IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

RUBEN MENDEZ,	§	
Plaintiff,	§	
	§	
v.	§	**EP-18-CV-189-PRM**
	§	
WAL-MART ASSOCIATES, INC.,	§	
	§	
Defendant.	§	

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION

On this day, the Court considered Defendant Wal-Mart Associates, Inc.'s [hereinafter "Defendant"] "Brief in Support of Demand for Arbitration" (ECF No. 25) [hereinafter "Motion"], filed on October 30, 2018; Plaintiff Ruben Mendez's [hereinafter "Plaintiff"] "Response in Opposition to Defendant's Motion to Compel Arbitration"[1] (ECF No. 28)

[1] Plaintiff's Response is longer than the page limit set by the local rules. The Fifth Circuit has not yet ruled on whether motions to compel arbitration are dispositive or nondispositive. *DHI Grp., Inc. v. Kent, No. CV H-16-1670*, 2018 WL 1150213, at *1 (S.D. Tex. Mar. 5, 2018). In Plaintiff's "Unopposed Motion to Extend Time by Seven (7) Days to File Response . . ." (ECF No. 26) [hereinafter "Motion to Extend Time"], filed on November 5, 2018, he seems to anticipate that this would be treated as a nondispositive motion, as Plaintiff assumed that the relevant deadline was seven days after Defendant's Motion, which reflects the deadline for nondispositive motions. *See* Mot. to Extend Time. Thus, it appears that Plaintiff's Response should have been limited to ten pages.

[hereinafter "Response"], filed on November 9, 2018; and Defendant's "Reply to Plaintiff's Response in Opposition to Defendant's Demand for Arbitration" (ECF No. 29) [hereinafter "Reply"], filed on November 14, 2018, in the above-captioned cause. After due consideration, the Court is of the opinion that Defendant's Motion should be granted for the reasons that follow.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a workplace injury. Plaintiff alleges that he suffered an injury in the course and scope of his employment with Defendant. Pl.'s Original Compl., Aug. 1, 2018, ECF No. 12 [hereinafter

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Local Rule CV-7(e). Notably, even if this is properly considered a dispositive motion, Plaintiff's Response would be limited to twenty pages. *Id.* However, Plaintiff's Response is twenty-five pages; therefore, he exceeds the page limit by either standard. In advance of filing his Response, Plaintiff sought an extension of time for his response—which the Court granted—but did not seek leave to file a motion in excess of the page limit. *See generally* Mot. to Extend Time. Inexplicably, it also appears that Plaintiff switches from 12 point font—the smallest font size allowed by the local rules—to a smaller, 10 point font (with his footnotes in even smaller font), in violation of Local Rule CV-10. *See, e.g.,* Resp. ¶¶ 22–23 (shrinking font size). Further, the Court recognizes that Defendant managed to reply to Plaintiff's arguments in five pages, the limit for reply briefings regarding nondispositive motions. *See* Local Rule CV-7(f). In future cases, Plaintiff's counsel would be well advised follow the local rules more carefully.

"Complaint"]. Specifically, Plaintiff asserts that he was "stocking a forty pound box of weights on the bottom of a shelf when the shelf broke." *Id.* at 2. As a result, he injured his "right shoulder and other parts of his body." *Id.*

On May 1, 2018, Plaintiff brought suit against Defendant in state court, alleging that Defendant acted negligently.[2] Notice of Removal Ex. A, June 18, 2018, ECF No. 1. Then, on June 18, 2018, Defendant removed the case to federal court, alleging that the Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332. *Id.* at 1.

Wal-Mart employees participate in a computer-based learning module titled "Texas Injury Care Benefit Plan." Mot. 1–2, Ex. A. The module educates employees on their rights and responsibilities regarding on-the-job injuries. *Id.* Relevant here, the module includes information about arbitration. Specifically, employees must open a

[2] Wal-Mart is a "nonsubscribing employer." A nonsubscribing employer is one that is not covered by workers' compensation insurance obtained in a manner authorized by Texas Labor Code § 406.003. An employer covered by workers' compensation is subject to limited liability for death and injury sustained by an employee in the course and scope of employment without regard to whether the employer acted negligently. A nonsubscribing employer is subject to unlimited liability for death and injury sustained by an employee in the course and scope of employment, but only where the employer acted negligently.

document—"Appendix D"—which includes an Arbitration Acknowledgement; after viewing the document, employees click to indicate that they have viewed the arbitration policy. *Id.* Ex. A. Further, while proceeding through the module, employees must click "I understand" in response to the following statement:

> I acknowledge that this Walmart and Sam's Club Texas Injury Care Benefit plan includes a mandatory policy requiring that claims or disputes relating to the cause on an on-the-job injury (that cannot otherwise be resolved between Walmart or Sam's Club and me) must be submitted to an arbitrator, rather than a judge and jury in court. I acknowledge that I have received this arbitration policy. I understand that the Company is also accepting and agreeing to comply with these arbitration requirements. . . .

Id. Plaintiff completed the module and represented that he understood these provisions by clicking on the relevant boxes. *Id.* Ex. C at 9.

Additionally, Wal-Mart employees are provided with a "Summary Plan Description," which is a handbook describing Defendant's Texas Injury Care Benefit Plan. *See* Mot. Ex. B. The Summary Plan Description's Appendix A describes the arbitration process in detail. In relevant part, Appendix A provides that the policy "is equally binding upon, and applies to any such claims that may be brought by, an Employer and each associate. . . ." *Id.* Ex. B (Summary Plan

Description) App. A p. 6. The policy further specifies:

> The Company shall have the right and power at any time and from time to time to amend this policy, in whole or in part, on behalf of Employer, and at any time to terminate this Policy or any Employer's participation, hereunder; provided that no such amendment or termination shall alter the arbitration requirements of this Policy with respect to any injury occurring prior to the date of such an amendment or termination. In addition, any such amendment or termination of this policy shall not be effective until at least 14 days after written notice has been provided. . . .

Id. App. A p. 7.

Based on these facts, Defendant filed the instant Motion on October 30, 2018. Therein, Defendant asserts that a valid arbitration agreement exists and that the Court should therefore compel the parties to participate in binding arbitration.

Plaintiff does not dispute that he completed the module and demonstrated that he understood the arbitration policy by clicking on the pertinent boxes. Rather, Plaintiff disputes the validity of the arbitration agreement. Specifically, Plaintiff argues that the Federal Arbitration Act ("FAA") does not apply to Plaintiff's claims because: (1) the agreement does not involve a "contract evidencing a transaction involving commerce" as is required by the FAA, (2) Congress did not intend for the FAA to preempt States' workers' compensation schemes,

and (3) the FAA as applied violates the Tenth Amendment. Additionally, even if the FAA applies to this type of claim, Plaintiff avers that the agreement to arbitrate should be unenforceable pursuant to Texas state common law because the agreement is illusory and because no valid consideration exists.

II. LEGAL STANDARD

The FAA § 2 provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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 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) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

When considering a motion to compel arbitration pursuant to the FAA, courts employ a two-step analysis. "First, a court must 'determine whether the parties agreed to arbitrate the dispute in question.'" *Tittle*

v. Enron Corp., 463 F.3d 410, 418 (5th Cir. 2006) (quoting *Webb v. Investacorp., Inc.*, 89 F.3d 252, 258 (5th Cir. 1996)). "Second, a court must determine 'whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.'" *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

The first step of the analysis—whether the parties agreed to arbitrate the dispute in question—consists of two distinct prongs: "(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*, 463 F.3d at 418–19 (quoting *Webb*, 89 F.3d at 258). "[I]n determining whether the parties agreed to arbitrate a certain matter, courts apply the contract law of the particular state that governs the agreement." *Washington Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 264 (5th Cir. 2004).[3]

[3] As both parties rely on Texas law in their briefing, the Court will apply Texas law. *Zamora v. Swift Transp. Corp.*, 547 F. Supp. 2d 699, 702 (W.D. Tex. 2008), *aff'd*, 319 F. App'x 333 (5th Cir. 2009).

III. ANALYSIS

A. Whether the FAA Applies

First, the Court considers whether the FAA applies here. Plaintiff asserts several theories as to why the FAA cannot apply: (1) the agreement does not involve a "contract evidencing a transaction involving commerce" as is required by the FAA, (2) Congress did not intend for the FAA to preempt States' workers' compensation schemes, and (3) the FAA as applied violates the Tenth Amendment. Below, the Court considers each of Plaintiff's theories in turn and concludes that the FAA properly applies to Plaintiff's claims.

1. The agreement involves a "contract evidencing a transaction involving commerce."

According to the FAA § 2, the Act applies to "[a] written provision in any maritime transaction or a *contract evidencing a transaction involving commerce*." 9 U.S.C. § 2 (emphasis added). Plaintiff contends that the employment contract at issue here should not be within the reach of the FAA because "while performing his duties . . . Plaintiff was not 'working in commerce, was not producing goods for commerce, and was not engaged in activity that affected commerce' within the meaning of those terms as interpreted by the Supreme Court." Resp. 12 (citing

Bernhardt v. Polygraph Co. of America, 350 U.S. 198 (1956)). Notwithstanding Plaintiff's position, the Court determines that Plaintiff's employment contract is clearly within the reach of the FAA.

"Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). Further, in *Circuit City*, the Supreme Court rejected an argument that § 2 "extends only to commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). The Court reasoned that it applies an "expansive reading" to § 2 and, therefore, asserted that the FAA covers employment contracts, except those which § 1 expressly removes from its reach. *Id.* Notably, the plaintiff in *Circuit City*—like the Plaintiff here—was employed by a local store for a national retail chain, and the Supreme Court determined that his claims were within the FAA's reach. *Id.* at 109.

Nonetheless, Plaintiff cites to a Supreme Court case from 1956—*Bernhardt v. Polygraph Co. of America*—and contends that its reasoning obliges the Court to find that Plaintiff's claims do not fall within the FAA's scope. Resp. 9–12. Specifically, Plaintiff highlights

language from *Bernhardt* asserting that there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." *Id.* at 12 (citing *Bernhardt*, 350 U.S. at 200–01). However, the Court remains unpersuaded by Plaintiff's arguments regarding *Bernhardt* for two reasons. First, Plaintiff fails to account for more recent decisions—including the cases cited above—which expressly hold that employment contracts are within the FAA's reach. Instead, Plaintiff simply ignores recent Supreme Court jurisprudence that is directly applicable to the case at hand. Second, *Bernhardt*'s reasoning contains very little discussion regarding the FAA. In fact, its analysis focuses on the application of the *Erie* doctrine—not on whether the employer was involved in interstate commerce pursuant to the FAA. *See generally Bernhardt*, 350 U.S. 198. Thus, *Bernhardt* appears to be unhelpful here.

For the reasons articulated above, the Court determines that Plaintiff's employment contract is a "contract evidencing a transaction involving interstate commerce" within the meaning of the FAA.

2. The FAA applies to claims pursuant to Texas's workers' compensation scheme.

The FAA generally preempts any state laws that would frustrate the FAA's purpose. *See Concepcion*, 563 U.S. at 343 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."). Notwithstanding this general principle favoring preemption, Plaintiff contends that "Congress did not intend the [FAA] to eviscerate or preempt [the] State's Workers' compensation scheme" and that, therefore, the FAA should not apply here. Resp. 13.

However, Plaintiff's contention is belied by the Texas Supreme Court's interpretation of how the FAA and Texas workers' compensation scheme interact. Specifically, the Texas Supreme Court has held that "an application of the FAA . . . does not have the effect of eviscerating the workers' compensation scheme in Texas." *Vista Quality Markets v. Lizalde*, 438 S.W.3d 114, 122 (Tex. App. 2014). The Texas Supreme Court reasoned that "a party who agrees to arbitration does not forgo any substantive rights afforded to him by statute, but rather submits their resolution in an arbitral, rather than a judicial

forum." *Id.* Therefore, according to the Texas Supreme Court, the FAA does not prevent employees from effectively vindicating the rights afforded to them by the Texas Workers' Compensation Act. *Id.*

Because the Texas Supreme Court has determined that claims pursuant to the State workers' compensation scheme are arbitrable, there appears to be no conflict between the state and federal law. However, even if there were a conflict, Supreme Court precedent suggests that the FAA generally preempts state laws. Thus, in step with both the United States Supreme Court and the Texas Supreme Court, the Court determines that arbitration agreements regarding workers' compensation claims may be enforced.[4]

[4] The Court also notes that it previously determined that Plaintiff's claim should not be understood as a claim pursuant to Texas's workers' compensation scheme. Rather, Plaintiff's claim derives from the common law. Defendant is a nonsubscribing employer. As the Court previously discussed in its "Order Denying Plaintiff's Motion to Remand" (ECF No. 23), filed on September 10, 2018, the Fifth Circuit and Texas Supreme Court have suggested that claims against nonsubscribing employers are derived from common law rather than the Texas Workers' Compensation Act, albeit in different contexts. Order Denying Pl.'s Mot. to Remand 8 (citing *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F. 3d 558, 564 (5th Cir. 2010)). Thus, even if the FAA did not apply to claims pursuant to State workers' compensation schemes, the Court determines that the FAA could still apply to Plaintiff's claim because his claim is brought pursuant to the common law.

3. The FAA as applied does not violate the Tenth Amendment.

Additionally, Plaintiff argues that the FAA "as applied would violate the Tenth Amendment." Resp. 17. Again, Plaintiff's argument is contrary to the Texas Supreme Court's decision on this issue. The Texas Supreme Court has rejected this argument and held that "the FAA does not violate the Tenth Amendment by encroaching on a state power to enact and regulate its workers' compensation system." *Vista Quality Market*s, 438 S.W.3d at 122. The Texas Supreme Court stated:

> We have recognized that a state has a Tenth Amendment power to enact and regulate its own workers' compensation system, protecting workers' claims against employers. . . . However, we have also held that statutory claims under the Texas Workers' Compensation Act are arbitrable. . . . Thus, we conclude that compliance with the Federal Arbitration Act would not directly impair Texas's ability to structure integral operations in areas of traditional government functions. . . .

In re Odyssey Healthcare, Inc., 310 S.W.3d 419, 423–24 (Tex. 2010) (internal citations and alterations omitted). Accordingly, the Court concludes that requiring arbitration in this case does not violate the Tenth Amendment.

B. Whether the Agreement to Arbitrate is Valid

Having determined that the FAA is applicable here, the Court

analyzes whether the parties agreed to arbitrate their claims. Defendant asserts that a valid arbitration agreement exists. According to Plaintiff, there is no legally enforceable agreement because "[t]he arbitration provisions fails [sic] for lack of consideration and/or is illusory." Resp. 4. Thus, Plaintiff believes the agreement is invalid based on principles of contract law. Below, the Court considers Plaintiff's arguments and determines that the agreement to arbitrate is not illusory and does not lack sufficient consideration.

1. The agreement to arbitrate is not illusory.

According to Plaintiff, Defendant "can amend or terminate the [] plan at any time," and therefore the plan is illusory and unenforceable. Resp. 7. However, in Texas, an agreement is illusory if a party "possesses the right to modify or terminate an arbitration agreement *without notice*." *Zamora*, 547 F. Supp. 2d at 702 (emphasis added). Texas law allows unilateral modifications to or termination of an agreement where: (1) the modification or termination is limited only to prospective, unknown claims and (2) the employer gives notice to the employees of the modification or termination. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003) (citing *In re Halliburton Co.*,

80 S.W.3d 566, 570–71 (Tex. 2002)).

Here, Defendant's policy provides that "no [] amendment or termination shall alter the arbitration requirements of this Policy with respect to any injury occurring prior to the date of such an amendment or termination." Mot. Ex. B (Summary Plan Description) App. A p. 7. The policy further provides that, "any such amendment or termination of this policy shall not be effective until at least 14 days after written notice has been provided." *Id.* Thus, the Agreement conforms to Texas law requiring that employers provide notice of any unilateral amendments to or termination of an arbitration agreement, and that all amendments only apply prospectively. Accordingly, Plaintiff's argument that the agreement is illusory fails.

2. The agreement to arbitrate does not lack consideration.

According to Plaintiff, the agreement lacks consideration because "by its plain and express language, [Defendant's] policy is a stand-alone agreement" and "the only valid consideration that may support a stand-alone arbitration agreement are the parties' mutual promises to arbitrate each party's potential claims." Resp. 5 (emphasis omitted) (citing *Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d 827, 832 (Tex. App.

2012)). Plaintiff's assertion misrepresents Defendant's policy. In fact, Defendant's policy specifically provides for the mutuality of the arbitration agreement and "is equally binding upon" the employer and employee. *Id.* Ex. B (Summary Plan Description) App. A p. 7. Thus, mutual promises to arbitrate claims exist, and the agreement does not fail for a lack of consideration.

In conclusion, because the agreement is not illusory and contains valid consideration, the Court is unpersuaded by Plaintiff's arguments that the agreement to arbitrate is invalid. Further, because the arbitration policy states that claims related to an on-the-job injury must be submitted to the arbitrator, Plaintiff's claims are plainly in the scope of the agreement. Accordingly, the Court is of the opinion that the parties agreed to arbitrate the dispute in question.

C. Whether this Case Should be Stayed or Dismissed

In its Motion, Defendant seeks a stay of this case pending arbitration. Although Defendant does not seek dismissal, the Court sua sponte considers whether a stay or dismissal is appropriate. According to the Fifth Circuit, § 3 of the FAA "was not intended to limit dismissal of a case in the proper circumstances. The weight of authority clearly

supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (emphasis omitted). Thus, if all of a plaintiff's claims must be submitted to arbitration, the district court may stay or dismiss the case. Finding no reason to keep this case pending on the Court's docket until arbitration is complete, the Court determines that the case should be dismissed.

IV. CONCLUSION

The Court concludes that the FAA applies to this case. Further, the parties entered into a valid agreement to arbitrate claims related to an on-the-job injury. Accordingly, the Court concludes that Plaintiff's claims must be resolved via binding arbitration and that this case should be dismissed.

Accordingly, **IT IS ORDERED** that Defendant Wal-Mart Associates, Inc.'s "Brief in Support of Demand for Arbitration" (ECF No. 25) is **GRANTED**.

IT IS FURTHER ORDERED that the above-captioned cause is **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff Ruben Mendez's

claims against Defendant Wal-Mart Associates, Inc.'s claims must be submitted to **ARBITRATION**.

IT IS FURTHER ORDERED that all settings in this matter are **VACATED**.

IT IS FURTHER ORDERED that all pending motions, if any, are **DENIED AS MOOT**.

IT IS FINALLY ORDERED that the Clerk shall **CLOSE** this case.

SIGNED this 28 **day** of **November, 2018**.

PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE