2016 WL 524253
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Nina Rossi, Destin Defeo, and
Martin Herman, Plaintiffs,
v.
SCI Funeral Services of New York, Inc., and
Alderwoods (New York), LLC, Defendants.

15 CV 473 (ERK) (VMS)
|
Signed 01/28/2016

Attorneys and Law Firms

David Harrison, Julie Salwen, Harrison, Harrison & Associates, Red Bank, NJ, for Plaintiffs.

Heather Sherrod, Norton Rose Fulbright, Houston, TX, Samantha E. Beltre, Norton Rose Fulbright US LLP, New York, NY, for Defendants.

REPORT AND RECOMMENDATION

VERA M. SCANLON, United States Magistrate Judge

***1** Before the Court on referral from the Honorable Edward R. Korman are Plaintiffs' and Defendants' cross-motions to enforce an arbitration agreement to which the parties agreed. At issue is whether the Court or an arbitrator should decide whether Plaintiffs should be permitted to seek classwide arbitration; Plaintiffs argue that an arbitrator should decide, while Defendants argue that this is a question for the Court to decide. For the reasons stated herein, this Court respectfully recommends that District Judge Korman **grant Plaintiffs' motion** and **deny Defendants' motion**, thus requiring the parties to submit the question of classwide arbitration to an arbitrator.

I. BACKGROUND

A. Procedural Background

On March 3, 2015, Plaintiffs Nina Rossi, Martin Herman and Destin Defeo commenced this putative class action by filing their Complaint against SCI Funeral Services of New York, Inc. *See* Complaint, ECF No. 1. On July 20, 2015, Plaintiffs filed an Amended Complaint, which is the currently operative pleading, adding Alderwoods (New York), L.L.C. as a defendant. *See* Amended Complaint, ECF No. 22.

According to the Complaint, the facts of which are summarized here solely for context, SCI Funeral Services of New York, Inc. and Alderwoods (New York), L.L.C. (collectively, "Defendants") operate various funeral homes in the New York City metropolitan area and around the United States. *Id.* ¶ 14. At any given time, Defendants employ approximately ten to fifteen "Pre–Need Funeral Directors," who sell pre-need funeral plans and related services in Defendants' New York City metropolitan area. *Id.* ¶ 16. Plaintiffs were employed by Defendants as Pre–Need Funeral Directors during various periods between October 2011 and August 2014. *Id.* ¶¶ 6–8, 16. Pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. § 201, et *seq.* ("FLSA"), Plaintiffs seek, *inter alia*, unpaid wages, unpaid overtime and liquidated damages. *Id.* ¶ 1. Plaintiffs also seek to represent a putative class of all SCI Pre–Need Funeral Directors who were employed from January 2012 to present. *Id.* ¶ 33.

The parties jointly requested a pre-motion conference before District Judge Korman. *See* ECF No. 7. As explained in their joint letter, it is undisputed that Plaintiffs' individual claims are subject to the arbitration agreements that each Plaintiff executed when hired by Defendants, but the parties disagree on two threshold matters: (1) who should decide whether the claims may proceed on a class basis in arbitration, the Court or an arbitrator; and (2) whether, as a result of the arbitration agreements, the Court should dismiss Plaintiffs' claims with prejudice, dismiss Plaintiffs' claims without prejudice or stay the litigation pending completion of the arbitration or arbitrations. *Id.* p. 1.

District Judge Korman referred the parties' pre-motion conference request to this Court. This Court held a pre-motion conference, during which a briefing schedule for the parties' cross-motions to enforce the arbitration agreement was set. *See* ECF No. 15. After the parties served their cross-motions, Defendants' and Plaintiffs' oppositions followed. *See* ECF Nos. 17–20. The parties subsequently filed their fully briefed motions. *Id.*

B. The Arbitration Agreement

***2** As noted above, Plaintiffs were previously employed by Defendants as Pre–Need Funeral Directors.[1] At the commencement of his or her employment, each Plaintiff executed an agreement entitled "Principles of Employment & Arbitration Procedures." *See generally* ECF No. 17, Exhibit A (the "arbitration agreement"). The agreements included a summary of Defendants' problem-resolution procedure and various policies governing Plaintiffs' employment. *Id.* Of particular relevance, each agreement contained the following arbitration provision:

> *Matters Subject to Arbitration*. Associate and the Company agree that, except for the matters identified in Section 2[2] below and except as otherwise provided by law, all disputes relating to any aspect of Associate's employment with the Company shall be resolved by binding arbitration. This includes, but it not limited to, any claims against the Company, its affiliates or their respective officers, directors, associates, or agents for breach of contract, wrongful discharge, discrimination harassment, defamation, misrepresentation, and emotional distress, as well as any disputes pertaining to the meaning or effect of this Agreement. The arbitration shall be conducted in accordance with the procedures attached hereto as Exhibit "A."

Id. at p. 1. In turn, Exhibit "A" contained the following provision:

> *Procedural Rules*.... [T]he arbitration proceedings shall be conducted in accordance with the employment arbitration rules of the American Arbitration Association....

Id. at p. 3.

C. The Parties' Motions, Generally

The parties have filed cross-motions, which, in essence, argue for diverging interpretations of the arbitration agreement.

i. Plaintiffs' Motion To Enforce

Plaintiffs argue that, because the arbitration agreement explicitly requires that "all disputes related to any aspect" of the employee's employment, including "any disputes pertaining to the meaning or effect of th[e] [a]greement," be resolved in arbitration, Defendants agreed to arbitrate the issue of arbitrability, regardless of whether this issue is characterized as a "gateway" question or otherwise. Plaintiffs also argue that Exhibit "A" of the arbitration agreement is strong evidence that the parties must arbitrate the issue of arbitrability as the employment arbitration rules of the American Arbitration Association ("AAA") explicitly provide arbitrators with the power to rule on his or her own jurisdiction, including the existence, scope or validity of the arbitration agreement, and the Second Circuit and several other circuits have required arbitration when similar language was utilized.

ii. Defendants' Motion To Enforce

Defendants argue that the Court, not an arbitrator, should decide whether the arbitration agreement permits arbitration of claims on a class or collective, as opposed to a bilateral, basis is a "gateway" question of arbitrability. Further, Defendants argue that, because the arbitration agreement does not contemplate classwide arbitration, the Court should compel each of the three Plaintiffs to pursue his or her claims in separate individual arbitrations.

II. ANALYSIS

A. Whether Plaintiffs' Claims are Subject to Arbitration

***3** "When a party seeks to compel arbitration of a federal statutory claim, a court must [first] determine 'whether Congress intended those claims to be nonarbitrable.' " *Lawrence v. Sol G. Atlas Realty Co.*, 14 CV 3616(DRH), 2015 WL 5076957, at *3 (E.D.N.Y. Aug. 27, 2015) (quoting *JLM Industries, Inc. v. Stolt–Nielsen SA*, 387 F.3d 163, 169 (2d Cir.2004)). The parties do not dispute that Plaintiffs' individual claims are subject to arbitration as a result of the previously executed arbitration agreements. This is consistent with decisions of courts in this Circuit, which have consistently held that FLSA and NYLL claims are arbitrable. *See, e.g.*, *Lawrence*, 2015 WL 5076957, at *3 ("It is well established that ... FLSA claims, as well as New York [ ] Labor Law claims, are susceptible to arbitration...."); *Patterson v. Raymours Furniture Co.*, 96 F.Supp.3d 71, 78–79 (S.D.N.Y.2015) (FLSA and NYLL claims arbitrable); *Reynolds v. De Silva*, 09 Civ. 9218(CM), 2010 WL 743510,

at *5 (S.D.N.Y. Feb. 24, 2010) (same); *Ciago v. Ameriquest Mortgage Co.*, 295 F.Supp.2d 324, 332 (S.D.N.Y.2003) (same).

B. Arbitrations And Arbitrability

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, "declares a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (internal quotation marks & alterations omitted). "Indeed, the Second Circuit has held that 'it is difficult to overstate the strong federal policy in favor of arbitration.' " *Klein v. ATP Flight School, LLP*, 14 CV 1522(JFB), 2014 WL 3013294, at *4 (E.D.N.Y. July 3, 2014) (quoting *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir.2006)). "Of course, notwithstanding the policy favoring arbitration, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Id.* (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

"Courts presume that the parties intend courts, not arbitrators, to decide ... disputes about 'arbitrability,' such as 'whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " *BG Grp., PLC v. Republic of Argentina*, 134 S.Ct. 1198, 1206 (2014) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). "That presumption may be overcome if the parties have 'clearly and unmistakably' delegated to an arbitrat[or] the authority to resolve issues of arbitrability." *Klein*, 2014 WL 3013294, at *4 (quoting *Howsam*, 537 U.S. at 83 (2002)); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 938 (1995) ("[C]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."). "In other words, questions concerning the scope of an arbitration clause, *i.e.*, whether particular claims fall within the arbitration clause, are to be determined by an arbitrator, not a court, if the parties have so provided clearly and unmistakably." *Id.* at *9.

A "question of arbitrability," often characterized as a "gateway" issue, has been described as

> the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam, 537 U.S. at 83–84. For example, "[d]isputes about whether the parties are bound by the arbitration agreement, or if a particular controversy falls under the scope of an arbitration agreement, are both the type of gateway issues that go to arbitrability" and are for courts to decide. *Guida v. Home Sav. of Am., Inc.*, 793 F.Supp.2d 611, 615 (E.D.N.Y.2011) (citing *Howsam*, 537 U.S. at 84). On the other hand, procedural questions, which develop as a result of the dispute and bear on its final disposition, such as "[i]ssues of waiver, delay, or a like defense," are presumptively not for a court, but for an arbitrator, to decide. *Id.* (quoting *Howsam*, 537 U.S. at 84).

***4** In order to find that the Court, and not the arbitrator, is to decide whether class arbitration is available, the Court must make two determinations. "First, the [c]ourt must assess whether this is a question of arbitrability that is presumptively for [c]ourt resolution." *In re A2P SMS Antitrust Litig.*, 12 Civ. 2656(AJN), 2014 WL 2445756, at *5 (S.D.N.Y. May 29, 2014). If answered in the affirmative, "the Court must [then] find that the [arbitration agreement] does not 'clearly and unmistakably' assign this question to the arbitrator." *Id.* If the answer to either question is negative, the class issue is one for the arbitrator.

The question of "who-decides" the availability of class arbitration has not yet been expressly decided by the Supreme Court. *See Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010); *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 n.2 (2011) *("Stolt–Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability."). It likewise appears that the Second Circuit has not yet had occasion to do so either. In fact, District Judge Alison J. Nathan of the Southern District of New York recently stated in a thoughtful and thorough opinion: "[T]he issue of who makes the initial determination regarding class arbitration is particularly difficult precisely because there is no controlling Supreme Court or Second Circuit precedent on point and the only available guiding precedent does not cut decisively in

either direction." [3] *In re A2P SMS Antitrust Litig.*, 12 Civ. 2656(AJN), 2015 WL 876456, at *3 (S.D.N.Y. Mar. 2, 2015) (internal quotations omitted).

C. The Parties' Arguments

i. Defendants' Argument

Defendants' argument in favor of the court deciding whether class arbitration is available hinges principally on decisions from the Third and Sixth Circuit Courts of Appeals, which, in essence, stand for the proposition that whether an arbitration agreement authorizes classwide arbitration is a gateway question of arbitrability that presumptively should be decided by the court.

In *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir.2013), the Sixth Circuit determined whether an arbitration agreement between subscribers and a legal research company, LexisNexis, required the issue of class arbitrability to be submitted to an arbitrator, rather than the court. The arbitration agreement at issue stated that "any controversy, claim or counterclaim ... arising out of or in connection" with the parties' agreement would be arbitrated, and that the then-current rules of the AAA would apply. *Reed Elsevier*, 734 F.3d at 599. The Sixth Circuit held that whether an arbitration agreement permits classwide arbitration is a gateway matter reserved for judicial determination unless the parties "clearly and unmistakably" provided otherwise, which the subject agreement did not do. *Id.* In particular, the Sixth Circuit pointed to the "total absence of any reference to classwide arbitration" in the agreement, which rendered it "silent or ambiguous as to whether an arbitrator should determine the question of classwide arbitrability." *Id.*

***5** The Third Circuit, in *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326 (3d Cir.2014), came to a similar conclusion. In *Opalinski*, plaintiffs were former employees who claimed that the defendant-employer failed to pay them overtime wages in violation of the FLSA. *Opalinski*, 761 F.3d at 329. Plaintiffs sought classwide arbitration and relied on a clause in their arbitration agreement which provided for the arbitration of "any dispute or claim arising out of or relating" to their employment. *Id.* at 335. Relying primarily on *dicta* in the Supreme Court's *Stolt–Nielsen* and *Oxford Health* decisions, discussed *infra*, the Third Circuit held that the classwide arbitration determination was a question of arbitrability for the court. *Id.* at 332–33. Similar to the Sixth Circuit's decision in *Reed Elsevier*, the Third Circuit was not swayed by the broad language in the arbitration agreements, which were "silent as to the availability of classwide arbitration or whether the question should be submitted to the arbitrator" such that the "strong presumption favoring judicial resolution of questions of arbitrability [wa]s not undone." *Id.* at 335.

Relying on these two cases, Defendants argue that the Court, not an arbitrator, should determine this "gateway" issue. [4] Defendants further argue that, as in *Reed Elsevier* and *Opalinski*, Plaintiffs here are unable to rebut the presumption of court determination because the parties' arbitration agreements do not make mention of class arbitrability and, even if construed to be ambiguous, are insufficient to convey a "clear and unmistakable" intent to have the arbitrator decide the issue of class arbitrability.

ii. Plaintiffs' Argument

Plaintiffs argue that the broad language of the arbitration agreement, which covers "all disputes relating to any aspect of [the] Associate's employment," and "any disputes pertaining to the meaning or effect of [the] Agreement," as well as the arbitration agreements' incorporation of the AAA's rules, provide clear evidence that the parties' intent to submit the issue of classwide arbitration to an arbitrator. In support of their argument, Plaintiffs primarily rely on recent cases from the Eastern and Southern Districts of New York, which hold that the possibility of classwide arbitration is a procedural question for an arbitrator to decide, *see Victorio v. Sammy's Fishbox Realty Co.*, 14 Civ. 8678(CM), 2015 WL 2152703, at *48 (S.D.N.Y. May 6, 2015), *In re A2P SMS Antitrust Litig.*, 2014 WL 2445756, at *11–12; *Guida*, 793 F.Supp.2d at 614–15; or provide reason to believe that the parties' arbitration agreement should be construed as delegating the power to determine arbitrability to an arbitrator, *see Klein v. ATP Flight School, LLP*, 14 CV 1522(JFB), 2014 WL 3013294, at *9–10 (E.D.N.Y. July 3, 2014).

D. Relevant Law

i. Supreme Court Precedent

Although the Supreme Court has yet to provide a conclusive answer as to whether the availability of classwide arbitration

is a question for the court or the arbitrator, it is helpful to review the pertinent cases. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Supreme Court examined whether classwide arbitration was allowed "by an agreement that was 'silent' with respect to the availability of such procedures." *In re A2P SMS*, 2014 WL 2445756, *5 (citing *Bazzle*, 539 U.S. at 452–53). A plurality of the *Bazzle* Court concluded that, in such a circumstance, the availability of classwide arbitration was not a question of arbitrability because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties ... [, but only] contract interpretation and arbitration procedures." *Bazzle*, 539 U.S. at 451–53. Specifically, "the question is not whether the parties wanted a judge or an arbitrator to decide whether they agreed to arbitrate a matter. Rather, the relevant question ... is what kind of arbitration proceeding the parties agreed to." *Id.* at 452. In light of the underlying arbitration agreement's " 'sweeping language concerning the scope of the questions committed to arbitration'–namely 'all disputes, claims or controversies' arising from or relating to the contract or the relationships resulting from the contract–the plurality viewed the availability of classwide arbitration as a question for the arbitrator." *In re A2P SMS*, 2014 WL 2445756, *5 (quoting *Bazzle*, 539 U.S. at 453).

***6** Arguably, subsequent Supreme Court decisions may have cast some doubt on the *Bazzle* plurality's decision. In *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the arbitration agreement at issue was silent on the availability of classwide arbitration, a fact to which the parties had stipulated, yet the arbitrators determined that the arbitration should proceed on a class basis. *Id.*, 559 U.S. at 668–69. The Second Circuit confirmed this decision, *see* 548 F.3d 85, 97–99 (2d Cir.2008), but the Supreme Court reversed "on the ground that the parties' stipulation that there had been no agreement about class arbitration meant precisely that –there was no agreement to arbitrate claims on behalf of a class." *Edwards v. Macy's Inc.*, 14 Civ. 8616(CM), 2015 WL 4104718, at *9 (S.D.N.Y. June 30, 2015); *see Stolt–Nielsen*, 559 U.S. at 676–77. After repeatedly emphasizing that the parties stipulated that they had not come to an agreement on the availability of class arbitration, the Supreme Court held that the arbitrators exceeded their powers by compelling an unwilling party to participate in such an arbitration. *Stolt–Nielsen*, 559 U.S. at 676–77.

In doing so, the Supreme Court did not reach the "who-decides" issue, but, in *dicta*, stated the following:

> [T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration.... In fact, however, only the plurality decided that question. But we need not revisit that question here....

Stolt–Nielsen, 130 S.Ct. at 1772. Later, the Supreme Court discussed the foundational principles underlying the Federal Arbitration Act ("FAA"), including "the basis precept that arbitration is a matter of consent, not coercion." *Id.* at 685. With this in mind, the Supreme Court explained that

> [a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate ... because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. In other words, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684 (emphasis in the original).

During the following term, the Supreme Court decided *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), invalidating a state court ruling that "classif[ied] most collective-action waivers in consumer contracts as unconscionable," and thus, unenforceable. Id. at 1745–46. In doing so, the Supreme Court–as it did in Stolt–Nielsen–explained in length the fundamental differences between class and bilateral arbitration, and noted that "[a]rbitration is poorly suited to the higher stakes of class litigation." *Id.* at 1750–52.

Most recently, in *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013), the Supreme Court addressed whether an arbitrator exceeded his powers under the FAA by permitting class arbitration where the parties agreed to submit the issue to an arbitrator. *Id.* at 2067–68. The Court affirmed the arbitrator's decision, explaining that the arbitrator had considered the parties' contract and appropriately decided whether it reflected an agreement to permit class proceedings, which sufficed to show that the arbitrator did not "exceed

his powers." *Id.* at 2069. In its analysis, the Supreme Court noted that it "would face a different issue if [the petitioner] had argued below that the availability of class arbitration" is a "question of arbitrability," which is "presumptively for courts to decide." *Id.* at 2069 n.2. In any event, *Oxford Health* made clear, yet again, that the Supreme Court "has not yet decided whether the availability of class arbitration" is for a court or for an arbitrator to resolve. *Id.*

***7** Although the Supreme Court has not issued binding precedent on the issue before the Court, it "has provided guideposts for the Court's consideration." *In re A2P SMS*, 2014 WL 2445756, *7. In sum "*Bazzle* ... suggests that the arbitrator should decide the availability of class arbitration, whereas *Stolt–Nielsen[, Oxford Health]* and *Concepcion* caution that classwide arbitration and individual arbitrations are very different procedures." *Id.*

ii. Second Circuit Precedent

Some Second Circuit decisions touch on the topic of classwide arbitration, although, in this Court's opinion, none is controlling. In any event, both parties' cite several of these cases for various propositions, so it is useful to discuss them.

In *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 554 F.3d 300 (2d Cir.2009) (*Amex I*), *vacated on other grounds Am. Express Co. v. Italian Colors Rest.*, 559 U.S. 1103 (2010), the Second Circuit addressed the enforcement of a mandatory arbitration clause in a commercial contract that also contained a "class action waiver," that is, a provision which forbid the parties from pursuing anything other than individual claims in arbitration. *Id.* at 302.

The Second Circuit did not ultimately decide whether class action waivers were universally enforceable, but, in striking down the specific provision at issue, held that courts, rather than arbitrators, are to address whether class action waivers contained in arbitration agreements are enforceable. *Amex I*, 554 F.3d at 311. "Specifically, *Amex I* explained that because the plaintiffs in that case were disputing the enforceability of the class action waiver and, 'by extension, the validity of the parties' agreement to arbitrate,' the plaintiffs had raised a question of arbitrability about whether the parties are bound by the arbitration clause." *In re A2P SMS*, 2014 WL 2445756, at *7 (quoting *Amex I*, 554 F.3d at 311).

Unlike *Amex I*, the dispute here does not involve a challenge to the enforceability of a class action waiver, but instead, raises a question of contract interpretation. "Although there are parallels between the two issues in terms of their practical effect–both may be dispositive as to the availability of class arbitration and whether an agreement provides for the availability of class arbitration might raise issues pertaining to the enforceability of that agreement–the former relates to whether the parties are bound by the plain terms of their arbitration agreement whereas the latter relates to determining the parties' intent as to a binding agreement to arbitrate." *Id.* In fact, "*Amex I* itself noted this distinction, explaining that *Bazzle* did not require that the arbitrator resolve the enforceability of a class action waiver because, unlike *Bazzle*, the Second Circuit 'd [id] not face an issue of contract interpretation; the [arbitration agreement] is unambiguous in forbidding arbitration to proceed on a class basis.' " *Id.* (quoting *Amex I*, 554 F.3d at 311 n.10).

In *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir.2011), an arbitration panel permitted class arbitration, and the Second Circuit examined the propriety of that decision under the deferential standard of the FAA in reviewing arbitration awards. The parties had agreed to submit the question of class arbitration to the arbitrators, 646 F.3d at 116, and thus, *Jock* did not address the threshold "who-decides" issue. *See Guida*, 793 F.Supp.2d at 619 n. 7.

***8** Finally, *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 Fed. Appx. 327 (2d Cir.2009), which was a summary order and decided before *Stolt–Nielsen*, treated the *Bazzle* plurality's holding as controlling law without any substantive analysis. *Id.* at 329.

iii. District Court Decisions

District courts in this circuit presented with this question have generally found that the issue of classwide arbitration is for an arbitrator to decide. For example, in *Edwards v. Macy's Inc.*, 14 Civ. 8616(CM), 2015 WL 4104718, at *12 (S.D.N.Y. June 30, 2015), and *In re A2P SMS Antitrust Litig.*, 12 Civ. 2656(AJN), 2014 WL 2445756, at *10 (S.D.N.Y. May 29, 2014), both of which were decided after *Stolt–Nielsen*, *Oxford Health* and *Concepcion*, courts found, after lengthy analysis, that whether class arbitration is available is a procedural issue for an arbitrator, not the Court, to decide. Similarly, although issued prior to *Stolt–Nielsen*, in *Guida v. Home Sav. of Am., Inc.*, 793 F.Supp.2d 611 (E.D.N.Y.2011), District

Judge Joseph F. Bianco of this District likewise found, after examining the interplay of *Bazzle* and *Stolt–Nielsen*, "that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide." *Id.* at 616; *see Victorio*, 2015 WL 2152703, at *20 (holding, without analysis, that "[w]hether the parties will arbitrate as a class or on an individual basis is a question for the arbitrator, not the Court"); *but see Anwar v. Fairfield Greenwich Ltd.*, 950 F.Supp.2d 633, 639 (S.D.N.Y.2013) (holding that the "issue of whether a case may proceed as a class action" is a "gateway dispute about whether the parties are bound by a given arbitration clause" and thus, "a question of arbitrability for a court to decide"), *reconsideration denied* (S.D.N.Y. July 23, 2013).

E. Who Should Decide If The Arbitration Agreements Authorize Classwide Arbitration

As explained throughout this Report and Recommendation, courts appear split on the "who-decides" issue. *See* Section II(D), *supra*. As discussed below, *see* Section II(E)(i), *infra*, this Court believes that, ultimately, the relevant precedential authority favors the conclusion that the issue of classwide arbitration is a procedural question for an arbitrator to decide, and so finds here, but also recognizes that there are sensible counter-arguments. What is much clearer, though, is that–even if the issue of classwide arbitration is properly characterized as a gateway issue–this Court's recommendation would not change because deeply rooted Second Circuit case law necessitates the finding that, in this case, the parties "clearly and unmistakably" delegated the question of arbitrability to the arbitrator and, therefore, must submit the question of classwide arbitration to the arbitrator. *See* Section II(E)(ii), *infra*.

i. The Availability Of Classwide Arbitration Is A Procedural Issue For An Arbitrator To Decide

In light of *Bazzle*, which, in this Court's opinion, remains the most persuasive authority, the availability of classwide arbitration, where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue, is a procedural question for the arbitrator, not the Court, to decide. *See Bazzle*, 539 U.S. at 452–53; *see also Edwards*, 2015 WL 4104718, at *10 (explaining that, although the "*Stolt[-Nielsen]* majority cautioned lower courts to 'pause' when addressing whether to leave the availability of class arbitration to the arbitrators, [it] did not suggest what rule of decision should apply," and therefore finding that the Court "should apply the rules of decision that were in effect before *Stolt[-Nielsen]*"). As mentioned previously, the *Bazzle* plurality determined that the availability of classwide arbitration was not a question of arbitrability because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties ... [, but only] contract interpretation and arbitration procedures." *Bazzle*, 539 U.S. at 451–53. "Put succinctly, the question of the availability of class arbitration does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator." *In re A2P SMS*, 2014 WL 2445756, *10.

***9** Here, it is undisputed that the parties' arbitration agreement is enforceable and that it covers Plaintiffs' substantive claims. *See Bazzle*, 539 U.S. at 452–53 (distinguishing questions pertaining to whether a party agreed to arbitrate a matter from the "kind of proceeding" on which they may have agreed). Because this determination has already been made, interpreting the provisions of the arbitration agreement to determine whether classwide arbitration is available is a matter that "[a]rbitrators are well situated to answer." *Id.* at 453; *In re A2P SMS*, 2014 WL 2445756, at *10 ("[I]nterpreting the provisions of the [arbitration agreement] to determine whether they allow for class arbitration is a matter within the arbitrator's competence."). Accordingly, it is respectfully recommended that the District Court hold that the issue of classwide arbitration is a procedural question for an arbitrator, not the Court, to decide.

This view falls in line "with Supreme Court precedent explaining that, in the face of a valid agreement to arbitrate, it will be the rare question that must be decided by the Court." *Id.* see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."). In this vein, "the Supreme Court has characterized questions of arbitrability as a 'narrow' and 'limited' exception to the general policy in favor of arbitration of disputes." *Id.* (citing *Bazzle*, 539 U.S. at 452; *Howsam*, 537 U.S. at 83–84 (explaining that "questions of

arbitrability" should not be read so broadly as to include "any potentially dispositive gateway question" merely because "its answer will determine whether the underlying controversy will proceed to arbitration on the merits")). Statements such as these serve as a reminder that "courts should be reluctant to expand the categories of 'questions of arbitrability' beyond the limits identified by the Supreme Court." *In re A2P SMS*, 2014 WL 2445756, at *10. Moreover, assigning the "who-decides" question to the court, rather than the arbitrator, which would unavoidably involve formal and time-consuming procedures, runs counter to the FAA's policy of "achieving streamlined proceedings and expeditious results." *Id.* (citing *Mercury Constr.*, 460 U.S. at 24–25).

This Court's conclusion is reinforced, not only by *Bazzle*, but the district courts in this Circuit which have similarly found. *See Edwards*, 2015 WL 4104718, at *12 ("Where, as here, the agreement is arguably not silent–that is where there is language that is capable of being construed in one of several ways on the issue–the arbitrators, not the Court, should interpret the contract of the parties in the first instance."); *Victorio*, 2015 WL 2152703, at *20 ("Whether the parties will arbitrate as a class or on an individual basis is a question for the arbitrator, not the Court."); *In re A2P SMS*, 2014 WL 2445756, at *10 ("[T]he Court is persuaded by the Supreme Court's decision in *Bazzle* that the arbitrator, rather than the Court, should decide whether class arbitration is available."); *Guida*, 793 F.Supp.2d at 616 ("[T]he ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide.").

Although the Court in *Stolt–Nielsen* pointed out that *Bazzle* did not have the same precedential value as an opinion by a majority of the Court, "[t]his ... is [a] far cry from a holding–or even a suggestion–that *Bazzle* reached the wrong result." *In re A2P SMS*, 2014 WL 2445756, at *11; *Guida*, 793 F.Supp.2d at 616 ("[W]hile *Stolt–Nielsen* pointed out that *Bazzle* did not have the same precedential value as an opinion by a majority of the Court, it did not indicate that the plurality opinion in *Bazzle* was incorrect on the issue of who decides whether a class can arbitrate a dispute."). Indeed, the *Bazzle* plurality opinion dealt with precisely the same issue pending before this Court, and no Supreme Court decision has subsequently offered clearer guidance. As such, *Bazzle* should guide the analysis here.

***10** In *Stolt–Nielsen* and *Concepion*, the Court cautioned that class arbitration differed significantly from bilateral arbitration in terms of costs, efficiency, and the ability to choose expert arbitrators. *See Stolt–Nielsen*, 559 U.S. at 686; *Concepcion*, 131 S.Ct. at 1750–51. Class arbitration also involves different procedural and confidentiality considerations, and limited the judicial review of potentially high-stakes litigation. *Id.* These concerns, on which Defendants urge this Court to rely, "are primarily relevant to deciding the availability of such class arbitration, not the antecedent question of whether that decision is assigned to the [c]ourt or the arbitrator." *In re A2P SMS*, 2014 WL 2445756, at *11. Perhaps more importantly, "none of these differences rebut the core point in *Bazzle* that the class of questions of arbitrability is a limited one, and that the availability of class arbitration pertains to the procedures to be employed at an arbitration, not whether an arbitration is permissible in the first instance." *Id.* at *12.

The Supreme Court's remark in *Oxford Health* that it would have faced a different question had the petitioner argued that classwide arbitration is a "question of arbitrability" (as opposed to a procedural issue), *Oxford Health* 133 S.Ct. at 2069 n.2, meant precisely that–the Court would have faced a different issue if the petitioner had argued that classwide arbitration is a "question of arbitrability." No more, no less. This Court does not recognize this matter-of-fact observation as some type of vague proclamation that, if presented with such a question, the Supreme Court would have held that arbitrability is a gateway question for courts to decide.

By relying on *Stolt–Nielsen*, *Oxford Health*, *Reed Elsevier*, and *Opalinski*, Defendants invite this Court to rely on out-of-circuit, non-binding precedent or to predict how the Supreme Court may ultimately answer the "who-decides" question based on *dicta*. Given its belief that the *Bazzle* plurality's opinion is the most persuasive authority, *see In re A2P SMS*, 2015 WL 876456, at *3 ("The Court remains convinced that the Supreme Court's plurality holding in *[Bazzle]*, provides persuasive guidance on the question."); *Rame, LLC v. Popovich*, 878 F.Supp.2d 439, 446 (S.D.N.Y.2012) ("[T]he *Bazzle* plurality's holding remains persuasive and instructive."), and that leaving this question for the arbitrator is most consistent with Congress' policy of supporting arbitration, *see Vera v. Saks & Co.*, 335 F.3d 109, 116 (2d Cir.2003) (The FAA "requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation") (citation omitted), this Court declines to do either.

It is also worth noting that Defendants' position in this matter further highlights the basis for this Court's belief that the classwide-arbitration-decision is procedural in nature. As Justice Alito explained in *Oxford Health*, class arbitration awards may be vulnerable to collateral attack such that absent class members can "unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.' " *See Oxford Health*, 133 S.Ct. at 2072 (Alito, J., concurring) (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 546–547 (1974)). Bearing this in mind, Defendants would seem to benefit from a class/collection arbitration in which all members have opted in such that Defendants could attempt to secure a global, favorable ruling against all such members at one time. Instead, Defendants argue for individual, bilateral arbitrations for the three Plaintiffs–and perhaps up to thirty-seven additional bilateral arbitrations for those Plaintiffs claim to be similarly situated–such that each individual would get a separate "bite at the apple." In making this strategic decision, Defendants seek to gain a tactical advantage by forcing Plaintiffs, and those similarly situated, to arbitrate upwards of forty separate arbitrations, which is far more likely to be prohibitively expensive and time-consuming. Thus, the advantage Defendants seek pertains directly to the arbitration procedures, not whether the (potential) forty members' claims must be arbitrated. As District Judge Nathan explained, "[i]n the end, the issue raised is not one of enforcement of an arbitration agreement or the power of the arbitrator to hear a dispute, but rather the form of the proceedings as to a dispute that is ... subject to the arbitrator's authority." *In re A2P SMS*, 2014 WL 2445756, at *12; *see Bazzle*, 539 U.S. at 451–53 (explaining that classwide arbitration was not a question of arbitrability because "it concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties ... [, but only] contract interpretation and *arbitration procedures")* (emphasis added). [5]

***11** In light of the above, this Court respectfully recommends that the availability of classwide arbitration, where, as here, the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue, is a procedural question for the arbitrator, not the court, to decide.

ii. Even If Classwide Arbitration Is A "Gateway Question" Of Arbitrability, Defendants Clearly And Unmistakably Agreed To Its Arbitration

As noted above, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options*, 514 U.S. at 944. Even if the availability of classwide arbitration is characterized as a gateway, rather than a procedural, issue, in this case, it would still be a question for the arbitrator to decide.

As Plaintiffs point out, there are two centrally relevant sections of the subject arbitration agreement which confirm the parties' unambiguous intent to submit questions of arbitrability to an arbitrator: first, the breadth of the agreement, which covers "all disputes relating to any aspect of [the employee's] employment," including "any disputes pertaining to the meaning or effect of this Agreement," and second, the incorporation of the employment arbitration rules of the AAA, which expressly assign to the arbitrator the power to rule on his or her own jurisdiction, including the existence, scope or validity of the arbitration agreement.

Under clear Second Circuit precedent, the agreement's broad language clearly and unmistakably evinces the parties' intent to submit questions of arbitrability, including scope, to arbitration. *See Shaw Grp. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir.2003) (holding that an arbitration agreement demonstrates a "clear and unmistakable intent to submit questions of arbitrability to arbitration" where "the agreement plainly states the parties' intent to submit '[a]ll disputes ... concerning or arising out of' the [contract] to arbitration"); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir.1996) ("The words 'any and all' are elastic enough to encompass disputes over ... whether a claim is within the scope of arbitration."); *see also Bazzle*, 539 U.S. at 451 ("The parties agreed to submit to the arbitrator '[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.' And the dispute about what the arbitration contract in each case means ... is a dispute 'relating to this contract' and the resulting 'relationships.' "). The combined use of the phrases "any disputes" and "all disputes," to describe the scope of the arbitration agreement, is "inclusive, categorical, unconditional and unlimited." *PaineWebber*, 81 F.3d at 1199. Defendants dispute this interpretation, but unavailingly so by only citing two out-of-circuit cases, which have interpreted similar clauses more restrictively. *See Reed Elsevier*, 734 F.3d at 599600 (finding that arbitration agreement's all-encompassing language did not cover issue of classwide arbitration because "it d[id] not mention classwide arbitration at all"); *Chesapeake Appalachia, LLC v. Suppa*, 2015 WL

966326, at *9–10 (N.D.W.Va. Mar. 4, 2015) (same), *aff'd*, *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 15 CV 1275, 2016 WL 53806 (3rd Cir. Jan. 5, 2016).

***12** Moreover, the "Second Circuit has 'held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator.' " *Klein*, 2014 WL 3013294, at *30 (quoting *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir.2005)) (holding that arbitration rule providing arbitrator "power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement" delegated arbitrability questions to arbitrator (internal quotation marks omitted)); *Gwathmey Siegel Kaufman & Associates Architects, LLC v. Rales*, 518 F. Appx. 20, 21 (2d Cir.2013) (summary order) ("[B]y incorporating the [AAA] rules the parties agreed to have the arbitrators decide arbitrability.").

Here, Rule 6 of the AAA Employment Arbitration Rules, which is incorporated by reference into the Plaintiffs' arbitration agreement with Defendants, states that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." As such, the parties' incorporation of the AAA Rules by reference evidence their agreement to rules that, by their very terms, remit the specific issue in question here to the arbitrators. *See Lapina v. Men Women N.Y. Model Mgmt.*, 86 F.Supp.3d 277, 283–84 (S.D.N.Y.2015) ("[A] party who signs a contract containing an arbitration clause and incorporating by reference the AAA rules ... cannot [later] disown its agreed-to obligation to arbitrate all disputes, including the question of arbitrability.") (internal quotations omitted); *see also Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir.2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association's [ ] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (citing *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir.2012); *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, 1371 (D.C.Cir.2012); *Fallo v. High–Tech Inst.*, 559 F.3d 874, 878 (8th Cir.2009); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10–12 (1st Cir.2009); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed.Cir.2006); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir.2005); *Contec*, 398 F.3d at 208).

Finally, the arbitration agreement excludes from arbitration certain disputes, including claims related to workers' compensation, unemployment benefits, or to enforce non-competition or confidentiality agreements, *see supra*, n. 2, but class claims are not included among these exceptions. Under the principles of *expressio unius est exclusio alterius*, which roughly translates to "the mention of one thing implies the exclusion of the other," *Hardy v. N.Y.C. Health & Hosp. Corp.*, 164 F.3d 789, 794 (2d Cir.1999), this choice implies that additional exceptions *(i.e.*, questions of arbitrability, or more specifically, classwide arbitration) were not intended. *See Chepilko v. Cigna Group Ins.*, 08 Civ. 4033(JGK), 2012 WL 2421536, at *7 (S.D.N.Y. June 27, 2012) (where an insurance policy contained exceptions to the statute of limitations requirements for claims brought in Kansas and South Carolina, no such exception existed for claims brought in New York under "the textual canon of *expressio unius est exclusio alterius"* because "a New York exception was not expressed, and was thus excluded"); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Although this Court is cognizant that "[a]n implicit agreement to authorize class-action arbitration" should not be inferred "solely from the fact of the parties' agreement to arbitrate," *Stolt–Nielsen*, 559 U.S. at 685, the parties' decision to omit class claims from the arbitration exclusions serves as further, independent support for the conclusion that the parties intended to submit issues of arbitrability to an arbitrator.

***13** Accordingly, this Court respectfully recommends that, even if the issue of classwide arbitration is classified as a gateway issue, the parties clearly and unmistakably delegated the question of class arbitration to an arbitrator, not the Court.

F. Whether The Court Should Dismiss Plaintiffs' Claims With Prejudice, Dismiss Plaintiffs' Claims Without Prejudice Or Stay The Litigation

The remaining issue is whether this case should be stayed or dismissed, with or without prejudice, pending arbitration. Defendants argue that because Plaintiffs' claims are subject to arbitration, the case should be dismissed with prejudice. On

the other hand, Plaintiffs argue that the Court should either stay the litigation or dismiss the case without prejudice.

"The district court can exercise its discretion to stay the proceeding or can conclude that the litigation should be dismissed." *Guida*, 793 F.Supp.2d at 620 (citing *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 92–93 (2d Cir.2002)). The "Second Circuit has noted that the decision between dismissal and [a] stay has implications for the speed with which arbitration may begin, because a dismissal is an appealable order, whereas a stay is not." *Dixon v. NBC Universal Media, LLC*, 12 Civ. 7646(PAE), 2013 WL 2355521, at *11 (S.D.N.Y. May 28, 2013) (citing *Salim Oleochemicals*, 278 F.3d at 93). As a result, a stay of the litigation is more likely to allow the matter to proceed to arbitration expeditiously. *Guida*, 793 F.Supp.2d at 620. "The Second Circuit urges courts deciding whether to dismiss or stay litigation when referring a matter to arbitration to 'be mindful of this liberal federal policy favoring arbitration agreements' and consider that '[u]nnecessary delay of the arbitral process through appellate review is disfavored.' " *Id.* (citing *Salim*, 278 F.3d at 93).

Defendants do not provide a clear explanation for their position that this matter should be dismissed with prejudice, and significantly, none of the district court cases cited by Defendants in their brief supports such a proposition as the cases were either unclear as to whether dismissal was with or without prejudice, *see Padro v. Citibank, N.A.*, 14 CV 2986(NGG), 2015 WL 1802132, at *7 (E.D.N.Y. Apr. 20, 2015); *Spencer–Franklin v. Citigroup/Citibank, N.A.*, 06 Civ. 3475(GWG), 2007 WL 521295, at *4 (S.D.N.Y. Feb. 21, 2007); *Rubin v. Sona Int'l Corp.*, 457 F.Supp.2d 191, 198 (S.D.N.Y.2006), or make clear that dismissal was actually *without* prejudice, *see Murphy v. Canadian Imperial Bank of Commerce*, 709 F.Supp.2d 242, 248 (S.D.N.Y.2010).

On the other hand, as Plaintiffs suggest, courts in this Circuit routinely stay the action or dismiss without prejudice. *See Guida*, 793 F.Supp.2d at 620 (staying litigation pending arbitration); *Murray v. UBS Securities, LLC*, 12 Civ. 5914(KPF), 2014 WL 285093, at *14 (S.D.N.Y. Jan. 27, 2014) (staying litigation pending arbitration and noting that courts in the Southern District of New York generally stay, rather than dismiss, an action upon compelling a party to arbitrate); *Murphy*, 709 F.Supp.2d at 248 (dismissing case without prejudice); *Mazza Consulting Grp., Inc. v. Canam Steel Corp.*, 08 CV 38(NGG), 2008 WL 1809313, at *5 (E.D.N.Y. Apr. 21, 2008) (dismissing case without prejudice); *Mahant v. Lehman Brothers*, 99 Civ. 4421(MBM), 2000 WL 1738399, at *3–4 (S.D.N.Y. Nov. 22, 2000) (dismissing case without prejudice).

***14** In light of the Court's recognition that, with respect to the "who-decides" issue, "there is no controlling Supreme Court or Second Circuit precedent on point and the only available guiding precedent does not cut decisively in either direction," *In re A2P SMS*, 2015 WL 876456, at *3, and understanding that dismissal renders an order appealable, it is respectfully recommended that the District Court dismiss this action without prejudice.

III. CONCLUSION

For the foregoing reasons, this Court respectfully recommends that the District Court **grant Plaintiffs' motion** and **deny Defendants' motion**, thus requiring the parties to submit the question of classwide arbitration to an arbitrator, and dismiss this action without prejudice.

IV. OBJECTIONS

Written objections to this Report and Recommendation must be filed with the Clerk of Court and in accordance with the Individual Rules of the District Judge within fourteen days of service of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. Proc. 72(b). A failure to file objections within the specified time waives the right to appeal any order or judgment entered based on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. Proc. 72(b); *see Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir.2008).

All Citations

Slip Copy, 2016 WL 524253

Footnotes

1 Defendants dispute Plaintiffs' employment title. *See* Defendants' Memorandum of Law, ECF No. 17, p. 3, n. 2. Plaintiffs' employment title is of no consequence to this Report and Recommendation.

2 Section 2 of the contract excluded disputes related to workers' compensation, unemployment benefits or claims brought to enforce non-competition or confidentiality agreements. *See generally* ECF No. 17, Exhibit A, at p. 2.

3 District Judge Nathan ultimately certified an interlocutory appeal to the Second Circuit on the issue of "who-decides" the permissibility of class arbitration. *In re A2P SMS Antitrust Litig.,* 12 Civ. 2656(AJN), 2015 WL 876456, at *7 (S.D.N.Y. Mar. 2, 2015). The appeal was subsequently withdrawn prior to the issuance of a ruling by the Second Circuit. *See In re A2P SMS Antitrust Litig.,* 15–758–CV (2d Cir. Apr. 2, 2015).

4 Following the parties' initial round of briefing, Defendants submitted supplemental authority in the form of a more recent decision by the Third Circuit Court of Appeals. *See* ECF No. 25. In *Chesapeake Appalachia, LLC v. Scout Petroleum,* 15 Civ. 1275, 2016 WL 53806 (3d Cir. Jan. 5, 2016), the Third Circuit reaffirmed its belief that "the availability of class arbitration constitutes a 'question of arbitrability' to be decided by the courts–and not the arbitrators– unless the parties' arbitration agreement 'clearly and unmistakably' provides otherwise." *Id.* at *1. For intents and purposes, *Chesapeake Appalachia* merely confirms that which was held by *Opalinski.*

5 Because of the concern identified by the Supreme Court with regard to the differences between classwide and bilateral arbitration, it is also prudent to discuss whether, in the event an arbitrator ultimately decides that class and collective arbitration is permissible in this case, such a decision could unfairly bind absentee class members, of which, according to Plaintiffs' Complaint, there is believed to be approximately forty (40) such members. *See* ECF No. 1, ¶ 39. To reiterate, Plaintiffs seek to bring, on behalf of themselves, individual causes of action under the FLSA and NYLL, and for those similarly situated, a *collective* action under the FLSA, pursuant to 29 U.S.C. § 216(b), and a *class* action under the NYLL, pursuant to Fed.R.Civ.P. 23. *See* ECF No. 1, ¶¶ 37, 47, 48.

As to Plaintiffs' federal claims, there is no practical risk that anyone would be improperly bound because, as a matter of procedure, a collective action, rather than a class action, is required. 29 U.S.C. § 216(b) provides a right of action "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated" to recover unpaid overtime compensation and liquidated damages. "Unlike a class action lawsuit brought pursuant to Federal Rule of Civil Procedure 23, in an FLSA collective action, only potential plaintiffs who 'opt in' can be 'bound by the judgment' or 'benefit from it.' " *Gjurovich v. Emmanuel's Marketplace, Inc.,* 282 F.Supp.2d 101, 104–05 (S.D.N.Y.2003) (quoting *Hoffmann v. Sbarro, Inc.,* 982 F.Supp. 249, 260 (S.D.N.Y.1997)). " 'Consequently, even if the [S]ection 216(b) plaintiff can demonstrate that there are other plaintiffs 'similarly situated' to him, he has no right to represent them absent their consent by an opt-in.' " *Lary v. Rexall Sundown, Inc.,* 74 F.Supp.3d 540, 551 n.5 (S.D.N.Y.2015) (quoting *Vogel v. American Kiosk Mgmt.,* 371 F.Supp.2d 122, 128 (D.Conn.2005)). Thus, if an arbitrator were to determine that collective and class actions claims were permissible, and certify same, the absentee members in the FLSA collective action would be required to affirmatively 'opt-in' if they wished to be part of the class. *See Young v. Cnty. of Nassau,* 09 CV 3830, 2010 WL 161593, at *1 (E.D.N.Y. Jan. 13, 2010) (Section 216(b) "requires that employees affirmatively opt-in to an FLSA collective action by filing a written consent"). Those members who did not want to be bound by the collective action arbitration could proceed independently, although Defendants might insist they arbitrate their claims. *See Mills v. Capital One,* 14 Civ. 1937(HBP), 2015 WL 5730008, at *6 (S.D.N.Y. Sept. 30, 2015) ("[T]he failure to opt in to an FLSA collective action does not prevent a plaintiff from bringing suit at a later date."); *see also Hoffmann v. Sbarro, Inc.,* 982 F.Supp. 249, 263 n. 17 (S.D.N.Y.1997) (Sotomayor, J.) (Fed.R.Civ.P. 23's "requirements are designed to protect the due process rights of absent class members, whereas in an FLSA 'opt-in' action, these requirements need not be strictly observed because there are no absent class members for the court to protect").

With respect to a class action under the NYLL, Justice Alito has suggested that absent class members would not be bound by an arbitrator's ruling: "[W]here absent class members have not been required to opt *in,* it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Oxford Health,* 133 S.Ct. at 2071–72 (Alito, J., concurring) (emphasis in the original). Justice Alito's rationale, joined by Justice Thomas, stems from the contractual nature of arbitration, explaining that, "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they w[ould] be bound by the arbitrator's ultimate resolution of this dispute." *Id.* at 2071. As such, it seems that any potential, yet absent, member of the class and/or collection action would not be unduly bound by a class arbitration award unless he or she affirmatively chose to be. That issue is not before the Court and the Court makes no determination on this issue.