IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KOLY CAMARA
Individually, on Behalf of All Others Similarly Situated, and on Behalf of the General Public of the District of Columbia,

Plaintiff,

v.

MASTRO'S RESTAURANTS LLC,

Defendant.

Civil Action No. 1:18-cv-724 (JEB)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION

Plaintiffs Koly Camara ("Camara") and the opt-ins (collectively, "Plaintiffs") oppose Defendant's Motion to Compel Arbitration ("Motion") on the following grounds:

I. FACTUAL BACKGROUND

Camara filed the original class and collective action wage theft complaint in this matter on February 13, 2018 in the Superior Court of the District of Columbia. Defendant removed on March 29, 2018. *See* Doc. 1. Shortly after the expiry of the time for Camara to move to remand, Defendant's counsel Gerald L. Maatman wrote a letter – attached to an email – to Plaintiffs' counsel Jason S. Rathod on April 23, 2018. The letter advised Plaintiffs of certain defenses Defendant had, including a purported arbitration agreement. Six minutes after receipt of the letter, Mr. Rathod wrote back to Mr. Maatman, requesting that Mastro's produce the purported arbitration agreement. Mastro's did not. Defendant filed an Answer to the Complaint, and, at that time, did not move to compel arbitration. *See* Doc. 8. The parties met and conferred and filed a statement that did not mention arbitration. *See* Doc. 9.

A week later at the first Initial Scheduling Conference, on May 22, 2018, Defendant's counsel Rebecca Bjork informed the Court of its intent to move to compel arbitration, allegedly in light of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, __ U.S. __ (2018), even though, as detailed below, the decision has no bearing on the instant dispute. Plaintiffs' counsel, Mr. Rathod, pointed this out and also requested that Defendant provide the basis for its belief that there was an enforceable arbitration agreement between the parties. Defendant's counsel could not do so. The Court requested the parties submit a supplemental meet and confer statement in light of Defendant's stated intent to move to compel arbitration, rescheduled the Initial Case Management conference and provide Plaintiffs and the putative collective with limited tolling of the statute of limitations (April 25, 2018 minute order).

On June 3, 2018 Justin Michael Johns filed a notice of consent to join the lawsuit as part of a declaration filed with the court, becoming an additional party plaintiff. *See* Doc. 14-1.[1] The declaration was part of Plaintiffs' Motion for Conditional Certification, which sought dissemination of notice to putative collective action members pursuant to the Fair Labor Standards Act ("FLSA") and Washington D.C. Minimum Wage Revision Act ("DCMWRA").[2] *See* Doc. 14. Defendant filed the Motion on June 14, 2018, but only with respect to Camara, and not with respect to Plaintiff Johns. *See* Doc. 17. With its motion, Defendant once again did not present a signed arbitration agreement between Plaintiff Camara and Defendant. To date,

[1] *See* 29 U.S.C. § 216(b); *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1278 (11th Cir. 2018) ("The plain language of § 216(b) supports that those who opt in become party plaintiffs upon the filing of a consent and that nothing further … is required.") (collecting authority). Plaintiff Johns filed the declaration as a separate docket entry on June 6, 2018 so that the face of the docket could clearly show his intent to become a party plaintiff. *See* Doc. 16. On June 25, 2018, two additional individuals – Dena Altamore and Jose Santiago – also filed notices of consent to become party plaintiffs. See Docs. 19, 20. Defendant has also not sought to compel either of these plaintiffs to arbitration.

[2] Plaintiff moved for leave to amend his complaint to add DCMWRA collective allegations, *see* Doc. 12, which was granted by the Court on June 4, 2018,. *see* Doc. 15.

Defendant has failed to do so.

In support of this opposition to Plaintiffs' Motion, Camara submits a declaration stating that he reviewed the form (unsigned) arbitration agreement that Defendant presented to the Court: "I have reviewed the form arbitration agreement …. I did not see that agreement when I worked at Mastro's, did not sign it, and I never agreed to its terms." *See* Declaration of Koly Camara, July 3, 2018 ("Camara Decl."), ¶ 3 (attached hereto as Exhibit 1). Mr. Camara added: "I never thought, or had reason to believe, that I gave up legal rights, including to a trial by jury, by working for Mastro's." *Id.* at ¶ 4.

II. LEGAL STANDARD

This Court previously described the legal standard of review for a motion to compel arbitration in a case titled *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77 (D.D.C. 2016) (Boasberg, J.):

> When considering a motion to compel arbitration, "the appropriate standard of review for the district court is the same standard used in resolving summary judgment motions pursuant to Fed. R. Civ. P. 56(c)." *Brown v. Dorsey & Whitney, LLP*, 267 F. Supp. 2d 61, 67 (D.D.C. 2003) (internal quotation marks and citation omitted); *see also Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865, 382 U.S. App. D.C. 134 (D.C. Cir. 2008) ("The district court properly examined [defendant's] motion to compel arbitration under the summary judgment standard of Federal Rule of Civil Procedure 56(c), as if it were a request for 'summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate.'") (quotation marks and citation omitted). "As the party seeking to compel arbitration, Defendant[] must first come forward with evidence sufficient to demonstrate an enforceable agreement to arbitrate." *Hill v. Wackenhut Services Int'l*, 865 F. Supp. 2d 84, 89 (D.D.C. 2012) (citation omitted). The burden then shifts to Plaintiff "to raise a genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed. R. Civ. P. 56." *Grosvenor v. Qwest Communications Intern., Inc.*, 2010 U.S. Dist. LEXIS 109884, 2010 WL 3906253, at *5 (D. Colo. 2010). ***Arbitration should be compelled if "there is 'no genuine issue of fact concerning the formation of the agreement' to arbitrate.'"*** *Kirleis v. Dickie, McCamey & Chilcote, PC*, 560 F.3d 156, 159 (3d Cir. 2009) (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)).

> To review the Rule 56 standard, a fact is "material" if it is capable of affecting the substantive outcome of the litigation. *See Holcomb v. Powell*, 433 F.3d 889, 895, 369 U.S. App. D.C. 122 (D.C. Cir. 2006); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Liberty Lobby*, 477 U.S. at 248; *Holcomb*, 433 F.3d at 895. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record." Fed. R. Civ. P. 56(c)(1)(A). ***When a motion for summary judgment is under consideration, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."*** *Liberty Lobby*, 477 U.S. at 255; *see also Mastro v. PEPCO*, 447 F.3d 843, 850, 371 U.S. App. D.C. 68 (D.C. Cir. 2006); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1288, 332 U.S. App. D.C. 256 (D.C. Cir. 1998) (*en banc*). On a motion for summary judgment, the Court must "eschew making credibility determinations or weighing the evidence." *Czekalski v. Peters*, 475 F.3d 360, 363, 374 U.S. App. D.C. 351 (D.C. Cir. 2007).
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> The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The nonmovant is required to provide evidence that would permit a reasonable jury to find in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1242, 259 U.S. App. D.C. 115 (D.C. Cir. 1987). If the nonmovant's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Liberty Lobby, Inc.*, 477 U.S. at 249-50.

Id. at 84-85 (emphasis supplied); *see also* 9 U.S.C. § 4.

III. ARGUMENT

A. Mastro's Has Failed to Carry Its Burden of Proving Contract Formation

Mastro's readily admits that it cannot locate a copy of its "Mutual Agreement to Arbitrate Claims" ("Agreement") that was executed by Camara. *See* Def. Br. (Doc. 17), at 4 ("Despite a diligent and ongoing search, Defendant has not yet located the original signed version of Plaintiff's [Agreement]."). Instead, Defendant is asking the Court to overlook this deficiency and rely almost exclusively on the liberal federal policy favoring arbitration as a basis to compel Camara's FLSA

claims to arbitration. *See, e.g., id.* at 5-8. However, as two recent federal circuit court decisions have demonstrated, the liberal policy in favor of arbitration is not limitless and should only apply if an employer can produce an enforceable agreement with the employee to arbitrate her claims under applicable state contract law. *See Weckesser v. Knight Enters. S.E.*, LLC, 2018 U.S. App. LEXIS 15751 (4th Cir. June 12, 2018); *Huckaba v. Ref-Chem, L.P.*, __ F. Supp. 3d __, 2018 U.S. App. LEXIS 15678 (5th Cir. June 11, 2019). Notably, both *Weckesser* and *Huckaba* were issued ***after*** the Supreme Court's May 21, 2018 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, __ U.S. __ (2018). Moreover, as this Court recognized in *McMullen*, Defendant cannot satisfy its significant burden of demonstrating that Camara distinctly intended to be bound by the Agreement as required by District of Columbia contacts law.[3] Thus, genuine issues of material fact remain necessitating the denial of Defendant's Motion.

1. Presumptions favoring arbitration do not apply in deciding this gateway issue

In *Weckesser*, the Fourth Circuit Court of Appeals was confronted with a similar question (as in this case) of whether the parties had a binding agreement to arbitrate an individual's wage and hour claims brought under the FLSA and South Carolina law. 2018 U.S. App. LEXIS 15751, at *2-3. There, the plaintiff had actually signed an arbitration agreement that contained a "clerical error" misidentifying the employer. *Id.* at *4. The defendant argued, *inter alia*, that despite this error, the arbitration agreement was still binding on the parties and that "the court should use its powers in equity to force the parties to arbitrate." *Id.*

In affirming the district court's denial of the motion to compel, the Fourth Circuit observed that the strong federal court presumption in favor of arbitration does not eliminate a

[3] The parties do not dispute that the Court should apply District of Columbia contract law. *See* Def. Br. (Doc. 17) at 9 n.1.

parties' need to establish the existence of a binding arbitration agreement under applicable state contract law:

> Although the Supreme Court has "long recognized and enforced a liberal federal policy favoring arbitration agreements," a court cannot force a party to arbitrate a claim unless that party has agreed to do so. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (internal quotation marks omitted); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). And the FAA doesn't "purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen*, 556 U.S. at 630. Thus, to determine whether the Arbitration Rider created an enforceable agreement between [the parties], we look to principles of South Carolina contract law.
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> [The defendant] argues that in the special context of arbitration agreements, a feather must be placed upon the scale on the side of arbitrating claims. To be sure, courts have spoken of a "general policy-based, federal presumption in favor of arbitration." *Peabody Holding Co. v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 102 (4th Cir. 2012). But that presumption is no armor for [the defendant] here. The presumption can't "override[] the principle that a court may submit to arbitration only those disputes the parties have agreed to submit." *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (internal quotation marks and ellipses omitted).
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> This case asks the question "who must arbitrate" rather than "what must be arbitrated." And the presumption applies "only when a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand, not when there remains a question as to whether an agreement [to arbitrate] even exists between the parties in the first place." *Id.* (internal quotation marks omitted); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (courts should "apply[] the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand"); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 324 n.2 (4th Cir. 2013) (arbitration presumption "applies only where a validly formed and enforceable arbitration agreement exists and its scope is ambiguous"); *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011) (presumption "does not apply to disputes concerning whether an agreement to arbitrate has been made').

Id. at *6, *11-12; *see also id.* at *12 ("However 'healthy' the federal regard for arbitration, we

won't force one party to arbitrate a claim with another when he hasn't agreed to do so."); *Granite Signature Tech. Sols. v. Incapsulate, LLC*, 58 F. Supp. 3d 72, 79-80 (D.D.C. 2014) ("[Defendant]… misconstrues the presumption in favor of arbitration, which applies when determining the scope of the issues encompassed by an arbitration clause in a valid and enforceable contract[; h]ere, the petitioners challenge the validity of a purported contract which contains an arbitration clause, not the scope of issues encompassed by this clause, and therefore, the presumption in favor of arbitrability also does not apply."); *Am. Heritage Life Ins. Co. v. Lang*, 321 F.3d 533, 537-38 (5th Cir. 2003) ("Normally, doubts must be resolved in favor of arbitration, but the 'federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties' or to 'the determination of who is bound' by the arbitration agreement.") (internal citiations omitted); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1220 (10th Cir. 2002) ("The presumption in favor of arbitration is properly applied in interpreting the scope of an arbitration agreement; however, this presumption disappears when the parties dispute the existence of a valid arbitration agreement."); *cf. Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J.) (". . . even under the FAA it remains a 'fundamental principle' that 'arbitration is a matter of contract,' not something to be foisted on the parties at all costs") (internal citations omitted).

Similarly, in *Hucakaba*, an employer attempted to compel arbitration based on an agreement that was signed by the employee but not the employer. 2018 U.S. Dist. LEXIS 15678, at * 1. The *Hucakaba* court relied on Texas contracts law to find that there was no binding agreement to arbitrate between the parties and reversed the district court's decision to compel arbitration. *Id.* Before embarking on its analysis of whether the parties had in fact agreed to arbitrate their claims, the Fifth Circuit held that since "the validity of the agreement is a

matter of contract, at [the motion to compel arbitration] stage, ***the strong federal policy favoring arbitration does not apply***." *Id.* at *4 (emphasis supplied).

As the party seeking to compel arbitration, it is Defendant (not Plaintiff) that bears the burden of proving that the parties formed an enforceable agreement to the arbitration clause in the purported Agreement: "the party asserting the existence of a contract [to submit disputes to arbitration] has the burden of proving its existence." *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94, 99 (D.D.C. 2004) (quoting *Bailey v. Fed. Nat'l Mortgage Ass'n*, 209 F.3d 740, 746 (D.C. Cir. 2000)). This burden extends to the issue of contract formation. *Novecon Ltd. v. Bulgarian-American Enter. Fund*, 190 F.3d 556, 564 (D.C. Cir. 1999).

Here, Defendant attempts to avoid this burden by arguing that the U.S. Supreme Court's recent decision in *Epic* eliminated this requirement altogether. *See* Def. Br. (Doc. 17) at 7-8. Specifically, Defendant cites to Justice Ginsburg's dissent in *Epic* in which she observed that the arbitration agreements were merely e-mailed to employees. *Id.* According to Defendant, this is proof that "the majority *still* found Epic System's arbitration program to be fully enforceable under the FAA, thus necessarily rejecting the view (like [Camera]'s apparent view) that there was insufficient basis to conclude he had agreed to the form agreement." *Id.*

Unfortunately for Defendant, this argument is belied by the majority's actual opinion in *Epic* which expressly recognized that the ***employees were not challenging the existence of a binding arbitration agreement under applicable state contract law***. *See* 138 S. Ct. at 1622. Instead, the majority relied on the fact that the employees were ***only*** asserting that the arbitration agreements' class and collective action wavers violated Section 7 of the National Labor Relations Act by barring employees from engaging in "concerted activit[y]":

> This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some

> other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones.

Id.[4]

Importantly, both the Fourth Circuit's decision in *Weckesser* and the Fifth Circuit's decision in *Hucakaba* were issued in June 2018 ***after*** the Supreme Court's May 2018 decision in *Epic***.** Yet, neither of these courts saw the need to cite to the *Epic* decision or address its holding since it did alter the need for an employer to establish the existence of a binding agreement to arbitrate ***before*** an employee can be compelled to arbitrate his claims.

2. Believing Camara's Sworn Declaration and Taking All Justifiable Inferences in his Favor, Defendant Has Failed to Carry Its Burden and the Motion Should be Denied

In *Bailey v. Fannie Mae*, the Court of Appeals for the District of Columbia Circuit outlined the standard for determining whether a binding agreement to arbitrate existed between the parties under District contract law:

> The Supreme Court has instructed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995), that "when deciding whether the parties agreed to arbitrate a certain matter, … courts generally … should apply ordinary statelaw principles that govern the formation of contracts." *Id*. at 944. Thus, in this case, we must look to the law of the District of Columbia to determine whether the employer's [arbitration agreement] reflects a binding agreement between [the parties].
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> Under applicable District of Columbia law, "arbitration is predicated upon the consent of the parties to a dispute, and the determination of whether the parties have consented to arbitrate is a matter to be determined by the courts on the basis of the contracts between the parties." *Ballard & Assocs., Inc. v. Mangum*, 368 A.2d 548, 551 (D.C. 1977). Furthermore, under District law, an enforceable contract does not exist unless there has been a "meeting of the minds" as to all

[4] Defendant also cites to several district court opinions that have since relied on the Supreme Court's decision in *Epic* to compel employee's claims to arbitration on an individualized basis. *See* Def. Br. (Doc. 17) at 8-9. However, as in *Epic*, each of these decisions concerned the legality of class and collective action waivers under the NLRA and did not concern challenges to the existence of binding agreements to arbitrate under applicable state law. *Id.*

> material terms. In other words, a contract is not formed unless the parties reach an accord on all material terms and indicate an intention to be bound. *See Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1238 (D.C. 1995). With respect to proof of intent, the D.C. Court of Appeals has held that "the parties' intention to be bound must be 'closely' examined." *Id*. at 1239. The court explained:
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> > ***In evaluating contract formation, we also look closely at the parties' intention to be bound. In order to form a binding agreement, both parties must have the distinct intention to be bound; without such intent, there can be no assent and therefore no contract.***
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> *Id*. (quoting *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 547 (D.C. 1981)). Finally, the party asserting the existence of a contract has the burden of proving its existence. *See Ekedahl v. Corestaff, Inc.*, 337 U.S. App. D.C. 236, 183 F.3d 855, 858 (D.C. Cir. 1999) (per curiam).

209 F.3d 740, 746 (D.C. Cir. 2000) (emphasis supplied); *see also McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 89 (D.D.C. 2016) (Because, under District of Columbia law, "both parties must have the distinct intention to be bound," where ambiguity exists about one party's intent, the party seeking to enforce the agreement has not carried its burden. ***This echoes the applicable Rule 56 standard: if Plaintiff "raise[s] a genuine issue of material fact as to the making of the agreement" to arbitrate, courts will not compel arbitration***.) (Boasberg, J.) (internal citations omitted and emphasis supplied); *Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1334 (11th Cir. 2016) ("As defendant offered no competent evidence to demonstrate the existence of a genuine issue of material fact concerning the existence of an arbitration agreement, its motion to compel arbitration must be denied as a matter of law without the need for a trial."). Here, Defendant cannot establish that Camara intended to be bound by the Agreement.

First (and most obvious), Defendant cannot locate an Agreement actually signed by Camara evidencing his intention to be bound by its terms. *See* Def. Br. (Doc. 17) at 4 ("Despite a diligent and ongoing search, Defendant has not yet located the original signed version of Plaintiff's [Agreement]."). Instead, Defendant proffers circumstantial evidence that Defendant intended to have

all employees sign an Agreement and that according to an internal "database" the "Washington D.C. location was very successful in its implementation of the rollout of the arbitration policy and its management was personally proud of the level of compliance it achieved." *Id.* at 3-5; *see also id.* at 7.

Setting aside Defendant's self-congratulatory assessment of its attempt to have employees waive their right to pursue class and collective actions, this untested circumstantial evidence is insufficient to demonstrate that Camara had "the distinct intention to be bound" by the Agreement as required by this Court in *McMullen*. *See* 164 F. Supp. 3d at 89. As here, the plaintiff in *McMullen* did not actually sign the arbitration agreement at issue. *Id.* at 88. While this Court recognized that the absence of one party's signature does not automatically foreclose the finding of a binding contract under District law, *see id.*, Camara has provided evidence demonstrating that he never had the distinct intention to be bound by the Agreement, *see* Camara Decl., Ex. 1. Specifically, Camara declares that he never saw the Agreement when he worked for Defendant, never signed it, nor agreed to its terms. *See* Camara Decl., ¶ 3. Under *McMullen*, these genuine issues of material facts require denial of Defendant's Motion.

Second, Defendant argues that even in the absence of a signed Agreement, Camara's intention to be bound by its terms can be inferred by his continued work for Defendant after Defendant purportedly rolled out its arbitration policy. *See* Def. Br. (Doc. 17) at 6-7. However, this Circuit has held on two occasions that this inference is an insufficient basis to compel arbitration.

In *Bailey v. Fannie Mae*, 209 F.3d 740 (D.C.C. 2000) it was "undisputed" that the employee never executed a written agreement with the employer to arbitrate his statutory claims of employment discrimination. *Id.* at 744. Yet, the defendant argued that the plaintiff agreed to a new arbitration policy that was introduced during his employment "because he did not positively reject

it." *Id.* at 746. The D.C. Circuit rejected this argument as "a *non sequitur*" holding that the employee's continued employment and "failure to reject a proposal" was insufficient evidence of assent to be bound by the agreement. *Id.*; *see also id.* ("There was no 'meeting of the minds' in this case, because Mr. Bailey did nothing whatsoever to embrace the employer's proposal.").

Similarly in *George Town Club at Suter's Tavern, Inc. v. Salamanca*, 2008 U.S. App. LEXIS 5758 (D.C. Cir. Mar. 10, 2008), the D.C. Circuit affirmed the district court's denial of a motion to compel arbitration where the plaintiff never signed the agreement at issue. There, the court held that "Salamanca's commencement of employment after first receiving the manual [containing the arbitration provision] and his continued employment after the Club reissued the manual thus reveal no 'meeting of the minds' between the parties." *Id.* at *3 (quoting *Bailey*); *see also George Town Club at Suter's Tavern, Inc. v. Salamanca*, 2007 U.S. Dist. LEXIS 25396, *11 (D.D.C. Apr. 5, 2007) ([R]espondent's continued employment alone is insufficient to demonstrate his assent to the Employee Manual's arbitration clause.").

B. Even if the Court Finds an Enforceable Agreement for Camara, the "Individual Basis" Only Provision of the Agreement is Unenforceable with Respect to Camara's Washington D.C. Claims, Leaving this Court with Jurisdiction and Venue over this Case

1. Washington D.C. Wage Theft Law Prohibits Waivers of the Right to Seek Public Injunctive Relief and the Right to Send Notice

D.C. Code § 32-1305 states that "no provision of this chapter shall in any way be contravened or set aside by private agreement." D.C. Code § 32-1308 authorizes claims pursuant to the DCMWRA to be maintained on a representative basis, including "individually by an aggrieved person," and provides for injunctive relief. It also authorizes representative actions "[c]onsistent with the collective action procedures of the Fair Labor Standards Act, 29 U.S.C. § 216(b)." D.C. Code § 32-1308. This Court has interpreted a prior iteration of the D.C. statute

authorizing collective notice as conferring a substantive right. *See Driscoll v. George Wash. Univ.*, 42 F. Supp. 3d 52, 62 (D.D.C. 2012) ("The Court concludes that the DCMWA's opt-in mechanism confers substantive rights.").

2. This is similar to California law, where the state supreme court and federal courts have held arbitration provisions that foreclose public injunctive relief unlawful

In *McGill v. Citibank, N.A.*, the Supreme Court of California unanimously held that contracts that purport to waive the right to seek the remedy of public injunctive relief in any forum are contrary to California public policy and, thus, unenforceable under California law. 393 P.3d 85, 87 (Cal. 2017). Public injunctive relief "has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public," and is one of the types of statutory relief available under the California Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq*.) and Unfair Competition Law ("UCL"; Cal. Bus. & Prof. Code §§ 17200, *et seq*.). *Id.*

In almost identical terms as D.C. Code § 32-1305, the California Civil Code states that "a law established for a public reason cannot be contravened by a private agreement." *Id.* at 93 (citing Cal. Civ. Code § 3513). *McGill* held that pre-dispute waivers of the public injunctive relief available under these statutes are unenforceable. *Id.* at 94 (waiver "of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statutes were intended to serve"). Nearly every Court has followed *McGill*'s reasoning, and invalidated arbitration agreements to the contrary. *See, e.g., Roberts v. AT&T Mobility LLC*, No. 2018 U.S. Dist. LEXIS 42235 (N.D. Cal. Mar. 14, 2018); *Blair v. Rent-A-Center, Inc.*, 2017 U.S. Dist. LEXIS 163979 (N.D. Cal. Oct. 3, 2017); *McArdle v. AT&T Mobility LLC*, 2017 U.S. Dist. LEXIS 162751 (N.D. Cal. Oct. 2, 2017); *Cf. DeVries v. Experian*, (AAA, Dec. 12, 2017) AAA Case. No. 01-17-0001-772, https://bit.ly/2EFyHDD. Courts have even done so in the past three

weeks, *after* the *Epic* decision on which Defendant so heavily relies. *See, e.g., Wang v. Stubhub Inc., et al*., CGC-18-564120 (San Fran. Super. Ct. Jun. 11, 2018), attached hereto as Exhibit 2.

Plaintiffs submit the Court of Appeals of the District of Columbia would adopt the same reasoning given the nearly identical language between D.C. Code § 32-1305 and Cal. Civ. Code § 3513. *See Casciano v. Jasen Rides, LLC*, 109 F. Supp. 3d 134, 139 (D.D.C. 2015) ("This Court is persuaded by the Supreme Court of California's reasoning and sees no reason why the D.C. Court of Appeals would not follow it."). Plaintiffs also submit the logic of the *McGill* rule necessarily extends to the provision of notice of the lawsuit to similarly situated employees under the DCMWRA since that, too, is a substantive right conferred for by statute. *See Driscoll*, 42 F. Supp. 3d at 62.

3. The Federal Arbitration Act does not prohibit this generally applicable contract defense

The Federal Arbitration Act ("FAA") does not preempt the *McGill* rule, which is permitted by the FAA's savings clause. The FAA requires courts to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted). However, the FAA's savings clause permits courts to declare arbitration agreements unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *Id*. (quoting 9 U.S.C. § 2). Therefore, under the FAA, arbitration agreements may be invalidated by "generally applicable contract defenses," but the FAA preempts "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id*. The FAA also preempts state-law rules that are "applied in a fashion that disfavors arbitration," *id*. at 341, or that "interfere[] with fundamental attributes of arbitration." *Id*. at 344.

The *McGill* rule is a generally applicable contract defense. *See* 393 P.3d at 94-95. As

applied here, it derives from a statutory ground in the D.C. Code for revoking any contract: "no provision of this chapter shall in any way be contravened or set aside by private agreement." D.C. Code § 32-1305. Unlike, for example, the (unrelated) California rule prohibiting parties from compelling public injunctive claims to be resolved through arbitration—a rule that applies only to arbitration agreements, and which the Ninth Circuit therefore concluded was preempted by the FAA—the *McGill* rule addresses contracts that would prohibit both arbitration and litigation of certain relief, such as public injunctive relief and dissemination of notice, in any forum. *Blair*, 2017 U.S. Dist. LEXIS 163979, at *13; *McGill*, 393 P.3d at 90. The same distinction exemplifies how the *McGill* rule does not disfavor arbitration: under the *McGill* rule, "parties can compel public injunctive claims to arbitration. [The rule] merely prohibits contracts that waive such claims altogether." *Blair*, 2017 U.S. Dist. LEXIS 163979, at *13-14.

Nor does the *McGill* rule interfere with fundamental attributes of arbitration. *See Concepcion*, 563 U.S. at 346-51. In fact, *McGill* does not directly affect arbitration procedures at all. *McGill*'s invalidation of contract provisions purporting to bar public injunctive relief or dissemination of notice in any forum permits such claims to proceed in court or arbitration (depending on the parties' agreement), but leaves any other claims subject to arbitration unaffected. To the extent it might result in parties arbitrating public injunctive relief when that was not the intent of their agreement, such claims require no extra procedures or formality. "[C]laims for public injunctive relief do not require burdensome procedures that could stand as an obstacle to FAA arbitration. On the contrary, the parties are free to contract for any procedures they choose for arbitrating, or litigating, public injunctive relief claims." *McArdle*, 2017 U.S. Dist. LEXIS 162751, at *11. The same is true with dissemination of notice. Once notice is disseminated, the parties are free to contract for any procedures for the arbitration, or

litigation, of the claims of those individuals who, after receiving notice, would also like to bring suit. The default rule – should the parties not contract otherwise – can presumably just be that once notice is disseminated, and an individual elects to join, she can have her claim brought before the same arbitrator, on a bilateral basis (with the opportunity to seek public injunctive relief). If brought in court, then the case would proceed as any other collective action.

The U.S. Supreme Court has distinguished the kind of procedural provisions preempted by the FAA, such as provisions forbidding *class* arbitration in which a single representative adjudicates the rights of absent class members who have not affirmatively elected to file suit, from waivers of substantive rights such as "a party's right to pursue statutory remedies." *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 133 S. Ct. 2304, 2310 (2013). *Italian Colors* stated explicitly that the FAA does not require enforcement of arbitration agreements "forbidding the assertion of certain statutory rights" or "eliminat[ing] . . . [the] right to pursue [a] statutory remedy." *Id.* at 2310-11. The *McGill* rule targets the waiver of statutory remedies, and is thus the kind of rule *Italian Colors* recognized as not preempted by the FAA.

Accordingly, several courts have held that the *McGill* rule is not preempted by the FAA. *Blair*, 2017 U.S. Dist. LEXIS 163979, at *13-14; *McArdle*, 2017 U.S. Dist. LEXIS 162751, at *11. Plaintiffs are aware of no cases reaching the opposite conclusion.

4. The waiver at issue in this case is prohibited

Camara seeks for notice to be sent out pursuant to the DCMWRA so that other individuals who worked at Mastro's Washington D.C. location have the opportunity to learn about this lawsuit and file their own claims. *See* Am. Compl. at ¶¶ 5, 7, 24-30, Prayer for Relief. Plaintiff also seeks "representative" or public injunctive relief for his DCMWRA claim so that

Mastro's can no longer operate its tip pool in an unlawful manner.[5]

Defendant's Agreement purports to waive the right to seek such relief. Specifically, it states:

> **THE PARTIES FURTHER AGREE THAT NEITHER PARTY MAY BRING, PURSUE, OR ACT AS A PLAINTIFF OR REPRESENTATIVE IN ANY PURPORTED REPRESENTATIVE PROCEEDING OR ACTION, OR OTHERWISE PARTICIPATE IN ANY SUCH REPRESENTATIVE PROCEEDING OR ACTION OTHER THAN ON AN INDIVIDUAL BASIS EXCEPT TO THE EXTENT THIS PROVISION IS UNENFORCEABLE AS A MATTER OF LAW.**

See Doc. 17-1, Ex. A, at p. 2. This language – that the action must be maintained "on an individual basis" – bars an arbitrator from disseminating notice of the suit and from granting the type of broadly applicable injunctive relief that would benefit the public at large, both of which the DCMWRA authorizes. This provision is materially indistinguishable from the provision at-issue in *McGill*, which, again Plaintiffs submit would be adopted by the D.C. Court of Appeals. *See* 393 P. 3d at 90 (quoting arbitration agreement barring arbitrator from awarding relief for any non-party or on a non-individual basis). Moreover, the broad scope of Defendant's Agreement, which purports to require the parties to arbitrate all disputes and claims between them, means that Plaintiffs cannot pursue dissemination of notice or public injunctive relief in court either, such that the Agreement forecloses Plaintiffs from securing substantive rights in any forum. *See id.* This is unenforceable. *See id.*at 87; *Blair*, 2017 U.S. Dist. LEXIS 163979, at * 14.

[5] Should the Court decide that the other grounds presented herein are not proper grounds for denying Defendant's Motion, Plaintiffs would like the opportunity to amend his complaint at this time to more specifically allege this relief. (If the arbitration motion is denied on the other grounds, Plaintiffs will seek this amendment after his motion for notice is ruled on). Presently, the desired relief can be inferred from Plaintiffs' clear description of Defendant's conduct as unlawful combined with the Prayer for Relief, which calls on the Court to grant all forms of relief that are in the interest of justice.

5. Because the waiver is invalid, this Court retains jurisdiction and venue to adjudicate Camara's Washington D.C. claims as well as the claims of others

The relevant language from the Agreement provides that an action maintained on a representative basis – one other than on "an individual basis – is prohibited "except to the extent this provision is unenforceable as a matter of law." The Agreement goes on to explain: "**THE PARTIES AGREE THAT ANY REPRESENTATIVE CLAIMS THAT ARE FOUND NOT SUBJECT TO ARBITRATION UNDER THIS AGREEMENT SHALL BE RESOLVED IN COURT AND ARE STAYED PENDING THE OUTCOME OF THE ARBITRATION."**

Here, since the prohibition on Plaintiffs' substantive right to disseminate notice and to seek public injunctive relief are otherwise foreclosed by the Agreement, they are unenforceable, which means that they are to be resolved in court. The other parts of Camara's claims are to be stayed, while they are arbitrated. Hence, the Court still has jurisdiction and venue over the dispute as a whole, including the claims of the opt-ins who have become party plaintiffs pursuant to 29 U.S.C. § 216(b). These individuals are also authorized to send notice to others similarly situated, so they, too, can file suit. In other words, even under the best case scenario for Defendant in which the Court finds – against the evidence – that Camara intended to be bound by the Agreement, this suit still remains before this Court and notice can still be disseminated in parallel to the partial arbitration of Camara's claims.

C. The Court should Rule on Plaintiffs' Conditional Certification Motion *Before* it Addresses Mastro's Motion to Compel

Defendant argues that the Motion should be ruled upon prior to Plaintiffs' pending Conditional Certification Motion. *See* Def. Brief (Doc. 17) at 10-12. However, the Court should decline to follow Defendant's proposed sequence because any delay in ruling on Plaintiffs' Conditional Certification Motion will prejudice members of the proposed collective.

Unlike class actions under Fed. R. Civ. P. 23, the filing of Plaintiffs' collective action FLSA complaint does not toll the statute of limitations for potentially covered employees. *See* 29 U.S.C. § 256; *see also Smith v. Lowe's Cos.*, 2005 U.S. Dist. LEXIS 9763, at *6 n.3 (S.D. Ohio May 11, 2005) ("Unlike a Rule 23 class action, the commencement of a representative action under § 216(b) does not toll the running of the 2-3 year statute of limitations period applicable to FLSA actions."). That is why this Court, and others around the country, have held that motions to facilitate notice to putative collective members should be ruled on promptly and without delay. *See, e.g., Cryer v. Intersolutions, Inc.*, 2007 U.S. Dist. LEXIS 29339, *5 (D.D.C. Apr. 7, 2007) (noting "the time-sensitive nature" of the plaintiff's conditional certification motion); *Ruggles v. WellPoint, Inc.*, 591 F. Supp. 2d 150, 161 n.12 (N.D.N.Y. 2008) ("Because the FLSA statute of limitations is not tolled unless a potential plaintiff opts in, making time of the essence, the general thinking is that an earlier and less rigorous review for conditional certification would permit potential plaintiffs ample time to weigh the benefits of joining a lawsuit that alleges a FLSA violation."); *Altenbach v. The Lube Center, Inc.*, 2009 U.S. Dist. LEXIS 106131, *2-3 (M.D. Pa. Nov. 13, 2009) ("district courts have allowed the conditional certification of a class of putative plaintiffs before significant discovery takes place because the statute of limitations continues to run on unnamed class members' claims until they opt into the collective action"); *Taylor v. Pittsburgh Mercy Health System, Inc.*, 2009 U.S. Dist. LEXIS 40080, *2 (W.D. Pa. May 11, 2009) ("'time [is] of the essence' for purposes of FLSA notice '[b]ecause the . . . statute of limitations is not tolled [until] a potential plaintiff opts in[to]' the proposed collective action"); *Pontius v. Delta Fin. Corp.*, 2005 U.S. Dist. LEXIS 49801, *10 (W.D. Pa. June 21, 2005) ("[T]he statute of limitations [in FLSA collective actions] is not tolled; that is, valid damages claims, if any, are being lost or reduced.").

The risk of collective members' claims being extinguished here by the passage of time is real and warrants a decision on conditional certification prior to ruling on Defendant's Motion. That is one of the reasons why district courts regularly refuse to address the arbitrability of collective members' claims when a conditional certification motion is pending. *See, e.g.*, *Sawyer v. Health Care Solutions at Home, Inc.*, 2018 U.S. Dist. LEXIS 70152, *10 (E.D. Pa. Apr. 25, 2018); *Racey v. Jay-Jay Cabaret, Inc.*, 2016 U.S. Dist. LEXIS 67879, *15 (S.D.N.Y. May 23, 2016); *Taylor v. Pilot Corp.*, 2016 U.S. Dist. LEXIS 191726, *12 (W.D. Tenn. Mar. 3, 2016); *Garcia v. Chipotle Mexican Grill, Inc.*, 2016 U.S. Dist. LEXIS 153531, *29 (S.D.N.Y. Nov. 3, 2016).

Moreover, Defendant's proposed sequence was specifically rejected by the District of Colorado in a case with striking similarities to the facts here. *See Whitington v. Taco Bell of America, Inc.*, 2011 U.S. Dist. LEXIS 55292 (D. Col. May 10, 2011). In *Whitington*, the employer attempted to compel the employee's federal and state overtime claims to arbitration prior to a motion for conditional certification. *Id.* at *12. As in this case, the employer could not produce an executed arbitration agreement by the named plaintiff. *Id.* at *6-9. Instead, the employer proffered evidence of its "business practices" regarding the dissemination of the arbitration agreement and internal data purportedly showing that a large percentage of the proposed class and collective had agreed to arbitrate the wage and hour claims at issue. *Id.*

The *Whitington* court denied the employer's motion compel holding that any determination regarding the enforceability of arbitration agreements was "premature" because it could not "compel putative class members who are not before the court to binding arbitration or issue a declaratory judgment regarding the enforceability of the alleged arbitration agreement at issue." *Id.* at *13, *22. In support of this holding, the *Whitington* court observed:

> The FAA provision requiring a court to compel arbitration contemplates that the parties to the agreement are before the court.

***

> The court finds no procedure or authority under 9 U.S.C. § 4 to compel putative class members, who are not currently before the court and, because a class has not yet been certified, have not even received notice of the litigation, to arbitrate their potential claims against Defendants. A motion to compel arbitration is clearly not the avenue for the relief Defendants seek.

Id. at *13-14, 16-17. According to *Whitington*, a declaration that the arbitration agreement is binding on members of the proposed class and collective prior to them being before the court would constitute an improper advisory opinion. *Id.* at *22.

Several district courts have since followed *Whitington* and refused to consider whether an arbitration agreement is binding on class and collective members until they are actually before the court following a ruling on class or conditional certification. *See, e.g., Brown v. Consol. Rest. Operations, Inc.*, 2013 U.S. Dist. LEXIS 193093, *7-8 (M.D. Tenn. Mar. 18, 2013) ("Simply put, ruling on the enforceability of the arbitration policy as it relates to hypothetical plaintiffs would impermissibly require the Court to adjudicate the rights of parties not before it."); *see also Maddy v. GE*, 59 S. Supp. 3d 675 (D.N.J. 2014); *D'Antuono v. C&G of Groton, Inc.*, 2011 U.S. Dist. LEXIS 135402, *11-12 (D. Conn. Nov. 23, 2011). Thus, this Court should defer ruling on Defendant's Motion until after Plaintiffs' Conditional Certification Motion has been decided.[6]

[6] Even assuming, for the sake of argument, that the Court were to grant Defendant's Motion, its desired relief to dismiss the case before ruling on Plaintiffs' pending motion for conditional certification does not follow. Defendant itself concedes that dismissal is only proper when "all the claims against all parties are subject to arbitration." *See* Def. Br. at 14 (internal citations omitted). Yet, here, there are three individuals in addition to Camara who have opted in to the lawsuit, and who are therefore party plaintiffs. 29 U.S.C. § 216(b); *Mickles*, 887 F.3d at 1278. Defendant's Motion does not address these individuals. Hence, even if Camara's claims were compelled to arbitration, dismissal is inappropriate because these other plaintiffs' claims are pending, and notice can issue on their behalf.

IV. CONCLUSION

For the reasons herein, Defendant's Motion should be denied in its entirety.

Dated: July 9, 2018

Respectfully submitted,

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Counsel for Plaintiff and the Putative Collective

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 6, 2018, the foregoing was sent via electronic mail to all counsel of record and was attempted to be filed electronically filed with the Clerk of the Court using the CM/ECF system which sends notification of such filing to all counsel of record. Undersigned counsel, however, received an error message (code 43) that prevented filing, and therefore has filed the foregoing via the CM/ECF system today, July 9, 2018, after the error was fixed.

By: */s/ Jason S. Rathod*
Jason S. Rathod, Esq. (D.C. Bar No. 100082)

By: /s/ R. Andrew Santillo
R. Andrew Santillo, Esq. (admitted *pro hac vice*)

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KOLY CAMARA Individually, on Behalf of All Others Similarly Situated, and on Behalf of the General Public of the District of Columbia, Plaintiff, v. MASTRO'S RESTAURANTS LLC, Defendant.	Civil Action No. 1:18-cv-724 (JEB)

DECLARATION OF KOLY CAMARA

I, Koly Camara, hereby declare, subject to penalty of perjury, that the following information is true and correct to the best of my knowledge, information, and belief:

1. I verify the factual allegations about my employment that are found in my Amended Complaint in this case.

2. I worked for Mastro's Steakhouse in Washington D.C. from approximately the summer of 2015 to November 2017.

3. I have reviewed the form arbitration agreement that is attached to the declaration of Mr. Stephen Carcamo. I did not see that agreement when I worked at Mastro's, did not sign it, and I never agreed to its terms.

4. I have never thought, or had reason to believe, that I gave up legal rights, including to a trial by jury, by working for Mastro's.

As stated above, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: 07/03/2018

Koly Camara

Exhibit 2

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

SUSAN WANG,

Plaintiff,

v.

STUBHUB, INC. and EBAY, INC.,

Defendants.

CASE NO: CGC18564120

[~~PROPOSED~~] ORDER RE: MOTION TO COMPEL ARBITRATION

Hon. Harold Kahn

Complaint Filed February 5, 2018

Defendants StubHub, Inc. and eBay Inc.'s motion to compel arbitration is denied. Ms. Wang's claims seek statutorily authorized public injunctive relief and thus fall within the scope of *McGill*. The FAL, UCL, and CLRA serve a public purpose, provide for public injunctive relief and thus, per *McGill*, a plaintiff's right to seek an injunction on behalf of the public pursuant to these statutes cannot be waived by an arbitration agreement. (*McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 954-955.) Ms. Wang is bringing a representative action and seeking public injunctive relief that, if granted, would benefit the general public and any individual benefit to Ms. Wang is merely incidental to the benefit of the public. The arbitration provision requiring Ms. Wang to arbitrate any and all disputes and the "Prohibition of Class and Representative Actions and Non-Individualized Relief" provision (Provision 7(a)), taken together, have the effect of eliminating Ms. Wang's ability to seek public injunctive relief in all fora. StubHub seeks to require Ms. Wang to arbitrate all her claims and, at the same time, prohibit the arbitrator from granting public injunctive relief. Provision 7(a) prohibiting Ms. Wang from seeking public injunctive relief in any forum is contrary to California public policy and thus unenforceable. Provision 7(d) of the arbitration agreement states that, if the court decides that any part of Provision 7(a) is invalid or unenforceable, the entirety of the arbitration agreement shall be null and void.

IT IS SO ORDERED.

Date: 6/11/18

Hon. Harold Kahn
JUDGE OF THE SUPERIOR COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KOLY CAMARA *Individually, on Behalf of All Others Similarly Situated, and on Behalf of the General Public of the District of Columbia,* Plaintiff, v. MASTRO'S RESTAURANTS LLC, Defendant.	Civil Action No. 1:18-cv-724 (JEB)

[PROPOSED] ORDER

This matter is before the Court on Defendant's Motion to Compel Arbitration. Upon consideration of the Defendant's Motion, Plaintiff's Opposition, and any reply, Defendant's Motion to Compel Arbitration is hereby **DENIED**.

IT IS SO ORDERED.

Dated: _____

_____

Honorable James E. Boasberg
United States District Judge