UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20872-CIV-ALTONAGA/O'Sullivan

FRANK HERRERA,

Plaintiff,

v.

WEST FLAGLER ASSOCIATES, LTD., *et al.*,

Defendants.
_________________________/

ORDER

THIS CAUSE came before the Court on Defendants, West Flagler Associates, Ltd. d/b/a/ Magic City Casino; Southwest Florida Enterprises, Inc.; BHH, Inc.; and Hecht Investments, Ltd.'s Motion to Dismiss Plaintiff's Complaint and to Compel Him to Comply with His Agreement to Utilize Defendants' Alternative Dispute Resolution Program [ECF No. 8]. The Court has carefully reviewed the Motion, the Complaint [ECF No. 1–2], Plaintiff, Frank Herrera's Response in Opposition [ECF No. 16], Defendants' Reply [ECF No. 17] and applicable law. For the reasons explained below, the Motion is granted in part.

I. BACKGROUND

A. The Complaint

Plaintiff filed his state-court Complaint against Defendants on behalf of himself and other similarly situated non-exempt facilities assistant managers of the Magic City Casino, seeking relief under the Fair Labor Standards Act, 29 U.S.C. section 201, for unpaid overtime and/or minimum wages, plus liquidated damages. (*See* Compl. 1–2). He alleges he was employed by a singular Defendant from 2007 through the present as a non-exempt facilities assistant manager, and Defendant failed to compensate him the required overtime and/or minimum wages at the rate

of one and a half times Plaintiff's regular rate of pay for hours worked in excess of 40 in a single work week. (*See id.* ¶¶ 11, 13).

In Count I, directed to Defendant, West Flagler Associates, Plaintiff alleges unpaid overtime and minimum wage violations of the FLSA. (*See id.* ¶¶ 23–33). In Count II, Plaintiff alleges SW FL Enterprises was a corporate officer of West Flagler Associates (*see id.* ¶ 35), was his employer (*see id.* ¶¶ 36–38), and like West Flagler Associates, willfully refused to pay Plaintiff his required wages under the FLSA (*see id.* ¶ 39). In Count III, Plaintiff sues BHH, as corporate officer of West Flagler Associates, for non-payment of wages under the FLSA. (*See id.* ¶¶ 41–42). Last, in Count IV, Plaintiff sues Hecht Investments, as a corporate officer of West Flagler Associates, for non-payment of wages under the FLSA. (*See id.* ¶¶ 47–48).

Plaintiff's Complaint does not reference the existence of an agreement to arbitrate between the parties. Nevertheless, there is indeed such an agreement.

B. The Arbitration Agreement

On August 22, 2010, Plaintiff acknowledged in writing receipt of the Magic City Casino Grievance and Arbitration Agreement ("Agreement"). (*See* Mot. Ex. 1.B. [ECF No. 8-1]). Plaintiff's acknowledgement followed attendance at an August 2010 meeting at Magic City where he was notified of Magic City's grievance and arbitration program. (*See* Mot., Ex. 1, Aff. of Ivy Cross [ECF No. 8-1] ¶ 6). Plaintiff and Magic City's other employees were encouraged to seek the advice of an attorney before agreeing to the Grievance and Arbitration Agreement, and were advised they would be allowed to continue employment at Magic City in consideration for entering the Agreement. (*See id.* ¶¶ 8, 9, 12). Plaintiff has never filed a grievance or initiated the process as he agreed to in the Agreement (*see id.* ¶ 14), nor has he ever requested a Dispute

Resolution Form from Magic City's human resources department (*see* Reply, Ex. B, Supp. Aff. of Ivy Cross [ECF No. 17-2] ¶ 8).

The Agreement contains several material provisions. First, the Agreement is between the "Company" and Plaintiff. "Company" is defined as West Flagler Associates d/b/a Magic City Casino, "its parent corporation (if any), affiliates, subsidiaries, divisions, successors, assigns[,] and the current and former employees, officers, directors, and agents." (Agreement 1 (alteration added)).

The Agreement states "[u]se of the Company's Grievance and Arbitration Agreement . . . binds both you . . . and the Company to grieve and arbitrate disputes, in lieu of litigating in court." (*Id.* (alteration and ellipses added)). Specifically, under the Agreement, the employee is "required to grieve and then, if necessary, arbitrate any and all disputes" "against the Company . . . including . . . . claims under the . . . Fair Labor Standards Act." (*Id.* (ellipses added)). The Agreement makes clear "[a]s a condition precedent to arbitration, you must have exhausted all prior steps in the Company's grievance procedures." (*Id.* (alteration added)). The Company similarly binds itself to grieve and if necessary arbitrate claims against the employee. (*See id.*).

The Agreement goes on to describe the grievance process, which, for grievances initiated by the employee, contains four detailed steps and clearly articulated time deadlines. (*See id.* 2–3). In the final step, the employee has 30 days from the step three determination to file for final and binding arbitration. (*See id.* 3). Arbitration is to be before a single arbitrator, and the phone number and address of the National Arbitration and Mediation are provided. (*See id.*). The Agreement limits each party to five depositions not to exceed seven hours, 25 interrogatories, and 35 requests for production of documents; the arbitrator may modify the limits "in the interest of equity or fairness." (*Id.* 4). Last, the Company agrees to reimburse the employee

administrative fees to initiate arbitration and agrees to pay the arbitrator's travel, lodging and meal costs. (*See id.* 5).

Rather than grieve and arbitrate, Plaintiff filed his state court complaint and now opposes Defendants' Motion seeking to have him abide by the terms of the Agreement. The several arguments raised by the parties are addressed below.

II. LEGAL STANDARD

"The Federal Arbitration Act ('FAA') establishes a general federal policy favoring arbitration." *Mims v. Glob. Credit & Collection Corp.*, 803 F. Supp. 2d 1349, 1352 (S.D. Fla. 2011) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217–218 (1985)); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." (alterations added)). "As a result of the well-established federal policy . . . , the burden is on the party opposing arbitration to prove to the court that arbitration is improper." *Kozma v. Hunter Scott Fin., L.L.C.*, No. 09-80502-CIV, 2010 WL 724498, at *2 (S.D. Fla. Feb. 25, 2010) (alteration added) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27 (1991)).

"District courts consider three factors in reviewing a motion to compel arbitration: (1) [w]hether there is a valid, written agreement to arbitrate; (2) [w]hether there is an arbitrable issue; and (3) [w]hether the right to arbitrate was waived." *Booth v. S. Wine & Spirits of Am., Inc.*, No. 14-22357-CIV, 2014 WL 5523123, at *2 (S.D. Fla. Oct. 31, 2014) (alterations added; citation omitted). As to the first factor, the FAA provides that pre-dispute agreements to arbitrate "evidencing a transaction involving commerce" are "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. "Section 3 of the . . . FAA[] requires that a court, upon motion by a party to an action in

federal court, stay the action if it involves an 'issue referable to arbitration under an agreement in writing.'" *Gunson v. BMO Harris Bank, N.A.*, 43 F. Supp. 3d 1396, 1399 (S.D. Fla. 2014) (alterations added) (quoting 9 U.S.C. § 3).

"The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements," and it "reflect[s] both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (alteration added; citations omitted). This means "courts must place arbitration agreements on equal footing with other contracts . . . and enforce them according to their terms[.]" *Id.* (alterations added; internal citations omitted). But it also means such agreements may be "invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); second citation omitted).

"Although the FAA governs the applicability of arbitration agreements, state law governs issues 'concerning the validity, revocability, and enforceability of contracts generally.'" *Bhim v. Rent-A-Center, Inc.*, 655 F. Supp. 2d 1307, 1311 (S.D. Fla. 2009) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) ("[S]tate law generally governs whether an enforceable contract or agreement to arbitrate exists." (alteration added; citation omitted)). Defenses such as fraud, unconscionability, and duress are governed by state law. *See Bhim*, 655 F. Supp. 2d at 1311 (citing *Dale v. Comcast*, 498 F.3d 1216, 1219 (11th Cir. 2007)).

"The party opposing a motion to compel arbitration . . . 'has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration.'" *Sims v. Clarendon Nat'l Ins. Co.*, 336 F. Supp. 2d 1311, 1314 (S.D. Fla.

2004) (alteration added) (quoting *Aronson v. Dean Witter Reynolds, Inc.*, 675 F. Supp. 1324, 1325 (S.D. Fla. 1987)). "This burden is not unlike that of a party seeking summary judgment." *Id.* (internal quotation marks and citation omitted). "Therefore, the party opposing arbitration should identify those portions of the pleadings, depositions, answers to interrogatories, and affidavits which support its contention." *Id.* (internal quotation marks, citations, and alterations omitted).

III. ANALYSIS

In opposing Defendants' request the Court dismiss, or in the alternative, stay this action and compel Plaintiff to grieve, mediate, and arbitrate his claims in accordance with the Agreement, Plaintiff raises the following arguments: (A) the Federal Arbitration Act does not provide a basis for the Court to require him to comply with any condition precedent to bringing his FLSA claims (*see* Resp. 4–6); (B) the FLSA does not permit an employer to impose conditions precedent by contract, and so Defendants' request he comply with the grievance procedure should be denied (*see id.* 7–8); (C) Defendants' pre-arbitration grievance process is illusory and unenforceable (*see id.* 9–10); (D) the Motion should be denied because Defendants seek incorrect relief when they advocate for a dismissal rather than ask for a stay (*see id.* 10); (E) his claims against the different Defendants are not inextricably intertwined and so the non-signatories to the Arbitration Agreement are not entitled to enforce its provisions (*see id.* 10–11); and last, (F) the Agreement's limitations on discovery render the Agreement unconscionable (*see id.* 11–12).

A. *Whether Plaintiff May Be Required to Comply With Conditions Precedent or a Grievance Procedure Before Bringing His FLSA Overtime Claims*

Plaintiff's first argument is easily dispensed with. The Eleventh Circuit long ago recognized under the FAA employees bound by an alternative dispute resolution agreement with

their employers may be required to arbitrate FLSA claims. *See Caley*, 428 F.3d at 1367–74. Further, employer-employee arbitration agreements may require employees to waive the ability to bring collective actions, a right recognized in the FLSA. *See Walthour v. Chipio Windshield Repair*, 745 F.3d 1326, 1330–36 (11th Cir. 2014).

B. *What to Do About the Agreement's Grievance Procedure?*

Plaintiff asks the Court to pass on the enforceability of the Agreement's grievance procedure, find it unenforceable, and hence deny the motion to compel arbitration. This, the Court will not do.

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Supreme Court distinguished disputes "about whether the parties are bound by a given arbitration clause" — which a judge should decide — from "'procedural' questions which grow out of the dispute" — which an arbitrator should decide. *Id.* at 84 (citations omitted). In doing so, the Court cited approvingly to the Revised Uniform Arbitration Act of 2000, noting the Act states "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." *Id.* at 85 (internal quotation marks and citation omitted). The Eleventh Circuit has since confirmed issues of procedural arbitrability, including conditions precedent to arbitration, are for arbitrators to decide. *See Klay v. United Healthgroup, Inc.*, 376 F. 3d 1092, 1107, 1109 (11th Cir. 2004) (stating courts resolve disputes over whether a particular claim should be resolved in court or arbitration, while arbitrators resolve whether the claim can be litigated at all due to, *e.g.*, statutes of limitations).

More recently, in *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1207–1208 (2014), in considering arbitration provisions of a treaty and likening them to contractual requirements, the Supreme Court reiterated procedural preconditions to arbitration are for

arbitrators and not the courts to decide. It cited approvingly to *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555–57 (1964), where the question of whether a mandatory prearbitration grievance procedure involving the holding of two conferences, was for the arbitrator and not the judge to decide. *See BG Grp., PLC*, 134 S. Ct. at 1208. It also cited approvingly to *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (arbitrator to address a prearbitration "good faith negotiations" requirement); and to *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (same as to a prearbitration filing of a "Disagreement Notice"). *See BG Grp., PLC*, 134 S. Ct. at 1208.

The Court will not deny Defendants' request Plaintiff arbitrate by passing on the Agreement's grievance precondition requirement. That will be, as with all procedural provisions, for the arbitrator to interpret and apply. *See id.* at 1207.

C. *Whether the Grievance Process is Illusory and Unenforceable.*

Plaintiff asserts the Agreement's grievance procedure is illusory and unenforceable given the parties are incapable of arriving at a private agreement without the supervision of the Court or the Department of Labor. As with the prior argument, this is a matter not for the Court to decide, but rather, for the arbitrator. Moreover, as noted by Defendants, the parties retain the option of submitting to the Court any future settlement agreement for approval. (*See* Reply 8 (citing *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982))).

D. *Dismissal Versus a Stay of this Case*

Plaintiff maintains the Motion is due to be denied because Defendants improperly request a dismissal of the action rather than a stay of the case. (*See* Mot. 1–2). Defendants, who seek dismissal or in the alternative a stay (*see* Reply 11), cite several examples where courts have

dismissed cases in enforcing arbitration agreements. (*See id.* 10–11). The Court engages in no greater discussion than to recognize the issue. As with other orders the undersigned has entered in similar cases, the Court will be staying this case while the parties arbitrate the claims for relief.

E. *Whether SW FL Enterprises, BHH, and Hecht Investments May Compel Arbitration*

Plaintiff argues SW FL Enterprises, BHH, and Hecht Investments may not compel arbitration on the basis they are not signatories to the Agreement and his claims against them are not inextricably intertwined with his claims against West Flagler Associates. (*See* Resp. 10–11). As to the first contention, Plaintiff is incorrect. SW FL Enterprises, BHH, and Hecht Investments are indeed parties to the Agreement. As noted, "Company" in the Agreement includes West Flagler Associates, its parent corporation and its agents. SW FL Enterprises is the parent corporation of Magic City, while BHH and Hecht Investments are general partners of Magic City. (*See* Reply 4; Supp. Aff. of Ivy Cross ¶¶ 4–7).

Even if the definition of Company in the Agreement did not reach the three additional Defendants, the doctrine of equitable estoppel would operate to require arbitration of the claims Plaintiff brings against them. Certainly non-signatories to an arbitration agreement generally may not compel signatories to arbitrate pursuant to that agreement under Florida law. *See Koechli v. BIP Int'l, Inc.*, 870 So. 2d 940, 943 (Fla. 1st DCA 2004). Yet, there are exceptions to this rule, one of which is the doctrine of equitable estoppel. *See Kolsky v. Jackson Square, LLC*, 28 So. 3d 965, 969 (Fla. 3d DCA 2010). This doctrine recognizes "[a] non-signatory . . . may compel arbitration when the allegations against him are inextricably intertwined with or mirror those against a signatory, or when the allegations are of interdependent and concerted

misconduct between a non-signatory and a signatory." *Dimattina Holdings, LLC v. Steri-Clean, Inc.*, 195 F. Supp. 3d 1285, 1292 (citations omitted; alterations added).

Although Plaintiff recognizes this exception, he fails to offer any convincing reason why it should not be applied in this case, and the Court is not aware of any. Plaintiff's claims against all four Defendants are inextricably intertwined because they rely on a single set of factual allegations concerning Defendants' status as joint employers and identical willful refusals to pay Plaintiff his minimum and overtime wages under the FLSA. *See id.* (compelling arbitration where the claims against the signatory and non-signatory were "one and the same," and because plaintiff "repeatedly refer[red] to their actions collectively" (alteration added; citation omitted)). Because of Plaintiff's own admissions, the Court finds Plaintiff is equitably estopped from avoiding arbitration with SW FL Enterprises, BHH, and Hecht Investments. *See Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App'x 475, 476 (11th Cir. 2012) (per curiam) (citation omitted) (affirming district court's finding non-signatory could be compelled to arbitrate on equitable estoppel grounds where plaintiff's claims against signatory and non-signatory defendants were "inextricably intertwined").

F. *Whether the Agreement's Limitations on Discovery are Unconscionable*

Under Florida law, to support a finding of unconscionability sufficient to invalidate the Agreement, Plaintiff must "establish *both* procedural and substantive unconscionability." *Premiere Real Estate Holdings, LLC v. Butch*, 24 So. 3d 708, 711 (Fla. 4th DCA 2009) (emphasis in original; citation omitted). Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999). Substantive

unconscionability focuses on the agreement itself, and it exists where the terms "are so 'outrageously unfair' as to 'shock the judicial conscience.'" *VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc.*, 912 So. 2d 34, 40 (Fla. 4th DCA 2005) (quoting *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 285 (Fla. 1st DCA 2003)).

In determining whether a contract is procedurally unconscionable, courts consider "(1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a 'take-it-or-leave-it' basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract." *Pendergast v. Spring Nextel Corp.*, 592 F.3d 1119, 1135 (11th Cir. 2010) (citations omitted). One issue bearing on this analysis is whether important terms in the agreement were "hidden in a maze of fine print and minimized by deceptive sales practices." *Powertel, Inc.*, 743 So. 2d at 574 (citation and internal quotation marks omitted). Plaintiff does not assert the Agreement is procedurally unconscionable. Nor would the Court find it to be, as Plaintiff was given the opportunity to consult an attorney and fully understand its terms. Further, the terms of the Agreement are clearly spelled out in normal-sized print, and the Agreement is devoted exclusively to the employer's alternative dispute resolution procedures.

Substantive unconscionability turns on the agreement itself, considering whether the disputed terms "limit available remedies, exclude punitive damages, prevent equitable relief, impose substantial costs, or lack mutuality of obligation with respect to the arbitration of disputes." *Henry v. Pizza Hut of Am., Inc.*, No. 07-01128-CIV, 2007 WL 2827722, at *4 (M.D. Fla. Sept. 27, 2007) (internal quotation marks omitted) (quoting *U.S. EEOC v. Taco Bell of Am., Inc.*, No. 06-001792-CIV, 2007 WL 809660, at *1 (M.D. Fla. Mar. 15, 2007)). Here, Plaintiff

complains the Agreement's limitations on discovery amount to substantive unconscionability. This argument is unconvincing.

"Discovery limitations promote the goals of the FAA, and such limitations are rarely grounds for avoiding an arbitration agreement." *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1350 (N.D. Ga. 2011) (citing *Caley*, 428 F.3d at 1378). The Agreement's limits on the parties' ability to take discovery are reasonable, even allowing for adjustment by the arbitrator, as necessary. In agreeing to arbitrate, a party trades the procedures and rules governing civil litigation "for the simplicity, informality, and expedition of arbitration." *Id.* (internal quotation marks and citation omitted).

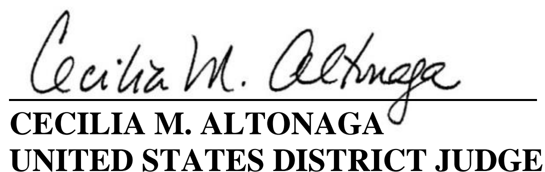
IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion **[ECF No. 8]** is **GRANTED in part** as follows:

1. Arbitration of Plaintiff's claims is compelled in accordance with the Arbitration Agreement and the FAA.
2. This case is **STAYED** pending arbitration.
3. The Clerk is directed to administratively **CLOSE** this case.

DONE AND ORDERED in Miami, Florida this 5th day of April, 2017.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record