* cited the arbitration tribunal's fee schedules, as well as opinions indicating the fees in those cases, she "failed to make any factual showing that the American Arbitration Association would conduct the arbitration, or that, if it did, she would be charged the filing fee or arbitrator's fee that she identified." *Id.* Nor did she show that the party invoking arbitration would not waive the fees. The Supreme Court concluded that "[t]hese unsupported statements provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration," and that "[n]one of this information affords a sufficient basis for concluding that [the claimant] would in fact have incurred substantial costs in the event her claim went to arbitration." *Id.*

III. DISCUSSION

Plaintiff argues that the fee splitting provision contained in the Arbitration Agreement is unenforceable because it prevents Plaintiff from pursuing his statutorily-provided rights. (Doc. 8 at 1). Plaintiff alleges that under the Arbitration Agreement he "would be required to pay thousands of dollars in arbitration fees and expenses, which he cannot afford to do." (*Id.* at 2). Therefore, Plaintiff contends the fee splitting provision is unenforceable and must be stricken from the Arbitration Agreement. (*Id.*). Alternatively, Plaintiff seeks a declaratory judgment that the entire Arbitration Agreement is unenforceable. (*Id.* at 2 n. 1).

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). The court may evaluate the unconscionability of an arbitration clause but not the unconscionability of the contract as a whole. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 430 (5th Cir. 2004). "A contract is unenforceable if, 'given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract." *In re Poly–Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (quoting *In re First Merit Bank*, 52 S.W.3d 749, 752 (Tex. 2001)).

Under Texas law, unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision; and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002). The party seeking to invalidate an arbitration agreement has the burden of proving unconscionability. *Id.* at 572. "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.*, 262 S.W.3d at 349 (internal quotation marks and citations omitted). Arbitration provisions relating to federal statutory claims are not enforceable "when a party is forced to 'forgo the substantive rights afforded by the statute,' as opposed to merely 'submit[ting] to resolution in an arbitral, rather than a judicial, forum.'" *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

"In applying the unconscionability standard, the crucial inquiry is whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, a forum where the litigant can effectively vindicate his or her rights." *In re Olshan Foundation Repair Co., LLC*, 328 S.W.3d 883, 894 (Tex. 2010). "In the absence of unusual animus between the parties or external motives,

plaintiffs continue to pursue claims when the expected benefits of the lawsuit outweigh the total cost of bringing it." *Id.* "If the total cost of arbitration is comparable to the total cost of litigation, the arbitral forum is equally accessible." *Id.* "Thus, a comparison of the total costs of the two forums is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation." *Id.* at 894–95. Other factors include:

> the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant's overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are less relevant if litigation costs more than arbitration.

Id. at 895.

"The party opposing arbitration must show the likelihood of incurring such costs in her particular case." *Id.* "Thus, for evidence to be sufficient, it must show that the plaintiffs are likely to be charged excessive arbitration fees." *Id.* "[P]arties must at least provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence." *Id.*

In this case, Plaintiff contends that the following fee-splitting provision of the Arbitration Agreement is unenforceable:

> To the extent required by applicable law, and only to this extent, the Company shall pay all costs uniquely attributable to arbitration, including the administrative fees and costs of the arbitrator. Otherwise, the Company and Employee shall split the arbitration fees.

(Doc. 6-3 at 6). In support, Plaintiff states that he "is married and has three minor children along with another that is in college." (Doc. 8 at 5). Plaintiff lost his job with Defendant in November 2015 following a decline in the oil and gas market. (*Id.*). Plaintiff was unemployed for approximately one month and then started working with Lozoya Construction in Midland in December 2015. (*Id.*). Defendants paid Plaintiff approximately $25 per hour; however, Lozoya

Construction paid Plaintiff only $18 per hour and he worked fewer hours for Lozoya Construction than during his employment with Defendants. (*Id.*).

In March of 2016, Plaintiff had back surgery. (*Id.* at 6). As a result, Plaintiff was unable to work and did not receive compensation for two weeks. (*Id.*). Plaintiff moved to San Antonio and quit his job with Lozoya Construction in October 2016. (*Id.*). As of the date of the filing of Defendants' Motion to Dismiss and to Compel Arbitration, Plaintiff was unemployed. (*Id.*). The monthly expenses of Plaintiff and his family are approximately $3,500 per month, consisting of a $900 mortgage payment, two car payments of $500 each, and miscellaneous living expenses. (*Id.*).

Furthermore, Plaintiff's attorney states that a prior arbitration "heard by a retired judge at JAMS cost more than $26,000 in arbitration fees[.]" (*Id.*). As such, Plaintiff's attorney estimates that arbitration could cost between $30,000 and $50,000, with Plaintiff being "required to pay between $15,000 and $25,000 in arbitration expenses and fees." (*Id.*). Plaintiff states he is unable to pay the fees and expenses of arbitration and any recovery in damages would be minimal relative to the cost of arbitration. (*Id.* at 7). Thus, Plaintiff concludes that the Arbitration Agreement's fee-splitting provision precludes him from using the arbitral forum. (*Id.*).

Defendants have failed to respond to Plaintiff's argument that the fee-splitting provision of the Arbitration Agreement is unenforceable. Here, the Court finds that the fee-splitting provision in the Arbitration Agreement undermines the FLSA. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 669 (6th Cir. 2003) (en banc) (district court erred in "holding that the cost-splitting provision in the. . . agreement was enforceable"). The existence of large arbitration costs would preclude Plaintiff from effectively vindicating his federal statutory rights under the FLSA. *Green Tree*, 531 U.S. at 91. As a result, the fee-splitting provision is substantively unconscionable. Accordingly, the Court concludes that the fee-splitting provision contained within the Arbitration Agreement is unenforceable.

Under Texas law, "[a]n illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement." *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 230 (Tex. 2014) (quoting *Poly–Am.*, 262 S.W.3d at 360). "In determining an agreement's essential purpose, the issue is 'whether or not parties would have entered into the agreement absent the unenforceable provisions.'" *Id.* (quoting *Poly–Am.*, 262 S.W.3d at 360). The presence of a severability clause sheds light on the agreement's "essential purpose." *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("[T]he purpose of a severability clause is to allow a contract to stand when a portion has been held to be invalid. However, when the severed portion is integral to the entire contract, a severability clause, standing alone, cannot save the contract."). In *Poly–America*, for example, the Texas Supreme Court found that unconscionable "fee-splitting and remedies-limitation provisions" did not make the arbitration clause unenforceable in part because the parties contract included a severability clause. 262 S.W.3d at 359–61. The court concluded that "the intent of the parties, as expressed by the severability clause, is that unconscionable provisions be excised where possible." *Id.* at 361.

Given that the Arbitration Agreement at issue has a severability clause, the Court finds that the Parties intended the Arbitration Agreement to remain valid when, as here, a non-integral part of the agreement is unenforceable. (Doc. 6-3). Therefore, the Court declares that the fee-splitting provision is unenforceable and **STRIKES** it. Accordingly, Defendants' Motion to Dismiss shall be **GRANTED** in part and Defendants' Motion to Compel Arbitration shall be **GRANTED**. (Doc. 6). Finally, the Court **ORDERS** Defendants shall be responsible for the fees of the arbitration.

IV. CONCLUSION

It is therefore **ORDERED** that Defendants' Motion to Dismiss is hereby **GRANTED** in part and Defendants' Motion to Compel Arbitration is **GRANTED.** (Doc. 6). In addition, this action is

DISMISSED WITHOUT PREJUDICE pending arbitration.[1] 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 the Clerk of the Court **CLOSE** this matter.

It is so **ORDERED**.

SIGNED this 3rd day of January 2017.

ROBERT A. JUNELL
Senior United States District Judge

[1] 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.