IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KING TORRES, on behalf of himself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	**CASE NO. 4:19-CV-00526**
AIR RESOURCES AMERICAS, LLC,	§	
Defendant.	§	

ORDER

Pending before the Court is Defendant Air Resources Americas, LLC ("Defendant" or "Air Resources")'s Motion to Dismiss and Motion to Compel Arbitration. **(Instrument No. 8)**.

I.

A.

Named Plaintiff King Torres ("Torres") brings this collective action suit, individually and on behalf of all others similarly situated, alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. (Instrument No. 1). Plaintiff alleges that although he regularly worked over 40 hours per week, Defendant had a written policy or practice of paying its employees at the regular rate of pay instead of at the statutory time-and-a-half rate. *Id.* at 1-2.

This case currently encompasses five at-will employees or former employees, Plaintiffs Torres, Robert Langham ("Langham"), Darrell Skinner ("Skinner"), Larry Enderli ("Enderli"), and Catina Hunter ("Hunter") who provide safety services to Defendant's oil and gas clients. (Instruments No. 1; No. 24).

In December 2015, Defendant implemented a Dispute Resolution Program to resolve disputes between it and its employees through arbitration. (Instrument No. 8 at 2). Employees hired prior to the

DR Program were sent notice of the DR Program as a modification to their employment contract. *Id.* Employees hired after Defendant implemented the DR Program signed the DR Program, which in relevant part provides:

> I, _____, acknowledge that this is an important agreement that affects my legal rights and that I may wish to discuss this agreement with legal counsel of my choice. I understand that this Agreement contains a mandatory arbitration provision, contains a jury trial waiver and prevents me from pursuing class-action relief in arbitration. I acknowledge that I received a copy of this Agreement and a copy of the Air Energi Dispute Resolution Program; I understand this Agreement in its entirety; have been given an opportunity to consult with an attorney regarding its contents; and enter into this Agreement voluntarily.

(Instrument Nos. 8-3 at 13; 8-6 at 17; 9-1 at 13; 16-4 at 36).

The DR Program also provides additional sections that are in dispute in this case as to Plaintiffs Torres and Langham:

> **General Acknowledgment**
> If any terms of this DR Program are found to conflict with the arbitration provisions found in an Employment Agreement or Contract for Services, the arbitration provision in the Employment Agreement and/or Contract for Services shall control.
>
> **Amendment**
> The DR Program may be amended by Air Energi at any time by giving at least 30 days' notice to current Workers. However, no amendment shall apply to a DR Program dispute which arises prior to the effective date of the amendment. The DR program may be terminated by Air Energi at any time by giving at least 30 days' termination notice to current Workers. However, termination shall not be effective as to DR Program Disputes which arise prior to the effective date of termination.

(Instrument Nos. 8-3 at 12; 8-6 at 16; 9-1 at 12; 16-4 at 35).

Plaintiffs Torres and Langham also signed Employment Agreements that referenced the DR Program and contain arbitration provisions. The following sections of the Employment Agreements of Torres and Langham are in dispute:

> **3.0 Amendments to Contract**
> The Employer reserves the right to review, revise and amend or replace the content of this Agreement and introduce new policies from time to time to reflect the changing needs of the business and to comply with updates to federal and/or state law.

> **7.0 Agreement Notices**
> Notices intended to affect this Agreement, and required or permitted to be given under this Agreement shall be in writing and deemed to be properly given only if addressed respectively to Employer at the address above and to the Employee address on file, and either:
> - delivered in person;
> - sent electronically by either email or facsimile with confirmation;
> - sent by certified mail, return receipt requested; or
> - delivered by private, prepaid courier.
>
> **11.0 Governing Law**
> . . . .
> 11.2 The Employee agrees to comply with any rules, policies, and procedures set out in the Dispute Resolution Program ("DR Program"), a copy of which has been given to the Employee. To the extent that there is any conflict between the terms of this Agreement and the DR Program, this Agreement shall control.

(Instruments No. 14-1 at 21-23; No. 8-8 at 2-4).

Plaintiff Skinner signed an Employment Agreement that pre-dates the DR Program. However, Skinner's Employment Agreement does not contain the same Governing Law language that is present in the Employment Agreements of Torres and Langham. Instead the relevant sections for Skinner's Employment Agreement provide:

> **3.0 Amendments to Contract**
> Any amendment to the terms of this Agreement shall only be effective if made in writing and signed by the Parties.
>
> **7.0 Agreement Notices**
> Notices intended to affect this Agreement, and required or permitted to be given under this Agreement shall be in writing and deemed to be properly given only if addressed respectively to Employer at the address above and to the Employee address on file, and either:
> - delivered in person;
> - sent electronically by either email or facsimile with confirmation;
> - sent by certified mail, return receipt requested; or
> - delivered by private, prepaid courier.
>
> **11.0 Governing Law**
> The validity, interpretation and construction of this Agreement shall be governed by and construed exclusively in accordance with Texas Law, without reference to its principles

> of conflict Laws [sic]. Venue of any dispute related to this Agreement shall lie exclusively, and be convenient, in Texas. Employee agrees that it will not challenge the choice of law or choice of venue provisions of this Section in any future proceedings.

(Instrument No. 16-5 at 2-4).

Plaintiff Enderli never executed a formal Employment Agreement. (Instrument No. 16 at 6 n.9). Instead, Enderli signed an Offer Letter, which provides that "Any disputes arising out of or related to this offer letter and/or your employment with the Company will be subject to the Company's Dispute Resolution Program, which will be provided to you." (Instrument No. 16-4 at 3). Enderli also signed the DR Program. (Instrument No. 8-7).

B.

On February 15, 2019, named Plaintiffs King Torres and Esther Huerta filed their Complaint against Defendant. (Instrument No. 1). Plaintiffs Darrell Skinner and Larry Enderli submitted their Notices of Consent to join this FLSA collective action on February 15, 2019. (Instrument No. 3). On February 19, 2019, Plaintiffs Robert Langham and Catina Hunter submitted their Notice of Consent to the Court. (Instrument No. 5).

Defendant filed a Motion to Dismiss and Compel Arbitration on April 1, 2019. (Instrument No. 8). Plaintiffs filed their Response on April 24, 2019. (Instrument No. 14). On May 3, 2019, Defendant filed its Reply, (Instrument No. 16), and, with leave of Court, Plaintiffs filed a Surreply on June 5, 2019. (Instrument No. 21).

On June 19, 2019, Plaintiff Esther Huerta filed a Notice of Withdrawal of Filed Consent and was terminated from this case. (Instrument No. 24).

II.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).[1] Section 2 of the FAA states that:

> A written provision in any . . . 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. The FAA directs district courts to stay proceedings brought "upon any issue referable to arbitration under an agreement in writing for such arbitration[.]" 9 U.S.C. § 3. District courts do not have discretion on the issue of arbitration, but rather must direct "parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

The court's primary concern is the intent of the parties as to whether or not to be bound by an arbitration clause and the scope of such provision, as arbitration is "strictly a matter of consent." *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 298 n.6 (2010). Arbitrability requires not merely a showing of an agreement, but also a showing of an agreement "that on its face appears broad enough to encompass the parties' claims." *Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985). When interpreting the scope of the arbitration provision, the court should construe ambiguities in favor of arbitration as it "must remain mindful of the strong federal policy favoring arbitration." *Explo, Inc. v. S. Nat'l Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986).

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[1] While state laws related to arbitration may be considered in some cases, courts apply the FAA to disputes surrounding the compulsion of arbitration absent express contractual language by the parties binding them to a specific state's arbitration laws. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 (1995). The mere inclusion of a general choice of law clause in a contract applies only to "substantive rights and obligations" and not to the determination of dismissal in favor of arbitration. *Mastrobuono*, 514 U.S. at 60.

While the express language of the FAA permits a federal court to stay proceedings pending arbitration, the Fifth Circuit has held that dismissal is appropriate "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). The Fifth Circuit has not decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss based on an arbitration provision, but where the parties have not objected to applying Rule 12(b)(3), the Fifth Circuit has reviewed the dispute under Rule 12(b)(3). *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472-73, 473 n.3 (5th Cir. 2010). On a motion to dismiss under either Rule 12(b)(1) or 12(b)(3), the court must take all well pled factual allegations as true and view all the facts in the light most favorable to the plaintiff. *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 448 (5th Cir. 2008).

III.

Defendant moves to dismiss Plaintiffs' claims and refer them to arbitration contending that all Plaintiffs in this case are bound by mandatory arbitration pursuant to signed agreements and as a condition of their employment. (Instrument No. 8). There is no dispute that Plaintiffs' FLSA claims are subject to the arbitration provisions if the Court finds that Plaintiffs entered into valid and enforceable agreements to arbitrate. The dispute between the parties is instead whether an agreement ever existed for Plaintiff Hunter and whether the arbitration agreements for Plaintiffs Torres, Langham, Enderli, and Skinner are unenforceable illusory contracts. (Instruments No. 8; No. 14). Accordingly, the Court must determine if the arbitration agreements in question existed and are valid under Texas contract law.

In determining whether to compel arbitration in accordance with an arbitration provision, the Court must analyze two factors: (1) whether the parties agreed to arbitrate, and (2) "whether any

federal statute or policy renders the claims non-arbitrable." *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004) (internal quotation omitted).

Regarding the first factor the court makes a two-step inquiry into: "(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." *Will-Drill Res., Inc. v. Samsom Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003) (internal quotation omitted). Although there is a strong federal policy favoring arbitration, a court does not apply this policy in its determination of the validity of an arbitration agreement. *Id.* To determine if the parties agreed to a valid arbitration agreement, ordinary state contract law applies. *Id.* Once a court determines that a valid arbitration agreement exists, then the court should settle ambiguities in favor of the "strong federal policy favoring arbitration." *Banc One*, 367 F.3d at 429. Due to the strong presumption in favor of arbitration, the party seeking to avoid arbitration bears the burden to show that the arbitration agreement is not enforceable. *In re Odyssey*, 310 S.W.3d 419, 422 (Tex. 2010).

Arbitration is a matter of consent, and the intent to be bound is a necessary pre-requisite to the enforcement of an arbitration provision. *Granite Rock Co.*, 561 U.S. at 299; *see also In Re Bunzl USA, Inc.*, 155 S.W.3d 202, 211-12 (Tex. App.—El Paso 2004, no pet.). If the parties consent to the terms of the contract, and there is no evidence of a parties' intent to require a signature as a condition precedent to the contract, a signature is not required. *Perez v. Lemarroy*, 592 F. Supp. 2d 924, 930 (S.D. Tex. 2008) (Hanen, J.) (quoting *ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc.*, 115 S.W.3d 287, 292 (Tex. App.—Corpus Christi 2003, pet. denied)). Where a contract expresses evidence that a signature was required, and the signature is absent, the agreement may be found unenforceable. *In Re Bunzl*, 155 S.W.3d at 211-12.

A.

Defendant argues that Plaintiff Hunter is subject to an agreement to arbitrate. (Instrument No. 8). Plaintiffs contend that Hunter never received or accepted the DR program as a condition of her employment. (Instrument No. 14 at 3). Plaintiffs also contend that Defendant concedes that Hunter did not sign the DR program, although it has a signature block, and that the presence of the empty signature block shows no intent to enter into arbitration. *Id.*

Defendant has the burden of proving that an agreement to arbitrate exists. *In re Odyssey Healthcare Inc.*, 310 S.W.3d at 422. Although a signature is not required, proof of the parties' intent to be bound by arbitration is necessary for the enforcement of any contract. *See Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 298 (2010). Under Texas contract law, the existence of an arbitration agreement is a question of intent and the presence or absence of a signature alone does not conclusively prove intent. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689-91 (5th Cir 2018). If the parties have unconditionally assented to terms stated in an unsigned document, then the document constitutes a binding written contract, whether signed or not. *See Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 454 (5th Cir 2013).

Plaintiff Hunter did not sign the DR Program document. (Instrument No. 14 at 16). She denies that she ever received the DR Program or that Defendant ever verbally told her that by continuing to work for Defendant she was assenting to the DR Program. (Instrument No. 15, Declaration of Catina Hunter). Defendant alleges that it was its practice to inform new and potential employees that their employment was conditioned on acceptance of the DR Program. However, Defendant provides no evidence that Hunter was personally informed of the policy. Defendant concedes that Hunter did not sign the DR Program or demonstrate her acceptance of the DR Program. Defendant has also provided no evidence that Hunter signed an Employment Agreement with an arbitration clause. The DR

Program contains a signature block. Defendant clearly intended to have its employees show their intent to enter into the program by having nearly all of the Plaintiffs in this case sign their copy of the DR Program. Therefore, the absence of Hunter's signature further supports Hunter's assertion that she did not agree to the DR Program or to arbitrate her claims. Defendant has failed to meet its burden of showing that an arbitration agreement between itself and Hunter existed.

Accordingly, Defendant's Motion to Dismiss and Compel Arbitration as to Hunter is DENIED. (Instrument No. 8).

B.

Plaintiffs Torres, Langham, Enderli and Skinner all signed the DR Program. (Instruments No. 8-3; No. 8-6; No. 9-1; No. 16-4). Their intent to be bound is clear and Defendant has met its burden regarding these Plaintiffs in showing the existence of their arbitration agreements.

Plaintiffs do not dispute the existence of the remaining signed DR Program agreements for Plaintiffs Torres, Langham, Enderli and Skinner. Plaintiffs instead contend that the agreements to arbitrate are illusory. (Instrument No. 14). Plaintiffs argue they are not required to arbitrate for three reasons: (1) Langham and Torres signed unenforceable arbitration agreements, (2) the employment agreements of Enderli and Skinner pre-date the DR program, and (3) the remaining arbitration clauses should be collaterally estopped based on a prior proceeding in the Southern District of Texas. (Instrument No. 21 at 1-2).

A party attempting to enforce an arbitration agreement must show that the agreement meets all requisite contract formation elements, including consideration. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 228 (Tex. 2003). "At-will employment does not preclude formation of other contracts between employer and employee, so long as neither party relies on continued employment as consideration for the contract." *Id.* The parties' intent controls when deciding whether an arbitration

agreement is valid. *Id.* at 229. Courts give contract terms their plain and ordinary meaning unless the contract indicates that the parties intended a different meaning. *Dynegy Midstream Servs., Ltd. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009).

1.

Plaintiff Skinner signed an Employment Agreement and his copy of the DR Program. (Instrument No. 8-6). However, his Employment Agreement differs from the ones signed by Torres and Langham. (Instruments No. 8-6; No. 16-5). Skinner's Employment Agreement requires both parties to sign any amendments to the Employment Agreement for the amendment to be effective. Moreover, the Governing Law section of Skinner's Employment Agreement does not provide that any arbitration provision in the Employment Agreement takes precedence over a conflicting arbitration provision in the DR Program. (Instrument No. 8-6). Although Skinner's 2014 Employment Agreement pre-dates the DR Program adopted in December 2015, Defendant provided notice to Skinner about the DR Program through email on December 5, 2015. *Id.* Skinner signed his acknowledgment of the DR Program on January 5, 2016. (Instrument No. 8-6 at 17).

Similarly, Plaintiff Enderli signed an Offer Letter with no separate arbitration provisions. (Instrument No. 16-4 at 35). The Offer Letter required Enderli to resolve any disputes through the DR Program, and Enderli signed the DR Program agreement on January 3, 2018. (Instrument No. 16-4 at 35).

Texas law accepts a mutual agreement to arbitrate as acceptable consideration for a valid arbitration agreement. *Lizalde v. Vista Quality Mkts.*, 746 F.3d 222, 225 (5th Cir. 2014); *see also Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 203 (5th Cir. 2016) (proper modification to an at-will employment agreement may constitute consideration when there is unequivocal notice of the change and acceptance of that change).

Defendant provided notice to Skinner who accepted arbitration as a modification to his Employment Agreement. Plaintiff Enderli also signed the DR Program agreement accepting its terms. Therefore, Plaintiffs Skinner and Enderli have valid arbitration agreements and are subject to arbitration.

Accordingly, Defendant's Motion to Dismiss and Compel Arbitration as to Skinner and Enderli is GRANTED. (Instrument No. 8).

2.

Plaintiffs Torres and Langham contend that their arbitration agreements are illusory because under the terms of the arbitration agreement, Defendant has the unilateral authority to terminate the arbitration agreement at any time without notice. (Instrument No. 14 at 9-15). Plaintiffs assert that although the DR Program contains a savings clause, this savings clause is contradicted by the Amendments Section of the Employment Agreements for Torres and Langham. (Instrument No. 21 at 3-6).

Defendant asserts that the DR Program significantly limits its right to amend by requiring notice of changes and preventing those changes from having a retroactive effect. (Instrument No. 16 at 5). Defendant contends that by reading the DR Program as a separate arbitration agreement, the agreements to arbitrate as to Torres and Langham are not illusory. *See id.* at 7-10.

Where an arbitration agreement is a "stand-alone" contract, separate and apart from an employment contract, the arbitration agreement itself must be supported by consideration. *See In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 607 (Tex. 2005). Arbitration agreements, like other contracts, must be supported by consideration. *Lizalde*, 746 F.3d at 225. Where an arbitration agreement is a "stand-alone" contract, separate and apart from an employment contract, the arbitration agreement itself must be supported by consideration. *See AdvancePCS*, 172 S.W.3d at 607. "Under

Texas law, an arbitration clause is illusory if one party can 'avoid its promise to arbitrate by amending the provision or terminating it all together.'" *Id.* (quoting *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010)). The question in this determination is whether one party "has the power to make changes to its arbitration policy that have retroactive effect, meaning changes to the policy that would strip the right of arbitration from an employee who has already attempted to invoke it." *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012).

Defendant asserts that the language from the DR Program is the equivalent of a valid savings clause.

> **Amendment**
> The DR Program may be amended by Air Energi at any time by giving at least 30 days' notice to current Workers. However, no amendment shall apply to a DR Program dispute which arises prior to the effective date of the amendment. The DR program may be terminated by Air Energi at any time by giving at least 30 days' termination notice to current Workers. However, termination shall not be effective as to DR Program Disputes which arise prior to the effective date of termination.

(Instrument Nos. 8-3 at 13; 8-6 at 17; 9-1 at 13; 16-4 at 36).

First, Plaintiffs contend that the Amendment Section of the DR Program contradicts the Amendment Section of the Employment Agreement which states:

> **3.0 Amendments to Contract**
> The Employer reserves the right to review, revise and amend or replace the content of this Agreement and introduce new policies from time to time to reflect the changing needs of the business and to comply with updates to federal and/or state law.

Second, Plaintiffs contend that the General Acknowledgment Section of the DR Program and Section 11.2 of the Employment Agreement create a contradiction about the type of notice that is required for amendments to the Employment Agreement:

> **General Acknowledgment**
> If any terms of this DR Program are found to conflict with the arbitration provisions found in an Employment Agreement or Contract for Services, the arbitration provision in the Employment Agreement and/or Contract for Services shall control.
>
> **11.0 Governing Law**

. . . .

11.2 The Employee agrees to comply with any rules, policies, and procedures set out in the Dispute Resolution Program ("DR Program"), a copy of which has been given to the Employee. To the extent that there is any conflict between the terms of this Agreement and the DR Program, this Agreement shall control.

Torres and Langham argue that the DR Program's notice requirement is nullified by the Amendment Section of the Employment Agreement. (Instrument No. 14 at 3-4, 9-15). They contend that their Employment Agreements give Defendant broad authority to make amendments or terminate the agreement to arbitrate. *Id.* Moreover, because the Governing Law section in their Employment Agreements provides that any conflicts between the Employment Agreements and the DR Program are resolved in favor of the Employment Agreements, Torres and Langham contend that their arbitration agreements with Defendant are illusory. *Id.*

A party may retain some power to terminate an agreement. *Lizalde*, 746 F.3d at 226. However, the retention of power must satisfy three standards: (1) the power must only extend to prospective claims, (2) the power must be equally assertable by employer and employee, and (3) advance notice must be required before termination is valid. *In re Halliburton Co.*, 80 S.W.3d 566, 569-70 (Tex. 2002). Texas courts have explained that a *Halliburton*-style savings clause requires notice alongside an inability to retroactively modify the claims. *Torres v. S.G.E. Mgmt., LLC*, 397 F. App'x 63, 68 (5th Cir. 2010) (citing several supporting Texas and Fifth Circuit cases).

In *Lizalde*, an employee and his employer entered into two agreements: an Arbitration Agreement that could be changed only prospectively on ten-days notice to the employee, and a Benefit Plan that could be terminated at any time. *Lizalde v. Vista Quality Mkts.*, 746 F.3d 222, 224 (5th Cir. 2014). The employee subsequently had an ERISA dispute against the employer. *Id.* at 224-25. The employer sought arbitration. *Id.* The employee argued that the terms of the Benefit Plan gave his employer the unilateral power to amend their agreement to arbitrate, making the Arbitration Agreement illusory. *Id.* at 225. The Fifth Circuit, reading the Arbitration Agreement and Benefit Plan

as a single contract, found that there was no indication that the parties intended the broader termination provision found in the Benefit Plan to also apply to the Arbitration Agreement. *Id.* at 226. "[T]he Arbitration Agreement is specifically crafted to provide a narrowly-tailored termination clause that ensures its enforceability; this deliberate wording makes it difficult to accept that the parties intended for the unconstrained termination provision found in the Benefit Plan to apply to the Arbitration Agreement." *Id.* at 226-27. Because both agreements contained termination provisions that clearly demarcated their respective provisions, the Fifth Circuit found that the broad termination provision in the Benefit Plan did not render the Arbitration Agreement illusory. *Id.* at 227.

Conversely, in *Carey*, the Fifth Circuit refused to enforce an arbitration agreement contained in an employee handbook. *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202, 204 (5th Cir. 2002). The handbook had a Changes-in-Terms Clause permitting the employer to "revise, delete, and add" to the handbook. *Id.* at 206. The court explained that "the fundamental concern driving this line of case law [on an illusory arbitration agreement] is the unfairness of a situation where two parties enter into an agreement that ostensibly binds them both, but where one party can escape its obligations under the agreement by modifying it." *Id.* at 209. Therefore, even though the Change-in-Terms Clause required notice to employees before a change in an employment policy became effective, the clause still made the arbitration agreement illusory because it would "arguably allow [the employer] to avoid its promise to arbitrate as to claims that were already in progress." *Id.*

The DR Program provides that amendments to the arbitration provisions therein are only effective if they relate to prospective claims and if Defendant provides notice to the employee. The Employment Agreement, by contrast, states that changes can be made "from time to time" and does not require any notice to employees for amendments to be effective. Therefore, one document has specific notice requirements while the other gives broad authority to the employer to make changes as

Defendant wishes. The General Acknowledgment section of the DR Program and Section 11 of the Employment Agreement expressly state that contradictions between the two documents are resolved by the Employment Agreement. Accordingly, the language of the Employment Agreement prevails regarding the contradictory notice requirement. The DR Program's notice language is superseded by Section 3 of the Employment Agreement.

Section 3 of the Employment Agreement provides that Defendant "reserves the right to review, revise and amend or replace the content of this Agreement and introduce new policies from time to time to reflect the changing needs of the business and to comply with updates to federal and/or state law." The Employment Agreement's provision contains no limitation on Defendant's ability to make amendments retroactively and Section 3 applies to the entire Employment Agreement. The DR Program, which requires arbitration, is subject to the terms of the Employment Agreement, and the Employment Agreement, which contains an arbitration clause, provides Defendant unilateral authority to terminate or amend the arbitration agreement "from time to time." While the Employment Agreements for Torres and Langham and the DR Program have notice requirements, these notice requirements do not prevent Defendant from escaping any obligation to arbitrate.

Additionally, only Defendant has the right to amend the Employment Agreement and employees are not given the right to object to amendments. Therefore, Defendant's broad authority to amend the arbitration provisions "from time to time" is not equally assertable by both employer and employee and notice is not required before Defendant can terminate its agreement to arbitrate. Defendant's arbitration agreements as to Langham and Torres are illusory and therefore unenforceable.

Accordingly, Defendant's Motion to Dismiss and Compel Arbitration as to Langham and Torres is DENIED. (Instrument No. 8).

C.

Plaintiffs contend that Defendant is collaterally estopped from compelling arbitration because another court in the Southern District of Texas has already ruled that the same arbitration clauses are unenforceable. (Instrument No. 14 at 5-8). Plaintiffs argue that there was full and fair litigation of the same fact issues regarding the enforceability of Defendant's arbitration clauses in a prior proceeding, *Hernandez et al. v. Air Resources Americas, LLC*, No. 4:17-CV-00689 (S.D. Tex., Rosenthal, J.). Defendant contends that collateral estoppel requires a final judgment on the merits and that there is no final ruling on the merits in *Hernandez*. (Instrument No. 16 at 2-5).

A party seeking to invoke the doctrine of collateral estoppel must establish: "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Terry v. Chicago Bridge & Iron Co.*, 283 F. Supp. 3d 601, 606 (S.D. Tex. 2017) (Gilmore, J.) (quoting *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Collateral estoppel "only precludes the relitigation of identical issues of facts or law that were actually litigated and essential to the judgment in a prior suit." *Van Dyke v. Bosswell, O'Toole, Davis, & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985).

The court in *Hernandez* never ruled on whether the arbitration agreements at issue here are illusory because the parties settled those plaintiffs' claims out of court. No. 4:17-CV-00689. The parties never fully and fairly litigated the issue. Collateral estoppel, therefore, does not apply here.

IV.

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss and Compel Arbitration, **(Instrument No. 8)**, is **GRANTED in part** and **DENIED in part**.

Defendant's Motion to Dismiss and Compel Arbitration is **DENIED** as to Plaintiffs Torres, Langham, and Hunter.

Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED** as to Plaintiffs Enderli and Skinner.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 25th day of July, 2019, at Houston, Texas.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE