UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-20277-KMM

MELISSA COMPERE, on behalf of herself and all others similarly situated,
Plaintiff,

v.

NUSRET MIAMI, LLC, d/b/a Nusr-et Steakhouse, a Florida limited liability company, NUSRET GOKCE, an individual,
Defendants.
_____/

ORDER ON DEFENDANTS' MOTIONS TO COMPEL ARBITRATION

THIS CAUSE came before the Court upon Defendants Nusret Miami, LLC ("Nusret Miami") and Nusret Gokce's ("Gokce") (collectively, "Defendants") Motion to Compel Arbitration as to Plaintiff Melissa Compere ("Plaintiff" or "Compere") and Opt-In Plaintiffs Valdo Sulaj ("Sulaj") and Diego Vargas ("Vargas") ("First Mot. to Compel") (ECF No. 38) and Defendants' Motion to Compel Arbitration as to Opt-In Plaintiff Slagjana Kovachevska ("Kovachevska") ("Second Mot. to Compel") (ECF No. 52) (collectively, "Motions to Compel"). The Parties filed their respective responses and replies.[1] The matter is now ripe for review.

I. BACKGROUND

On January 18, 2019, Plaintiff filed a Collective Action Complaint on behalf of herself and all others similarly situated asserting claims for unpaid minimum wage and overtime compensation

[1] *See* Plaintiff's Response in Opposition to Defendants' Motion to Compel Arbitration ("First Resp.") (ECF No. 49); Defendants' Reply Brief in Support of their Motion to Compel Arbitration ("First Reply") (ECF No. 59); Plaintiff's Response in Opposition to Defendants' Motion to Compel Arbitration for Slagjana Kovachevska ("Second Resp.") (ECF No. 60); Defendants' Reply Brief in Support of their Motion to Compel Arbitration of Opt-In Plaintiff Slagjana Kovachevska ("Second Reply") (ECF No. 62).

under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*., and declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* ("Compl.") (ECF No. 1). Because this case is styled as a collective action, other similarly situated individuals may opt in and join Compere as a plaintiff to the action. 29 U.S.C. § 216(b). Thus far, seven individuals have opted in. ("Notices of Consent to Join") (ECF Nos. 15, 20, 39, 44, 54, 56).

Compere, the named plaintiff in this action, worked at Nusret Steakhouse[2] in various positions between October 17, 2018 and November 16, 2018, when her employment was terminated. Declaration of Belen Rodriguez ("Rodriguez Decl.") (ECF No. 38–1) ¶ 10. Vargas is currently employed as a meat cutter at Nusret Steakhouse. *Id*. ¶ 12. He was hired on October 10, 2017. *Id.* Sulaj began working at Nusret Steakhouse on October 10, 2017 and worked as a meat cutter when his employment was terminated on May 17, 2018. *Id*. ¶ 11. Kovachevska began working as a bartender at Nusret Steakhouse in October 2017. (ECF No. 52–1).[3]

Defendants have provided offer letters signed by Compere, Sulaj, and Kovachevska. ("Offer Letters") (ECF Nos. 38–1, 52–1).[4] Each of the Offer Letters state the following with respect to arbitration:

> Prior to your commencement of employment with the Restaurant, you will be required to sign an Arbitration Agreement. We have enclosed a copy of the Arbitration Agreement for your review.
>
> You acknowledge that this Offer and the Arbitration Agreement, contain the entire agreement of the parties with respect to this subject matter and supersedes any previous discussions or negotiations.

[2] Plaintiff alleges that she worked at Nusret Steakhouse, which does business as Nusret Miami. Compl. ¶ 6. She further alleges that Nusret Miami and Gokce are joint employers. *Id.* ¶ 11.

[3] Each Opt-in Plaintiff filed a Notice of Consent to Join. (ECF Nos. 15, 20, 44).

[4] The Offer Letters are substantially similar and include identical language with respect to the arbitration of claims. Thus, the Court addresses the Offer Letters together.

Id. Defendants have not provided copies of the arbitration agreements allegedly attached to each of the signed Offer Letters.

Defendants have not provided an offer letter signed by Vargas. However, Defendants have provided a copy of an arbitration agreement signed by Vargas, which states that "all controversies, disputes, or claims arising out of Employee's employment by Nusret Miami . . . whether contractual, in tort, or based upon statute, shall be exclusively decided by binding arbitration and held pursuant to the Federal Arbitration Act ('FAA') before the American Arbitration Association ('AAA')." ("Vargas Arbitration Agreement") (ECF No. 38–1). The Vargas Arbitration Agreement lists examples of claims subject to arbitration, including claims under the FLSA, and includes a class and collective action waiver. *Id.*

In addition to the Motions to Compel, on March 4, 2019, Defendant Nusret Miami filed a Partial Answer (ECF No. 8) and a Partial Motion to Dismiss (ECF No. 9), making no mention of arbitration. Nusret Miami has since moved to amend its Partial Answer to add an affirmative defense that Plaintiff's claims are subject to binding arbitration. (ECF No. 36). On March 12, 2019, Plaintiff filed a Motion to Certify 216(b) Collective Action. ("Mot. to Certify") (ECF No. 19).[5] On March 29, 2019, Defendant Gokce filed a Partial Answer asserting an affirmative defense that Plaintiff's claims are subject to binding arbitration. (ECF No. 32). In support of Defendants' response to Plaintiff's Motion to Certify, Defendants deposed Compere, Vargas, and Sulaj. First

[5] The Court considers the Motions to Compel before the Motion to Certify in light of federal policy favoring arbitration. *See Edwards v. Doordash, Inc.*, 888 F.3d 738, 743 (5th Cir. 2018) ("We continue to hold that arbitrability is a 'threshold question' to be determined 'at the outset,' a holding consistent with the 'national policy favoring arbitration.'") (citation omitted); *Doe #1 v. Deja Vu Consulting Inc.*, No. 3:17-CV-00040, 2017 WL 3837730, at *8 (M.D. Tenn. Sept. 1, 2017) ("[A]lthough the issue has not been frequently litigated, it appears that, when a motion for conditional certification and a motion to compel arbitration are both pending before a district court, courts generally consider the motion to compel arbitration first and, then, if the motion to compel is denied, whether conditional certification is appropriate.") (citations omitted).

Mot. to Compel at 3. Now, Defendants move to compel arbitration as to Compere and three Opt-In Plaintiffs: Vargas, Sulaj, and Kovachevska (the "Opt-In Plaintiffs").[6]

II. LEGAL STANDARD

There is an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The Federal Arbitration Act ("FAA") governs the validity of an arbitration agreement. *Bhim v. Rent-A-Center, Inc.*, 655 F. Supp. 2d 1307, 1309 (S.D. Fla. 2009) (citation omitted). "The FAA establishes a 'federal policy favoring arbitration . . . requiring that [courts] rigorously enforce agreements to arbitrate.'" *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) (alteration in original) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The FAA provides that a court must either stay or dismiss a lawsuit and compel arbitration upon a showing 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) (quoting 9 U.S.C. §§ 2–4). Pursuant to this policy, courts must construe "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Mitsubishi*, 473 U.S. at 626 (citation omitted). Thus, the party opposing arbitration has the burden, "not unlike that of a party seeking summary judgment," of showing why the court should not compel arbitration. *Bhim*, 655 F. Supp. 2d at 1311 (citations omitted).

However, the party seeking to compel arbitration has the initial burden of "producing the [a]rbitration [a]greement and establishing the contractual relationship necessary to implicate the

[6] The Motions to Compel, Plaintiff's responses, and Defendants' replies are substantially similar and generally raise the same arguments. Accordingly, the Court addresses the arguments raised in the two Motions to Compel and the Parties' respective responses and replies together.

FAA and its provisions granting this Court authority to dismiss or stay Plaintiff's cause of action and to compel arbitration." *Fantis v. Flywheel Sports, Inc.*, No. 18-24934-CIV-UNGARO/O'SULLIVAN, 2019 WL 1582957, at *2, n.2 (S.D. Fla. Mar. 11, 2019) (citations omitted), *report and recommendation adopted*, No. 18-CV-24934-UU, 2019 WL 2245417 (S.D. Fla. Apr. 29, 2019), *appeal docketed*, No. 19-11690 (11th Cir. Apr. 30, 2019). "Thus, with respect to the threshold question of whether an [arbitration] agreement between the parties exists at all, the initial burden is on the defendant to prove the existence of a contract by a preponderance of the evidence." *Id.* Whether a valid agreement to arbitrate exists is a matter of state contract law. *Id.* at *1. Under Florida law, a valid contract requires offer, acceptance, and consideration. *Id.*

III. DISCUSSION

Defendants make two arguments in support of their Motions to Compel: (1) any issues related to the arbitrability of the present disputes should be delegated to the arbitrator and (2) the Vargas Arbitration Agreement is a valid and enforceable contract requiring that Vargas, Compere, Sulaj, and Kovachevska arbitrate their claims. *See* First Mot. to Compel at 5–12; Second Mot. to Compel at 5–12. In response, Plaintiff argues that (1) Defendants waived the right to arbitrate, and alternatively (2) no agreement to arbitrate exists between Defendants and Compere, Sulaj, or Kovachevska. *See* First Resp.; Second Resp.

A. Delegation to the Arbitrator

First, Defendants argue that questions regarding the existence of a valid arbitration agreement and whether a party has waived its right to compel arbitration should be decided by the arbitrator—not the Court. First Mot. to Compel at 8–9, 13; Second Mot. to Compel 8–9, 12–13. Specifically, Defendants argue that the incorporation by reference of the AAA's Employment Dispute Resolution Rules ("AAA Rules") in the Vargas Arbitration Agreement is a clear and

unmistakable delegation of these questions to the arbitrator. First Mot. to Compel at 8–9; Second Mot. to Compel 8–9.

Generally, questions of arbitrability are for the courts to decide "*unless* there is clear and unmistakable evidence that the parties intended to submit such questions to an arbitrator." *JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018) (citation and internal quotation marks omitted). Reference to the AAA Rules "alone serves as a clear and unmistakable delegation of questions of arbitrability to an arbitrator." *Id.* at 936. Here, the Vargas Arbitration Agreement references the AAA Rules. *See* Vargas Arbitration Agreement. Therefore, there appears to be a valid delegation clause in the Vargas Arbitration Agreement.

However, because the Parties dispute whether an agreement to arbitrate exists between Nusret Miami and Compere, Sulaj, and Kovachevska, the Court must first make a threshold determination as to whether a contract has been formed before assessing any such delegation clause as to these employees. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.") (citation omitted); *Seminole Cty. Tax Collector v. Domo, Inc.*, No. 6:18-CV-1933-OrL-40DCI, 2019 WL 1901019, at *9 (M.D. Fla. Feb. 13, 2019) ("Having found that a valid agreement to arbitrate exists between the parties, the Court now considers the application of the delegation provision within the arbitration clause."), *report and recommendation adopted*, No. 6:18-CV-1933-ORL-40-DCI, 2019 WL 1772108 (M.D. Fla. Apr. 23, 2019), *appeal docketed*, No. 19-11782 (11th Cir. May 7, 2019). Similarly, the Eleventh Circuit has held that "questions of waiver based on a party's litigation conduct are for the courts to resolve." *Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1354 (11th Cir. 2011); *see also Tellus Prods., LLC v. Sustainable Fiber Techs., LLC*, No. 18-81143-CIV-ROSENBERG/REINHART, 2019 WL

1116952, at *3 (S.D. Fla. Jan. 8, 2019) (citation omitted), *report and recommendation adopted*, No. 9:18-CV-81143-ROSENBERG/REINHART, 2019 WL 1112275 (S.D. Fla. Jan. 23, 2019).

Accordingly, this Court will first consider the Parties' arguments as to whether an agreement to arbitrate exists between Nusret Miami and Compere, Sulaj, and Kovachevska, respectively.[7] The Court will then address whether Defendants have waived any such right.

B. The Offer Letters: Compere, Sulaj, and Kovachevska

The Parties dispute whether a valid arbitration agreement exists between Nusret Miami and Compere, Sulaj, and Kovachevska, respectively. Defendants argue that Compere, Sulaj, and Kovachevska "expressly accepted the offer of employment conditioned on the requirement to arbitrate any employment-related dispute" by signing and accepting the terms of each of their Offer Letters. First Mot. to Compel at 10; Second Mot. to Compel at 10. In response, Plaintiff argues that Compere, Sulaj, and Kovachevska did not receive a copy of an arbitration agreement and that the Offer Letters are not valid contracts to arbitrate. First Resp. at 5–8; Second Resp. at 5–10.

Defendants have not produced a signed arbitration agreement for Compere, Sulaj, or Kovachevska. Rather, Defendants provide a Declaration of Nusret Miami's current Human Resources Manager, Belen Rodriguez, who has been employed by Nusret Miami since March 2018—well after these three employees were hired. Rodriguez Decl. ¶ 1. Rodriguez states that she has reviewed Nusret Miami's records and that "in preparation for the opening . . . in November 2017, Nusret Miami onboarded scores of employees in September and October 2017" and that at the time, "Nusret Miami's practice was to require new hires to agree to binding arbitration as a

[7] Plaintiff does not dispute that an agreement to arbitrate exists between Nusret Miami and Vargas.

condition of employment, and its onboarding practices[8] reflected that requirement." *Id.* ¶¶ 6–7. She also states that individuals were first "provided an offer letter that explicitly referenced the requirement to arbitrate" and that "[l]ater, during or after orientation, employees were required to sign the Arbitration Agreement referenced in the offer letter." *Id.* ¶¶ 7–8. However, she states that she has been unable to locate the signed agreements for many employees, explaining that "with the press of opening the restaurant and onboarding such a high volume of employees, documents executed by such employees in Fall 2017 sometimes were not filed in such a way that [Nusret Miami] can promptly retrieve such documents." *Id.* ¶ 9. In response, Plaintiff provides an affidavit of Compere in which she states that she "never signed an agreement to arbitrate employment claims, nor was [she] ever told that [she] was required to arbitrate employment claims as a condition of [her] employment with Defendants." ("Compere Aff.") (ECF No. 49–1) ¶ 3. Further, Compere states that she "received an offer letter from Defendants" but "never received a copy of the arbitration agreement referenced in the offer letter, and [she] [has] no idea what claims it was intended to arbitrate." *Id.* ¶ 4. Defendants have not met their burden to demonstrate that an agreement to arbitrate exists between Nusret Miami and Compere, Sulaj, and Kovachevska.

First, Defendants have not provided evidence to demonstrate that Nusret Miami actually provided each of these employees with a copy of an arbitration agreement. The statements in the Rodriguez Declaration are not based on personal knowledge of the onboarding of Compere, Sulaj, and Kovachevska, as Rodriguez was not employed by Nusret Miami at the time. The Declaration lacks specificity as to when and where these individuals received a copy of an arbitration

[8] Notably, although Defendants claim it was Nusret Miami's practice to require employees to sign arbitration agreements, Nusret Miami's 68-page employee handbook does not mention arbitration. (ECF No. 49–2). Further, Nurset Miami has provided only one copy of a signed arbitration agreement.

agreement and when and where they actually signed it. *See Schoendorf v. Toyota of Orlando*, No. 6:08–cv–767–Orl–19DAB, 2009 WL 1075991, at *10 (M.D. Fla. Apr. 21, 2009) (declining to compel arbitration where "there [was] only circumstantial evidence to suggest that Plaintiff signed the contested arbitration agreement, no one actually witnessed Plaintiff sign the agreement, and Plaintiff directly denie[d] signing it"). Further, the allegations amount to "pattern and practice evidence," which is insufficient on its own to demonstrate the existence of an agreement to arbitrate. *See Gagnon v. Experian Info. Sols., Inc.*, No. 8:14-CV-1817-T-30TBM, 2014 WL 5336490, at *3 (M.D. Fla. Oct. 20, 2014) ("Drivetime's evidence is essentially merely pattern and practice evidence which is insufficient to establish that Gagnon signed the Arbitration Agreement.").

Second, Defendants have not provided evidence that Compere, Sulaj, or Kovachevska accepted the terms of any arbitration agreement. Generally, an arbitration agreement need not be signed to be enforceable. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005). "However, an arbitration agreement may define the appropriate method of acceptance as the signature of the parties." *Gagnon*, 2014 WL 5336490, at *2 (citing *Schoendorf*, 2009 WL 1075991, at *8). Under those circumstances, the party compelling arbitration must provide evidence that the arbitration agreement was signed or that the party to be bound otherwise assented to the agreement's terms. *Id.* Here, the Offer Letters state that the employees would be required to *sign* a separate arbitration agreement prior to commencing employment. *See* Offer Letters. Thus, to show acceptance of the terms of an arbitration agreement, Defendants must produce a signed agreement absent other evidence of assent to its terms.[9]

[9] Defendants' argument that Compere, Sulaj, and Kovachevska manifested their assent to the terms of a separate arbitration agreement by signing the Offer Letters and commencing employment is unpersuasive. The Court cannot infer acceptance of an arbitration agreement from Compere, Sulaj,

Third, any argument that the Offer Letters independently give rise to an agreement to arbitrate fails. The Offer Letters do not contain any arbitration terms and simply reference an arbitration agreement. Although "there are certain circumstances where Florida law requires a party to a contract to inquire further about missing documents [referenced in a contract] and that in those circumstances, a party cannot later disavow receipt of a particular document," those circumstances are not present here. *Fantis*, 2019 WL 1582957, at *8. The Offer Letters did not require that the employees acknowledge receipt of an arbitration agreement therein. *See id.* (distinguishing cases finding that a party to a contract has a duty to inquire about missing documents where they signed a document acknowledging receipt).[10] Rather, the Offer Letters

---

and Kovachevska's signatures on the Offer Letters, as the Offer Letters themselves make clear that the arbitration agreement is an independent agreement to be reviewed and executed separately. *See Schoendorf*, 2009 WL 1075991 at *8 (finding that "the Court [could not] infer acceptance of the arbitration agreement from Plaintiff's acceptance of employment with Defendant" where the employment agreement referenced an arbitration agreement but stated that "the arbitration agreement [was] independent of the employment agreement"). Similarly, the Court cannot infer acceptance of the terms of an arbitration agreement from the Compere, Sulaj, and Kovachevska's commencement of employment, as the Offer Letters do not state that commencement of employment is an appropriate method of acceptance. *See id.* at *9 (distinguishing cases where "acceptance was specified in the [agreement] as continued employment"). Therefore, because Defendants have not proffered a signed arbitration agreement for Compere, Sulaj, and Kovachevska and have not otherwise presented evidence of a manifestation of assent to an arbitration agreement's terms, Defendants have not demonstrated that these employees accepted any agreement to arbitrate. And, without acceptance, there is no contract. *Gagnon*, 2014 WL 5336490, at *2.

[10] Indeed, the cases that Defendants cite to the contrary are distinguishable on these grounds. *See Dorward v. Macy's Inc.*, No. 2:10-CV-669-FTM-29DNF, 2011 WL 2893118, at *10 (M.D. Fla. July 20, 2011) (finding sufficient proof of an agreement to arbitrate where plaintiff acknowledged receipt of the arbitration agreement in an acknowledgment form and then failed to opt out of the terms of the arbitration agreement within the specified timeframe, as failure to opt out constituted acceptance); *Sultanem v. Bright House Networks, L.L.C.*, No. 8:12-CV-1739-T-24 TBM, 2012 WL 4711963, at *2 (M.D. Fla. Oct. 3, 2012) (finding that there was sufficient evidence of an agreement to arbitrate where the plaintiff signed a work order acknowledging receipt of a separate agreement containing an arbitration provision and failed to opt out within the specified timeframe).

state that an arbitration agreement was enclosed for the employee's review and that the employee would need to execute a copy prior to commencing employment. *See* Offer Letters. Therefore, the executed Offer Letters do not constitute valid agreements to arbitrate.

Accordingly, Defendants have not met their burden to demonstrate that an agreement to arbitrate exists between Nusret Miami and Compere, Sulaj, or Kovachevska, respectively. As such, this Court will not compel Compere, Sulaj, or Kovachevska to arbitrate their claims.[11]

C. The Arbitration Agreement: Vargas

Defendants argue that Vargas should be required to arbitrate his claims pursuant to the valid, signed arbitration agreement he entered with Nusret Miami. First Mot. to Compel at 10–12; *see also* Vargas Arbitration Agreement. Plaintiff does not dispute that a valid agreement to arbitrate exists between Vargas and Nusret Miami. *See* First Resp. Rather, Plaintiff argues that Defendants waived their right to arbitration through their participation in this litigation. *See id.* at 2–5. Defendants contend that their actions thus far have been purely defensive and do not support a finding of waiver. First Reply at 6–11.

A party's conduct during litigation may give rise to a waiver of the right to arbitrate. *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990). Courts use a two-part test to determine whether a party has waived its right to arbitrate. *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1277 (11th Cir. 2012). First, courts look to whether "under the totality of the circumstances," the defendant "has acted inconsistently with the arbitration right." *S & H Contractors*, 906 F.2d at 1514 (citation omitted). "A party acts inconsistently with the arbitration right when the party 'substantially invokes the litigation machinery prior to demanding

[11] Because the Court finds that Defendants have not met their burden to demonstrate that an agreement to arbitrate exists as to Compere, Sulaj, and Kovachevska, the Court need not address waiver for Compere, Sulaj, or Kovachevska.

arbitration.'" *Garcia*, 699 F.3d at 1277 (quoting *S & H Contractors*, 906 F.2d at 1514). Second, courts look to whether, in doing so, the defendant "has in some way prejudiced the other party." *Id.* (citation omitted). In determining whether the other party has been prejudiced, the Court "may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process." *Id.* (quoting *S & H Contractors*, 906 F.2d at 1514). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Stone v. E.F. Hutton & Co.*, 898 F.2d 1542, 1543 (11th Cir. 1990) (citation omitted). Indeed, the party arguing waiver bears a heavy burden. *Id.* ("Because federal law favors arbitration, any party arguing waiver of arbitration bears a heavy burden of proof.") (citation and alteration omitted). When addressing the question of waiver in a collective action, the Court addresses the defendant's conduct as to each individual plaintiff separately. *See Collado v. J. & G. Transp., Inc.*, No. 14-80467-CIV, 2015 WL 1478609, at *6 (S.D. Fla. Mar. 31, 2015).

Plaintiff has not met her burden as to Vargas. The delay following Vargas' joining the lawsuit was minimal. Plaintiff filed the Collective Action Complaint on January 18, 2019. *See* Compl. On March 12, 2019, Plaintiff filed a Motion to Certify and Vargas filed a Notice of Consent to Join (ECF No. 15).[12] On March 25, 2019, Vargas was deposed in connection with Defendants' opposition to Plaintiff's Motion to Certify. *See* First Resp. at 2–3. On March 29, 2019, Defendant Gokce filed an Answer referencing arbitration, and on April 8, 2019, Defendant Nusret Miami filed a Motion for Leave to File an Amended Answer, adding an affirmative defense

[12] Vargas did not join this action until March 12, 2019—after Defendant Nusret Miami filed its Partial Motion to Dismiss and Partial Answer. Therefore, this Court considers only Defendants' conduct following this date in determining whether Defendants waived their right to arbitrate Vargas' claims. *See Collado*, 2015 WL 1478609, at *6. Indeed, it would have been impossible for Defendants to move to compel arbitration of Vargas' claims before he was a party to this suit.

regarding arbitration. On April 9, 2019—less than a month after Vargas opted in to this action—Defendants moved to compel arbitration of Vargas' claims. *See* First Mot. to Compel.

Therefore, Plaintiff was on notice just weeks after Vargas joined the lawsuit of Defendants' intention to pursue arbitration, and Defendants moved to compel arbitration less than a month later. This weighs in favor of finding that Defendants did not waive their right to compel arbitration as to Vargas. *See Diggett v. Swisher Int'l, Inc.*, No. 3:14-CV-0242-J-20JBT, 2014 WL 12617591, at *5 (M.D. Fla. Aug. 28, 2014) ("It is true that Defendant has participated in this litigation; however, Defendant was forthright with Plaintiff about the potential arbitration agreement from the beginning, and Defendant's actions in the litigation have been little more than that minimally required to comply with the Federal Rules of Civil Procedure.").

In addition to the conduct described above, between March 12, 2019 and April 9, 2019, Defendants also moved for two extensions of time to respond to the Motion to Certify (ECF Nos. 21, 28), responded to Plaintiff's Statement of Claim (ECF No. 24), filed a reply in further support of the Motion to Dismiss (attaching the Vargas Arbitration Agreement) (ECF No. 34), and moved for an extension of time to conduct a settlement conference (ECF No. 35). After filing the First Motion to Compel, Defendants continued to participate in the litigation, including by opposing the Motion to Certify (ECF No. 40), attending a settlement conference (ECF No. 58), and filing a Joint Scheduling Report (ECF No. 61).[13]

[13] Courts have found that filing a Joint Scheduling Report is an act inconsistent with a party's intent to arbitrate and weighs in favor of finding waiver. *See, e.g., Diggett*, 2014 WL 12617591, at *3–4 (citations omitted). Here, however, the Joint Scheduling Report states that Defendants have moved to compel arbitration and that "[w]hile Defendants believe this matter should be stayed pending the disposition of their motions to compel arbitration, Defendants participated in the Scheduling Conference in order to comply with the Courts' requirements, but, by doing so and in planning for the potential litigation of this case before this Court, Defendants [do] not intend to waive their arguments that arbitration is the proper forum for Plaintiff's claims." Joint Scheduling Report (ECF No. 61) at 1 n.1. Accordingly, under these circumstances, and in light of the fact that

The Court does not find this conduct substantial enough to warrant a finding of waiver. *See Pierre-Louis v. CC Sols., LLC*, No. 17-CV-60781-BLOOM/Valle, 2017 WL 4841428, at *3 (S.D. Fla. Oct. 26, 2017) (finding no waiver where the defendants "filed a Joint Scheduling Report, an Answer, and a Response to Statement of Claim before filing the Motion to Compel") (internal citations omitted). Indeed, where courts have found waiver, the length of time between the commencement of the action and the demand for arbitration was greater, and the defendant's participation in the litigation prior to the demand for arbitration was more substantial than the present circumstances. *See, e.g.*, *Garcia*, 699 F.3d at 1276–78 (finding waiver where the parties participated in discovery for more than a year, including conducting approximately 20 depositions and producing approximately 900,000 pages of documents); *S & H Contractors, Inc.*, 906 F.2d at 1514 (finding waiver where the defendant moved to compel arbitration 8 months into the litigation after 2 motions and 5 depositions); *Garcia v. Acosta Tractors, Inc.*, No. 12-21111-CIV, 2013 WL 462713, at *5, n.3 (S.D. Fla. Feb. 7, 2013) (finding waiver where the defendants acted inconsistently with the right to arbitrate for approximately 6 months by "failing to refer to arbitration in their Answer, attending a settlement conference . . . , submitting a scheduling report which was silent as to arbitration and referenced the Plaintiffs' right to a jury trial, and serving their initial requests for documents and interrogatories"). Additionally, much of Defendants' conduct in the litigation—even if inconsistent with the right to arbitrate—was "purely defensive." *Lupo v. Winghouse of Daytona Beachside, LLC*, No. 8:12-CV-1263-T-35-EAJ, 2013 WL 12161805, at *3 (M.D. Fla. Jan. 25, 2013) (finding no waiver where defendants moved to compel arbitration after 4 months, recognizing that the defendants' actions before doing so had been

Defendants have not moved to arbitrate the claims of all opt-in Plaintiffs, the Court does not find the action entirely inconsistent with Defendants' right to arbitrate.

"purely defensive"); *see also Collado*, 2015 WL 1478609, at *6 ("Little or no litigation has occurred to date involving these parties. Virtually the only litigation practice that even arguably relates to the opt-in Plaintiffs is the motion practice that has already occurred relating to whether this matter should be conditionally certified as an FLSA collective action.").

Finally, Plaintiff has not demonstrated prejudice to Vargas resulting from Defendants' participation in the litigation. Plaintiff has not identified significant litigation expenses incurred by Vargas of the type "that arbitration was designed to alleviate." *Spinner v. Credit One Bank, N.A.*, No. 6:17-CV-340-ORL-37TBS, 2017 WL 6731967, at *3 (M.D. Fla. Dec. 29, 2017) (citation omitted). Although Compere states that she has been prejudiced because she has been required to "expend[ ] costs that [she] would not have had to expend in arbitration," the relevant inquiry is whether Vargas was prejudiced by Defendants' participation in the litigation—not Compere. First Resp. at 2; *see Collado*, 2015 WL 1478609, at *6 ("While there is certainly some prejudice to the named Plaintiff . . . that is not the type of prejudice that can affect this analysis."). Plaintiff's only allegation related the Opt-In Plaintiffs states that they have been "prejudiced by . . . missing work to participate in this litigation." First Resp. at 2.

The Court finds that Plaintiff has not met her burden to demonstrate that Defendants waived their right to compel arbitration of Vargas' claims. Accordingly, because Vargas is bound by the Vargas Arbitration Agreement, the Court will compel Vargas to arbitrate his claims.

IV. CONCLUSION

UPON CONSIDERATION of the Motions to Compel Arbitration (ECF Nos. 38 and 52), the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendants' First Motion to Compel Arbitration as to Plaintiff Melissa Compere and Opt-In Plaintiffs Valdo Sulaj and Diego Vargas (ECF No. 38) is GRANTED

IN PART AND DENIED IN PART, as set forth above, and Defendants' Second Motion to Compel Arbitration as to Opt-In Plaintiff Slagjana Kovachevska (ECF No. 52) is DENIED. The Clerk of the Court is INSTRUCTED to TERMINATE Opt-In Plaintiff Diego Vargas as a party to this action.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of August, 2019.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record