IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JARROD PYLE, on behalf of himself and all others similarly situated Plaintiff vs. VXI GLOBAL SOLUTIONS, INC. AND VXI GLOBAL SOLUTIONS, LLC Defendants	CASE NO. 5:17-CV-00220 JUDGE: SARA LIOI

DEFENDANT VXI GLOBAL SOLUTIONS, LLC'S MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S COMPLAINT

Defendant VXI Global Solutions, LLC ("VXI"), by and through its undersigned counsel, and pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3-4, submits this Motion requesting that this Court compel arbitration according to the terms of the arbitration clause and dismiss the action in its entirety or, in the alternative, stay the proceedings. Plaintiff Jarrod Pyle ("Plaintiff") admits in his Complaint that he entered into an arbitration agreement that covers his claims and that the agreement is silent as to class actions or class arbitration. Under Sixth Circuit and Ohio law, the arbitration agreement does not authorize class or collective arbitration, and this Court should compel Plaintiff to proceed with individual arbitration in this forum and dismiss Plaintiff's Complaint. None of the legal arguments raised by Plaintiff regarding the Fair Labor Standards Act ("FLSA"), National Labor Relations Act ("NLRA"), or the arbitration agreement's arbitration cost provision invalidate the arbitration agreement, and it should be enforced according to its terms. Facts and arguments supporting this Motion are more fully set

forth in Defendant's Memorandum in Support and the exhibits thereto, all of which are hereby incorporated by reference.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Thomas J. Lipka
Thomas J. Lipka

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

Plaintiff Jarrod Pyle ("Pyle") is subject to a binding arbitration agreement and this Court should compel him to arbitrate according to the terms of that agreement and dismiss his Complaint. There are no disputed facts relevant to this motion:

- Pyle admits that he signed an arbitration agreement with VXI, attaching it as an exhibit to his Complaint. See Dkt. No. 1, ¶ 9, Ex. A.
- He admits that he "agreed to arbitrate certain claims, including any 'claims for wages…or any other form of compensation.'" *Id.*
- He admits his individual FLSA claims are covered under the arbitration agreement and submitted his claims for arbitration to VXI under the agreement. *Id.*, ¶ 10.
- He admits that the agreement is silent regarding class or collective arbitration. *Id.*, ¶ 9.

Pyle does not appear to dispute that the agreement's silence on class or collective actions means that class or collective arbitration is not authorized under the agreement. In any event, it is indisputable that the Sixth Circuit has definitively ruled on this issue. *See AlixPartners, LLP v. Brewington*, 836 F.3d 543, 553 (6th Cir. 2016) ("An agreement must expressly include the possibility of classwide arbitration for us to conclude that the parties agreed to it."); *Hope Christian Fellowship v. Chesapeake Energy Corp.*, 2016 WL 5661607, *8 (N.D.Ohio 2016) ("Decidedly, under the FAA, when an arbitration provision is silent as to the availability of class arbitration, a court may not impose it.").

Pyle's only challenges to the arbitration agreement are legal challenges. He alleges that an arbitration agreement that does not authorize collective or class arbitration is invalid under the Fair Labor Standards Act ("FLSA") and/or the National Labor Relations Act ("NLRA").[1] Dkt. No. 1 at ¶12-13. Although the Supreme Court and Sixth Circuit have not expressly ruled on

[1] Pyle also alleges in his complaint that certain language in the arbitration agreement regarding arbitration fees invalidates the agreement but this is incorrect as discussed below.

either of these issues, [2] there is a majority rule in both cases. Every circuit court of appeals to have considered the issue, and a majority of the district courts in the Sixth Circuit, have found that arbitration agreements that require individual arbitration are valid under the FLSA. *See e.g., Colley v. Scherzinger Corp.*, 2016 WL 2998111, *5 (S.D.Ohio 2016) ("arbitration agreements are not invalid [under the FLSA] because employees are prohibited from collective or class-based arbitration"). While there is a circuit split regarding whether the NLRA forbids arbitration agreements that explicitly prohibit class arbitration, the majority of circuit courts of appeal and all district courts in the Sixth Circuit to have considered the issue hold that the NLRA does not forbid agreements that bar class arbitration.[3] *See, e.g., id.* at *7 ("The Fifth Circuit's analysis of the issue [in *D.R. Horton*] is persuasive. And in the absence of any contrary Sixth Circuit or Supreme Court precedent, the Court adopts its conclusion that the NLRA does not prohibit an arbitration agreement that includes a prohibition on collective arbitration of FLSA claims.").

This Court should compel individual arbitration and dismiss Pyle's Complaint.

II. STATEMENT OF FACTS

Pyle was an employee of VXI at its Canton, Ohio call center facility. *See* Dkt. No. 1 ¶ 18. He was hired on September 30, 2013. *Id.* On that day, Pyle signed an arbitration agreement. *Id.* ¶ 9, Ex. A. He admits that he "agreed to arbitrate certain claims, including any 'claims for wages…or any other form of compensation.'" *Id.* He admits his individual FLSA claims are covered under the arbitration agreement and submitted his claims for arbitration to VXI under the agreement. *Id.*, ¶ 10. He admits that the arbitration agreement is silent regarding class or collective arbitration. *Id.*, ¶ 9. Pyle originally submitted this claim to VXI for arbitration. Id., ¶

[2] Both issues are pending on appeal in the Sixth Circuit, and the NLRA issue has been accepted for review by the U.S Supreme Court.

[3] Although a minority of courts have found that the NLRA forbids such agreements, no Court of Appeals has found that arbitration agreements that are completely silent on the issue violate that provision.

10. He filed this lawsuit because VXI agreed that Pyle's claims should be arbitrated, but pointed out that collective arbitration was not authorized by an arbitration clause that was silent regarding collective arbitration. Id., ¶ 11.

A similar VXI agreement was the subject of litigation in Ohio state court in a wage and hour class action with claims that are virtually identical to those alleged by Pyle in his action. The Ohio state court held that the arbitration agreement was enforceable and that plaintiffs' claims were within the scope of the arbitration agreement. *See Shakoor v. VXI Global Solutions*, 35 N.E.3d 539, 547-48 (Ohio App. 2015). The Ohio trial court held that the arbitration agreement required individual arbitration and dismissed the class action. *Shakoor v. VXI Global Solutions, Inc.*, Mahoning County Ohio Court of Common Pleas, Case No. 13 CV 3183, Judgment Entry (March 4, 2016). Exhibit A, Affidavit of Thomas Lipka ("Lipka Aff."), Ex. 2.

The arbitration agreement requires arbitration of all disputes, including any "claims for wages, bonuses, commissions or any other form of compensation." Dkt. No. 1, Ex. A. It also requires that "[t]he arbitration shall take place in or near the city in which I am or was last employed by the Company." *Id.* That city is Canton, Ohio.

The arbitration agreement also provides that "the Company and I agree that neither of us shall initiate nor prosecute any lawsuit in any way related to any claim." *Id.* In violation of his agreement to arbitrate any claims, Pyle filed this lawsuit.

III. LAW AND ARGUMENT

A. THIS COURT SHOULD COMPEL ARBITRATION

Section 4 of the FAA provides that:

> [A] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties,

> for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4.[4]

Pyle signed a valid arbitration agreement and filed this lawsuit in violation of, and in an attempt to avoid compliance with, the arbitration agreement. Permitting Pyle's attempt to avoid the agreement would violate the longstanding policy of the U.S. Supreme Court and the Sixth Circuit: "'Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts.'" *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Ass. Co., Inc.*, 590 Fed.Appx. 482, 486 (6th Cir. 2014) (*quoting Southland Corp. v. Keating*, 465 U.S. 1, 7, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)). "'Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.'" *Id.* (*quoting Southland Corp.*, 465 U.S. at 7). Pyle should be compelled to arbitrate.

B. VXI'S MOTION MEETS THE LEGAL STANDARD FOR COMPELLING ARBITRATION

The FAA, 9 U.S.C. §1, *et seq*., manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). "To enforce this dictate, [the FAA] provides for a stay of proceedings when an issue is referable to arbitration and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003) (citing 9 U.S.C. §§3, 4).

[4] Section 4 further requires that the arbitration proceedings themselves "shall be within the district in which the petition for an order directing such arbitration is filed." *Id.* The arbitration agreement has a forum selection clause that specifies Canton, Ohio, as the forum for arbitration. The Sixth Circuit holds that "where the parties have agreed to arbitrate in a particular forum, only a district court in that forum has jurisdiction to compel arbitration pursuant to Section 4." *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997). This district is the correct district in which to compel arbitration for Pyle, but it may not be for other employees including those that have filed consents to join Pyle's lawsuit but who worked in cities other than Canton.

As this Court has stated, the Sixth Circuit applies a four-pronged test to determine whether to grant motions to dismiss or stay the proceedings and compel arbitration:

- The Court must determine whether the parties agreed to arbitrate;
- The Court must determine the scope of that agreement;
- If federal statutory claims are asserted, the Court must consider whether Congress intended those claims to be non-arbitrable; and
- If the Court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Wallace v. Red Bull Distributing Co., 958 F.Supp.2d 811, 816-17 (N.D.Ohio 2013) *(quoting Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000)); *see also Rupert v. Macy's, Inc.*, 2010 WL 2232305, *4 (N.D.Ohio 2010). "'[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" *Cox v. ScreeningOne, Inc.*, 2015 WL 413812, *3 (N.D.Ohio 2015) (*quoting Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (U.S. 2000)). This case meets all prongs of the *Stout* test, and therefore, this Court should compel Pyle to arbitrate his claims against VXI.

1. VXI and Pyle agreed to arbitrate their disputes.

There is no question that the parties agreed to arbitrate. Pyle admits he signed the arbitration agreement when he was hired. Dkt. No. 1 ¶ 9, Ex. A.

The arbitration agreement states:

> I understand and agree that by entering into this Mutual Agreement to Arbitrate Claims (the "Agreement") both the Company and I anticipate gaining the benefit of the speedy, impartial dispute resolution procedure offered by arbitration.

Id. Ex. A. The Agreement further provides that "[t]he Company and I agree to resolve, by arbitration, all claims or controversies…involving the Company…whether or not those claims or controversies arise out of my employment with the Company or the termination of my

employment ("Claims")." *Id.* The Agreement also provides that arbitration is the sole remedy allowed, stating that "the Company and I agree that neither of us shall initiate nor prosecute any lawsuit…in any way related to any claim." *Id.* On the signature page, the Agreement states that "the Company and I are giving up our rights to a jury trial and to a trial in a court of law." *Id.*

2. Pyle's claims are within the scope of the arbitration agreement.

"'The question of whether a contract's arbitration clause requires arbitration of a given dispute remains a matter of contract interpretation.'" *Rupert*, 2010 WL 2232305 at *4 (*quoting Seaboard C.L.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982)). This dispute is squarely within the scope of the arbitration agreement. This Court has made clear that analysis of the scope of an arbitration agreement should be weighted in favor of arbitration stating:

> In applying [the *Stout*] test, "doubt regarding the applicability of an arbitration clause should be resolved in favor of arbitration."

Wallace, 958 F.Supp.2d at 817 (*quoting Stout*, 228 F.3d at 715).

The scope of the arbitration agreement is set forth in section 1 entitled "Claims Covered by this Agreement." Dkt. No. 1, Ex. A. This section of the agreement states that, "[t]he Claims covered by this Agreement include, but are not limited to, claims for wages, bonuses, commissions or any other form of compensation." *Id.* Pyle's lawsuit alleges that VXI "violated the FLSA by failing to pay Plaintiff…any compensation for overtime work attributable to" certain work activities. Dkt. No. 1 at ¶ 28. Pyle admitted these claims are within the scope of the arbitration agreement by demanding arbitration. *Id.* at ¶ 10. Moreover, these claims for wages are clearly covered by the scope of the arbitration agreement. *Rupert*, 2010 WL 2232305, at *5

("Given this clear language, there can be no doubt that all of Plaintiff's federal and state law 'employment-related claims' are covered by the arbitration agreement").[5]

3. Pyle's FLSA claims are arbitrable

"If federal statutory claims are asserted, the Court must consider whether Congress intended those claims to be non-arbitrable." *Stout*, 228 F.3d at 714. Pyle's lawsuit alleges claims for FLSA violations. Dkt. No. 1 at ¶¶ 27-30. The Sixth Circuit and Ohio federal district courts hold that FLSA claims may be subject to arbitration. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000); *Aracri v. Dillard's, Inc.*, 2011 WL 1388613, *4 (S.D.Ohio 2011) ("statutory claims may be the subject of an arbitration agreement, including claims under the FLSA"); *Smith v. BT Conferencing, Inc.*, 2013 WL 5937313, *9 (S.D.Ohio 2013) ("many courts have found that FLSA rights may be effectively vindicated in an arbitral, rather than legal, setting").

Pyle's argument that the arbitration clause is invalidated by the FLSA because it does not authorize collective arbitration is addressed below in Section D.

4. The Complaint should be dismissed after this Court has ordered arbitration

As this Court has stated repeatedly: "[i]n cases where all claims are referred to arbitration…the litigation may be dismissed." *Rupert*, 2010 WL 2232305, at *4 (*citing Hensel v. Cargill, Inc.*, 198 F.3d 245, *4 (6th Cir. 1999)); *see also Wallace*, 958 F.Supp.2d at 816. After

[5] Additionally, an Ohio state court held that similar wage claims were within the scope of the arbitration agreement: "A review of Section 1 of the arbitration agreement demonstrates that Plaintiff's individual claim for wages does, in fact, fall within the parameters of the arbitration agreement." Lipka Aff. Ex. 1 (*Lashonna Shakoor v. VXI Global Solutions, Inc.*, Mahoning County Court of Common Pleas, Case No. 13 CV 3183, Judgment Entry, May 1, 2014, *rev'd on other grounds*, *Shakoor*, 35 N.E.3d 539. Although the Ohio Court of Appeals reversed the trial court on the issue of who decides whether class arbitration is authorized, it agreed that the wage claims were within the scope of the arbitration agreement. *Shakoor*, 35 N.E.3d at 547 ("Admittedly, the claim that Appellant violated the Ohio Minimum Fair Wage Standards Act is an arbitrable claim.").

Pyle's wage claims under the FLSA are referred to arbitration, there are no claims remaining and Pyle's lawsuit should be dismissed.

C. THIS COURT SHOULD COMPEL ARBITRATION ON AN INDIVIDUAL BASIS

Pyle admits that the arbitration agreement is silent regarding class or collective arbitration. Docket No. 1, ¶ 9. There are two necessary consequences under Sixth Circuit law to the agreement's silence regarding classwide arbitration: (1) this Court, not the arbitrator, should determine the question of classwide arbitrability; and (2) the arbitration clause does not authorize classwide arbitration. *AlixPartners*, 836 F.3d at 553.

"'[T]he question whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved for judicial determination unless the parties clearly and unmistakably provide otherwise.'" *Id.* (*quoting Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert. denied* 134 S.Ct. 2291 (2014)); *see also Huffman v. Hilltop Cos., LLC*, 747 F.3d 391, 398 (6th Cir. 2014). If "the arbitration clause is 'silent as to whether an arbitrator or a court should determine the question of classwide arbitrability, [it means] the determination lies with this court.'" *Id.* (*quoting Huffman*, 747 F.3d at 398 (*citing Reed Elsevier*, 734 F.3d at 599)).[6]

"Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Oxford Health Plans LLC v. Sutter*, _ U.S. _, 133 S.Ct.

[6] Additionally, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally…should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). "The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." *Id.* The Ohio Court of Appeals has already held that a virtually identical VXI arbitration agreement did "not provide a clear and unmistakable statement that the parties agreed the arbitrator is authorized to determine if the contract allows for class arbitration" because the "clause does not specifically mention class arbitration." *Shakoor*, 35 N.E.3d at 548. And neither party seeks to have the arbitrator decide this issue.

2064, 2066, 186 L.Ed.2d 113 (2013). The Sixth Circuit has definitively held that class or collective arbitration is not authorized unless the agreement expressly authorizes it:

> An agreement must expressly include the possibility of classwide arbitration for us to conclude that the parties agreed to it. [*citing Reed Elsevier* and *Huffman*]. This arbitration clause is silent on the availability of classwide arbitration, and we may not presume from "mere silence" that the parties consented to it.

AlixPartners, 836 F.3d at 553 (*citing Stolt-Nielsen v. Animalfeeds Int. Corp.*, 559 U.S. 662, 685, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)); see also *Reed Elsevier*, 734 F.3d at 599 ("The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it."); *Huffman*, 747 F.3d at 398-99 ("here the parties' arbitration clause nowhere mentions classwide arbitration…[w]e therefore conclude that the arbitration clause does not authorize classwide arbitration, and hold that the plaintiffs must proceed individually"); *Hope Christian Fellowship*, 2016 WL 5661607 at *8 ("Decidedly, under the FAA, when an arbitration provision is silent as to the availability of class arbitration, a court may not impose it."); *Taylor v. American Income Life Ins. Co.*, 2013 WL 2087359, *4 (N.D.Ohio 2013) (same) (*citing AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1750, 179 L.Ed.2d 742 (2011)); *Smith*, 2013 WL 5937313, *9-10 (same)

Additionally, the arbitration agreement is phrased entirely in terms of bilateral arbitration, not class arbitration. The language used by the agreement refers to singular parties and is consistent with individual arbitration: "[t]he Company and **I** agree to resolve, by arbitration, all claims or controversies…involving the Company…whether or not those claims or controversies arise out of **my** employment with the Company or the termination of **my** employment" Dkt. No. 1, Ex. A (emphasis added). The agreement includes over 30 individual references and not a single class or collective action reference.

Ohio federal courts, in applying Ohio contract interpretation law to arbitration agreements, recognize this type of language shows intent for individual arbitration. *AlixPartners*, 836 F.3d at 553 ("Further, the clause limits its scope to claims 'arising out of or in connection with any aspect of *this Agreement*,' as opposed to other employees' and/or potential employees' agreements, and states that the arbitrator's decision 'shall be final and binding as to *both parties*.'") (emphasis in original); *Smith*, 2013 WL 5937313, at *10 ("the Arbitration Clause refers to disputes arising out of "my" employment, and not to disputes arising out of the employment of others"); *Reed Elsevier*, 734 F.3d at 599 ("as the district court correctly observed, is that the clause limits its scope to claims 'arising from or in connection with *this Order*,' as opposed to other customers' orders") (emphasis in original).[7]

D. THIS COURT SHOULD REJECT PYLE'S ARGUMENTS THAT THE ARBITRATION AGREEMENT IS INVALIDATED BY THE FLSA, NLRA OR ITS ARBITRATION FEE PROVISION

Pyle raises no factual argument for why he should not be compelled to arbitrate according to the provisions of the arbitration agreement. He raises only legal arguments. Pyle alleges in his complaint that the arbitration clause is invalid under the FLSA, Dkt No. 1 at ¶12, and the NLRA, *id.* at ¶13, and because of its arbitration fees and costs provision, *id.* at ¶ 14. None of these arguments have merit.

[7] Additionally, the forum selection clause, providing that the arbitration should be filed in or near the city where the employee worked, indicates intent to have individual local arbitrations rather than class arbitration in some central location. Courts have held that a provision that provides for different locations for the arbitration depending on the location of the plaintiff indicates intent for bilateral arbitration. *See NCR v. Jones*, 2016 WL 74424, *6 (W.D.N.C. 2016) (holding that a clause which required arbitration of the employee's claims "in or near the city" where the employee worked did not authorize class arbitration in part because "the venue provision in the Agreement at least evinces an intent on behalf of the parties to arbitrate disputes solely on an individual basis in or near the city where each employee works, which weighs against the Agreement encompassing class arbitration"); *JP Morgan Chase Bank v. Jones*, 2016 WL 1182153, *9 (W.D.Wa. 2016) (holding that provision in arbitration clause that called for arbitrations "to take place in the state the employee was last employed" suggested "that collective arbitration was not contemplated").

1. The FLSA does not invalidate the arbitration agreement

Pyle alleges in his complaint that the arbitration agreement is invalid under the FLSA. Dkt No. 1 at ¶12. "Neither the Supreme Court nor the Sixth Circuit has squarely addressed whether employers may require their employees to sign agreements that mandate arbitration of their FLSA claims on an individual, non-class basis." *McGrew v. VCG Holding Corp.*, 2017 WL 1147489, *6 (W.D.Ky. 2017). But "[e]ach circuit court to address this issue has concluded that the FLSA does not contain the 'contrary congressional command' necessary to override the FAA's mandate." *Id.* at *7. The Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have all held that the FLSA does not prohibit waiver of collective actions in an arbitration agreement. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 & n.6 (2d Cir. 2013) (determining that the FLSA does not contain "contrary congressional command"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (neither text, legislative history, nor purpose support Congress intended FLSA to confer non-waivable right to class action); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting argument that inability to proceed collectively deprived plaintiff of substantive right); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016) ("while the FLSA and ADEA allow class or collective actions, they do not guarantee collective process"); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013) (FLSA does not set forth "contrary congressional command"); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) ("all of the circuits to address this issue have concluded that § 16(b) does not provide for a non-waivable, substantive right to bring a collective action").

Walthour provides a good summary of the reasons supporting these holdings:

> After examining the FLSA's text, legislative history, purposes, and these Supreme Court decisions, we discern no "contrary congressional command" that precludes the enforcement of plaintiffs' Arbitration Agreements and their collective action waivers.

745 F.3d at 1334. "First, the FLSA contains no explicit provision precluding arbitration or a waiver of the right to a collective action under § 16(b)." *Id.* Second:

> As interpreted in *Italian Colors Restaurant*, the Supreme Court in *Gilmer* had "no qualms" about enforcing an arbitration agreement that would result in the parties forgoing their right to proceed collectively, despite (1) the ADEA expressly permitting plaintiffs to bring collective actions, and (2) the Supreme Court's recognition of Congress's policy that ADEA plaintiffs should have the "opportunity" to proceed collectively.

Id. at 1334-35 (*citing Am. Express Co. v. Italian Colors Rest.*, 570 U.S. _, 133 S.Ct. 2304, 2311, 186 L.Ed.2d 417 (2013) (*citing Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991))). "The Supreme Court's decision in *Gilmer*, as interpreted by *Italian Colors Restaurant*, addressed the ADEA, but applies with equal force to the FLSA, because, as noted above, the ADEA expressly adopts the FLSA's class action provision." *Id.* at 1335. Third, "the legislative history of § 16(b) does not contain the requisite contrary congressional command sufficient to override the FAA." *Id.* "Fourth, after reviewing the purposes of the FLSA, we conclude that the enforcement of collective action waivers in arbitration agreements is also not inconsistent with the FLSA." *Id.* "Fifth, all of the circuits to address this issue have concluded that § 16(b) does not provide for a non-waivable, substantive right to bring a collective action." *Id.* at 1136. Finally, *Walthour* found that "Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right. Rather than expand a plaintiff's substantive rights, Congress's decision to enact the collective action provision actually limited a plaintiff's existing procedural rights set forth in Rule 23." *Id.*

While the Sixth Circuit has not ruled on the issue, it has strongly indicated it would agree with the other circuit courts of appeal. *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 591 (6th Cir. 2014). Citing the above circuit court decisions, *Killion* noted that "all of the circuits to

address this issue have concluded that § 16(b) does not provide for a non-waivable, substantive right to bring a collective action." *Id.* Indeed, *Killion* referred to these circuit court decisions as an "emerging consensus" that collective action waivers were permissible under the FLSA in arbitration agreements. *Id*. But it distinguished those cases because *Killion* did not involve an arbitration clause: "none of the foregoing authorities speak to the validity of a collective-action waiver outside of the arbitration context." *Id.* at 592. And it premised its disapproval of the waiver by stating it found "no countervailing federal policy that outweighs the policy articulated in the FLSA" "[b]ecause no arbitration agreement is present…" *Id.*

Additionally, a majority of district courts in the 6th Circuit, including the Ohio district courts, hold that waiver of collective action in arbitration agreements is not invalid under the FLSA. *See Colley*, 2016 WL 2998111, at *5; *Compton v. Frisch's Restaurants, Inc.*, 2013 WL 1500211, *2-3 (S.D.Ohio 2013); *McGrew v. VCG Holding Corp.*, 2017 WL 1147489, *7 (W.D.Ky. 2017); *Winn v. Tenet Healthcare Corp.*, 2011 WL 294407, *2 (W.D.Tenn. 2011). *Colley* holds "it is beyond dispute that FLSA claims may be arbitrated." 2016 WL 2998111, at *5 (*citing Floss*, 211 F.3d at 313). "And arbitration agreements are not invalid because employees are prohibited from collective or class-based arbitration." *Id. Compton* quoted the Third Circuit's decision in *Owen v. Bristol Care*, which held that "arbitration agreements containing class waivers are enforceable in claims brought under the FLSA," and stated "[t]his Court agrees with the reasoning discussed in *Owen*, which this Court adopts and incorporates by reference." 2013 WL 1500211, at *2-3. Pointing out that the arbitration clause it was considering did not contain an express waiver of collective action, the *Compton* court held:

> If an explicit class waiver does not defeat compelled arbitration, the [defendant's] arbitration agreement, which arguably provides an implicit class waiver, cannot logically preclude compelled arbitration of the claims here.

Id. at *3. Likewise, *McGrew* held that "for several reasons, this Court believes that the FLSA does not contain a 'contrary congressional command' requiring Plaintiffs' claim to be hear in a judicial forum." *Id.* (*quoting Italian Colors Rest.*, 133 S.Ct. at 2309).

Plaintiff cites *Gaffers v. Kelly Services, Inc.*, 203 F.Supp.3d 829 (E.D.Mich. 2016) for the proposition that the FLSA invalidates an arbitration agreement that does not authorized collective actions. *Gaffers* is wrongly decided and enunciates a minority rule that has been rejected by most courts. *Gaffers* relies on *Killion* to support its argument that the Sixth Circuit will hold that the FLSA forbids waiver of collective actions in arbitration clauses. But it ignores that the collective action waiver in *Killion* was not part of an arbitration clause. The plaintiff in *Colley* also relied "heavily on *Killion*," as *Gaffers* does, and the court distinguished that case because it did not involve an arbitration clause:

> However, the court in *Killion* specifically noted: "We are aware, of course, that the considerations change when an arbitration clause is involved." *Boaz* explained that 'an employee can waive his right to a judicial forum only if the alternative forum allow[s] for the effective vindication of [the employee's] claim…**Arbitration, it noted, is such a forum.**" *Killion*, 761 F.3d at 591, *quoting Boaz* [*v. FedEx Customer Info. Servs., Inc.*], 725 F.3d [603,] 606-607 [(6th Cir. 2013)] (emphasis added). Given the different facts and the Sixth Circuit's explicit recognition of arbitration as an acceptable forum, these cases simply do not support [Plaintiff's] assertion that federal law prohibits an arbitration clause that limits employees to individual, rather that collective or class-based statutory claims.

Colley, 2016 WL 2998111, at *6. *McGrew* agreed with *Colley* and disagreed with *Gaffers*:

> The Court is also aware that contrary authority exists within this circuit. In [*Gaffers*], the district court held that individual arbitration provisions are illegal and unenforceable. But *Gaffers* is currently on appeal before the Sixth Circuit, and is also contradicted by at least one other district court within the circuit. *See* [*Colley*]. In short, this Court is persuaded by the reasoning of the Eleventh Circuit in *Walthour* and the other circuit courts that hold arbitration agreements like Plaintiffs' may be enforced without running afoul of the FLSA. **Nothing suggests that the Sixth Circuit will depart from this strong majority position.**

2017 WL 1147489, at *7 (emphasis added).

The Sixth Circuit will likely decide this issue shortly in the *Gaffers* case, but in the meantime, this Court should hold consistently with the "strong majority position" that the FLSA does not forbid arbitration agreements that do not authorize collective arbitration.

2. The NLRA does not invalidate the arbitration agreement

Pyle alleges that the NLRA may invalidate the arbitration agreement. Dkt. No. 1, ¶ 13. As Pyle alleges, there is a circuit court split on the issue, with the Second, Fifth, and Eighth Circuits holding that that NLRA does not invalidate arbitration agreements that require individual arbitration, and the Seventh and Ninth holding that it does. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *D.R. Horton v. N.L.R.B.*, 737 F.3d 344, 362 (5th Cir. 2013) ("*Horton II*"); *Murphy Oil USA v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015), *cert. granted*, _ S.Ct. _, 2017 WL 125666 (U.S. Jan. 13, 2017); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), *cert. granted*, _ S.Ct. _, 2017 WL 125664 (U.S. Jan. 13, 2017); *Morris v. Ernst & Young LLP*, 834 F.3d 975, 989-90 (9th Cir. 2016), *cert. granted*, _ S.Ct. _, 2017 WL 125665 (U.S. Jan. 13, 2017). This issue is pending before the Sixth Circuit,[8] and the U.S. Supreme Court has accepted certiorari of three of the leading cases on the issue: *Murphy*, *Lewis* and *Morris*. Even before the Supreme Court accepted review, an Ohio district court found "[i]t is plausible, if not likely, that the Sixth Circuit or perhaps the Supreme Court will resolve the issue in the foreseeable future." *Schnaudt v. Johncol, Inc.*, 2016 WL 5394195, *11 (S.D.Ohio 2016).

The majority rule, that class action waivers in arbitration clauses were not controlled by the NLRA, but rather by the FAA, is summarized by the Fifth Circuit in *D.R. Horton*:

> The NLRA should not be understood to contain a congressional command overriding application of the FAA. The burden is with the party opposing arbitration, … and here the Board has not shown that the NLRA's language, legislative history, or purpose

[8] *NLRB v. Alternative Entm't, Inc.*, 6th Cir. No. 16-1385.

> support finding the necessary congressional command. Because the Board's interpretation does not fall within the FAA's "saving clause," and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.

737 F.3d 344, 362 (5th Cir. 2013) ("*Horton II*").

While the Sixth Circuit has not yet ruled on this issue, all district courts within the Sixth Circuit to have considered the issue, including the district courts of Ohio, have followed *Horton II*. *See Colley*, 2016 WL 2998111, at *7; *Schnaudt*, 2016 WL 5394195, at *11; *McGrew*, 2017 WL 1147489, at *8.

In *Colley*, the court held:

> [I]n [*Horton II*], the court of appeals rejected the NLRB's decision that Section 7 of the [NLRA] conflicts with the [FAA], because Section 7 guarantees employees the right to engage in concerted action. In reaching its conclusion, the Fifth Circuit noted: "Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." *Id.* at 362. (internal citations omitted). **The Fifth Circuit's analysis of the issue is persuasive. And in the absence of any contrary Sixth Circuit or Supreme Court precedent, the Court adopts its conclusion that the NLRA does not prohibit an arbitration agreement that includes a prohibition on collective arbitration of FLSA claims.** (emphasis added)

2016 WL 2998111, at *7. The Western District of Kentucky district court agreed:

> This Court agrees with the Fifth Circuit's reasoning. In *D.R. Horton*, the court recognized "[n]either the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA," and there is no "inherent conflict between the FAA and the NLRA's purpose." *D.R. Horton*, 737 F.3d at 361. The Fifth Circuit also held that the FAA's "savings clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 360. Accordingly, the court concluded that arbitration agreements like Plaintiffs' do not violate the NLRA and "must be enforced according to [their] terms." *Id.* at 362. **While there is considerable disagreement among the circuits regarding this proposition, this Court believes that the majority position is most sound, especially given the Supreme Court's express directive to "place arbitration agreements on an equal footing with other contracts."** *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (*citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). **The NLRA poses no obstacle to the enforcement of Plaintiffs' arbitration agreements.** (emphasis added)

2017 WL 1147489, at *8. Even *Schnaudt*, cited by Pyle in his Complaint, provisionally granted defendant's motion to compel, but withheld the order pending further consideration "and developments," including "further developments at the appellate level." 2016 WL 5394195, at *11. No district court in the Circuit has held that the NLRA invalidates arbitration agreements.[9]

Additionally, this case is not subject to the rationale of cases like *Lewis* and *Morris*, because those cases invalidated terms that required **waiver** of class and collective actions in the arbitration agreement, while here the arbitration clause does not authorize collective arbitration because it is **silent** as to the issue. In *Morris*, for example, the court enunciated the standard for deciding whether the FAA's savings clause applies:

> [W]hen a party raises a defense to the enforcement of an arbitration provision, a court must determine whether the defense targets arbitration contracts without "due regard…to the federal policy favoring arbitration."

834 F.3d at 984 (*quoting DIRECTV, Inc. v. Imburgia*, _ U.S. _, 136 S.Ct. 463, 471, 193 L.Ed.2d 365 (2015)). *Morris* made clear that "[t]he contract defense in this case does not 'derive [its] meaning from the fact that an agreement to arbitrate is at issue,' *id.* (*quoting Concepcion*, 563 U.S. at 339), but because the "separate proceedings" clause was illegal:

> The illegality of the "separate proceedings" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes in court and in "separate proceedings."…The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.

Id. at 985. To emphasize the point, *Morris* distinguished *Stolt Nielsen*,[10] a case which held that arbitration agreements that were silent as to class arbitration, did not authorize class arbitration:

> [*Stolt-Nielsen*] is not to the contrary. Under *Stolt*, an arbitrator may not add to the terms of an arbitration agreement, and therefore may not order class arbitration unless the

[9] *Gaffers* did not rule on the issue. 203 F.Supp.3d at 836-37 ("the Court finds it unnecessary to reach that question under the NLRA").

[10] The case on which the Sixth Circuit based its holdings in *AlixPartners*, *Huffman*, and *Reed Elsevier*, discuss above

> contract provides for it…. This does not require a court to enforce an illegal term. Nor would *Stolt* prevent the district court, on remand from severing the "separate proceedings" clause to bring the arbitration provision into compliance with the NLRA.

Id. at 985 n. 8. Here, on the contrary, there is no illegal term to sever. Collective arbitration is not authorized precisely because of the arbitral forum and the fact that the agreement does not specifically provide for collective arbitration. *AlixPartners*, 836 at 553. The court cannot add to the terms. But the "contract defense" absolutely "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Therefore, the FAA's savings clause does not apply and, therefore, neither does the reasoning in *Morris*. 834 F.3d at 985 ("When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other, the FAA recognizes a general contract defense of illegality.").

This Court should adopt the majority position followed by the other district courts in Ohio and find that the NLRA does not invalidate the arbitration agreement.

3. The arbitrator fees provision does not invalidate the arbitration agreement

Pyle alleges that he is prevented from vindicating his statutory rights under the FLSA because the "Arbitration Agreement is ambiguous regarding Plaintiff's obligation to pay half of all arbitration fees and cots" because it states that "'[t]he Company shall pay the fees and costs of the arbitrator, only as required by law.'" Dkt. No. 1 at ¶ 14. Pyle cites *Morrison v. Circuit City Stores*, 317 F.3d 646 (6th Cir. 2003) in support of this allegation. But *Morrison* does not support this claim.

In *Morrison*, the arbitration agreement provided that "each party is required to pay one-half of the costs of arbitration following the issuance of an arbitration award." 317 F.3d at 655. The Sixth Circuit held that a cost splitting provision did not "per se deny litigants an effective

forum for the vindication of their statutory rights." *Id.* at 658-59. Instead, the court held "that potential litigants must be given an opportunity, prior to arbitration on the merits, to demonstrate that the potential costs of arbitration are great enough to deter them" from seeking to vindicate their rights in an arbitral forum. *Id.* at 663. If the court finds that the provision would deter potential litigants, "it should refuse to enforce the cost-splitting provision." *Id.* If the provision is found to be unenforceable and the agreement allows severance, it can be severed and arbitration can proceed without cost splitting. *Id.* at 675.

Here the agreement provides that VXI will pay the costs if the law requires it. This is very different from requiring cost splitting in all cases. It is much more like an agreement that is silent as to cost splitting, which has been found not to invalidate the arbitration agreement:

> [T]he Court declines to find the arbitration agreements…unenforceable where those agreements are silent regarding arbitration costs and fees, the imposition of any fees and/or costs on Plaintiffs result only from a decision by the arbitrator, and no final decision in this regard has been made….In the event such costs and fees are imposed, however, the Court can engage in post hoc review of the arbitrator's award and modify it to conform to public policy.

Thomas v. Right Choice Staffing Group, LLC, _ F.Supp.3d _, 2016 WL 6471196, *6 (E.D.Mich. 2016). In the present case, if the Court holds that VXI is legally required to pay all of the arbitration costs, the language of the agreement itself provides that VXI make that payment. But if this Court finds that the provision is unenforceable, it can simply sever that provision under the arbitration agreements severance clause. *Morrison*, 317 F.3d at 675.[11] This provision does not make the arbitration agreement unenforceable.

[11] Paragraph 9 of the arbitration agreement provides: "If any provision of this Agreement is determined to be void or otherwise unenforceable, in whole or in part, such determination shall not affect the validity of the remainder of this Agreement." Dkt. No. 1, Ex. A.

IV. CONCLUSION

Wherefore, this Court should enter an order compelling Pyle to arbitrate his claims on an individual basis against VXI and dismissing Pyle's Complaint.

Respectfully submitted,

s/Thomas J. Lipka
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Thomas J. Lipka
Thomas J. Lipka

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JARROD PYLE, on behalf of himself and all others similarly situated Plaintiff vs. VXI GLOBAL SOLUTIONS, INC. AND VXI GLOBAL SOLUTIONS, LLC Defendants	CASE NO. 5:17-CV-00220 JUDGE: SARA LIOI AFFIDAVIT OF THOMAS J. LIPKA

NOW COMES Thomas J. Lipka, and being first duly sworn, deposes and says as follows:

1. My name is Thomas J. Lipka and I have personal knowledge of all the assertions contained in this Affidavit.

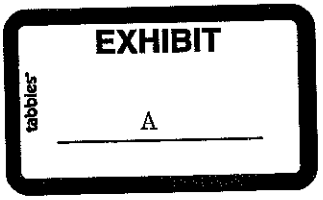
2. I am an attorney for VXI Global Solutions, LLC ("VXI").

3. I represent VXI in the Ohio Court of Common Pleas in the case of *Shakoor v. VXI Global Solutions, Inc.*, Mahoning County Ohio Court of Common Pleas, Case No. 13 CV 3183. The trial court entered two Judgment Entries in that case, one dated May 1, 2014 and one on March 4, 2016.

4. A true and accurate copy of the May 1, 2014 Judgment Entry is attached hereto as Exhibit 1.

5. A true and accurate copy of the March 4, 2016 Judgment Entry is attached hereto as Exhibit 2.

6. As required by this Court's Initial Standing Order (Dkt No. 3) at 6, I hereby certify that the Memorandum of Law In Support of Motion to Compel Arbitration and Dismiss



Plaintiff's Complaint complies with the page limit of 20 pages for substantive motions filed before the Case Management Conference stated in Dkt. No. 3 at 7.

FURTHER AFFIANT SAYETH NAUGHT.

Thomas J. Lipka

SWORN TO AND Subscribed before me on this 10th day of May, 2017.

Notary Public

NOTARIAL SEAL STATE OF OHIO

DENISE A. LESON
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES OCTOBER 17, 2020

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

Lashonna Shakoor,	)	**Case No. 13 CV 3183**
	)	
Plaintiff,	)	Judge Lou A. D'Apolito
	)	
vs.	)	Magistrate Daniel P. Dascenzo
	)	
VXI Global Solutions, Inc.,	)	**Judgment Entry**
	)	
Defendant.	)	

This matter is before the Court on Plaintiff's motion to stay litigation pending arbitration and Defendant's motion to compel arbitration.

Upon review and consideration of the motions, briefs, and exhibits of the parties, the Court first must determine the question of arbitrability from a substantive perspective. That is, do Plaintiff's claims fall within the scope of the parties agreement to arbitrate.

R.C. 2711.02 (B) requires the trial court to analyze the contract language to determine whether the dispute falls within the scope of the arbitration agreement. Absent a specific agreement to the contrary, " the question of arbitrability … is undeniably an issue for judicial determination." *Academy of Med. of Cincinnati v. Aetna Health, 108 Ohio St. 3rd 185.*

A review of Section 1 of the Arbitration Agreement demonstrates that Plaintiff's individual claim for wages does, in fact, fall within the parameters of the arbitration agreement. Further, the Agreement states the "the Arbitrator, and not any …. State or local court or agency, shall have exclusive authority to resolve any dispute relating to the

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interpretation … enforceability … of this Agreement." As such, from a substantive standpoint and upon a review of the subject Agreement, this claim must be addressed through arbitration.

The parties have also put forward a procedural issue with respect to Plaintiff's claims. Specifically, Plaintiff is seeking a determination from this Court that the Agreement to arbitrate disputes contemplates the procedural remedy of not only "individual arbitration" but also "class arbitration."

Due to the clear language of the Agreement providing that such disputes be determined by the Arbitrator, the Court will not address that issue, but will acknowledge that the language of the Agreement does not explicitly mention "class arbitrations."

Plaintiff's motion to stay this matter pending arbitration is sustained to the extent that this matter is referred to arbitration per the Agreement entered into by the parties.

Defendant's motion to compel individual arbitration is denied, as such a determination, by virtue of the Agreement, is to be made by the Arbitrator.

DATED: 5/1/14

Judge Lou A. D'Apolito

CLERK: COPIES TO ALL COUNSEL OR UNREPRESENTED PARTIES

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

Lashonna Shakoor, et al,	)	**Case No. 13 CV 3183**
	)	
Plaintiffs,	)	Judge Lou A. D'Apolito
	)	
vs.	)	Magistrate Daniel P. Dascenzo
	)	
VXI Global Solutions, Inc.,	)	**Judgment Entry**
	)	
Defendant.	)	

This matter is before the court on remand from the Seventh District Appellate Court.

This Court previously held that with respect to the issue of arbitrability of the claims presented by the Plaintiffs are within the parameters of the arbitration agreement. As such, the claims must be resolved through arbitration. However, on the question of whether or not the arbitration agreement permitted class arbitration or compelled individual arbitration, this Court held that such a question is left to the arbitrator, per the language of the agreement.

On remand, this Court reiterates its previous finding that the arbitration agreement does not explicitly permit class arbitration. Consequently, and in accordance with the reviewing court's reliance on the Ninth District Court of Appeals holding in Bachrach v Cornwelll Quality Tool, Co. (unreported –WL2040865), this Court is compelled to find in favor of Defendant Corporation and against the employees. This matter is dismissed and referred to arbitration. Since the arbitration agreement does not explicitly "state that class arbitration is permitted, the claims are to be arbitrated individually. (Bachrach v. Cornwell)"

There is no just cause for delay.

Dated: 3/3/16

Judge Lou A. D'Apolito

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