IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

MICHAEL EASTERDAY, Individually and on behalf of all persons similarly situated, Plaintiff, v. USPACK LOGISTICS LLC, Defendant.	Civil No. 15-7559 (RBK/AMD)

ORDER

Presently before the Court is a renewed request by Defendant US Pack Logistics, LLC[1] (hereinafter, "Defendant") to compel arbitration in this proposed class action brought by Plaintiff Michael Easterday (hereinafter, "Plaintiff") on behalf of himself and those similarly situated, for alleged violations of the New Jersey Wage Payment Law, *N.J.S.A.* §§ 34:11-4.1 to -4.14, and the New Jersey Wage and Hour Law, *N.J.S.A.* §§ 34:11-56a to -56a38 and New Jersey common law. Defendant seeks to compel arbitration under a 2013 owner operator agreement[2] (hereinafter,

[1] Defendant US Pack Logistics, LLC is improperly pled as "USPack Logistics LLC." (*See* Def.'s Mot. [D.I. 8].)

[2] The Agreement contains a provision which states that "[t]he Owner/Operator agrees that no employer/employee relationship is

the "Agreement") that Plaintiff signed with Subcontracting Concepts, LLC (hereinafter, "SCI"). For the reasons set forth below, the Court denies Defendant's request.[3]

The background of this case has been set forth previously by the Court in several opinions and will not be repeated herein. In brief summary, Plaintiff alleges that he worked as a full-time delivery driver for Defendant from February 2013 until May 2015, and was improperly classified as an independent contractor by

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created under this Agreement as a result of the relationship between SCI and the Owner/Operator or its Customers[]." (Exhibit A to Fidopiastis Dec. [D.I. 17-2], ¶ 6.) As noted in the Court's June 29, 2016 Order (hereinafter, the "2016 Order"), Defendant initially sought to compel arbitration pursuant to the wrong agreement. (*See* Order [D.I. 42], June 29, 2016, n.4.)

[3] As set forth by the Court in the 2016 Order, 28 U.S.C. § 363(b)(1)(A) generally sets forth the magistrate judge's authority to decide non-dispositive matters. 28 U.S.C. § 636(b)(1)(A) and the Court "has authority to decide the present matter because motions to compel arbitration are not dispositive. *See Virgin Islands Water & Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 133 (3d Cir. 2014) (concluding that "[a] ruling on a motion to compel arbitration does not dispose of the case, or any claim or defense found therein"; that "orders granting this type of motion merely suspend the litigation while orders denying it continue the underlying litigation[];" and that "even where motions to compel arbitration are granted, federal courts continue to retain the authority to dissolve any stay or make any orders effectuating arbitration awards" (citing *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 14 (1st Cir. 2010))." (Order [D.I. 42], June 29, 2016, n.2.) *See also Pop Test Cortisol, LLC v. Univ. of Chicago*, No. 14-7174, 2015 WL 5089519, at *4, n. 4 (D.N.J. Aug. 27, 2015) (". . . although [p]laintiff invoked the automatic extension under the Local Civil Rules, that automatic extension only applies to dispositive motions, *see* L. Civ. R. 7.1(d)(5), and a motion to compel arbitration is not dispositive") (citing *Virgin Islands Water and Power Auth. v. Gen. Elec. Int'l Inc.*, 561 F. App'x 131, 135 (3d Cir. 2014)).

Defendant. (Compl. [D.I. 1], 1.) Plaintiff further asserts that Defendant has engaged in a "practice of improperly classifying Plaintiff and other courier drivers as independent contractors" and that he and the class "have been subject to improper deductions from their pay, [and] have been denied overtime pay[.]" (*Id.*) Defendant, however, argues that Plaintiff's action is subject to arbitration as well as a class action waiver[4] set forth in the Agreement. (*See generally*, Defendant's Brief in Further Support of Motion to Compel Arbitration and Enforce the Class Action Waiver Provision [D.I. 165], Mar. 22, 2019.) The arbitration provision provides in relevant part that:

> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts within the locality of the Owner/Operator's residence shall be finally settled by arbitration in accordance with the Federal Arbitration Act.

(Agreement [D.I. 17-2], ¶ 26.)

In response, Plaintiff argues that Plaintiff's claims are exempt from arbitration under the Federal Arbitration Act (the "FAA"), and that under New Jersey law, the arbitration provision in the Agreement is not enforceable for a host of reasons. (*See*

[4] The class action waiver portion of the arbitration provision provides: "Neither you nor SCI shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.". (Agreement [D.I. 17-2], ¶ 26.)

generally, Plaintiff's Supplemental Brief Regarding the Enforceability of Defendant's Arbitration Clause in Light of the FAA's Inapplicability [D.I. 166], Mar. 22, 2019; Plaintiff's Reply Brief in Support of Supplemental Submission [D.I. 191], Mar. 6, 2020.)

In addressing Defendant's first motion to compel arbitration, this Court found that Defendant may seek to compel arbitration as a third-party beneficiary of the Agreement, but that discovery was necessary to determine whether Plaintiff fell under the Section 1 exemption in the FAA. (*See* Order [D.I. 42], June 29, 2016, pp. 10-13, 17.) Section 1 of the FAA exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that "Section 1 exempts from the FAA only contracts of employment of transportation workers"). Specifically, the Court noted that the FAA does not define "contracts of employment" and, relying on *Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 134 (D. Mass 2015), determined that additional discovery was necessary on the threshold issue as to whether Plaintiff was an employee or independent contractor. (*See* Order [D.I. 42], June 29, 2016, pp. 20-21.) The Court expressly denied without prejudice Defendant's motion to compel arbitration and stay the proceedings. (*Id.*, p. 22.)

Defendant filed a motion for reconsideration, which the Court denied by way of Order dated March 29, 2017. (*See* Order [D.I. 65], Mar. 29, 2017.) Defendant then appealed this Court's decision, which the District Judge denied on June 7, 2017. (See Order [D.I. 87], June 7, 2017.) Thereafter, the parties engaged in limited discovery regarding whether Plaintiff was an employee for the purposes of the FAA transportation worker exemption. The Court stayed this case on December 11, 2018 pending the United States Supreme Court's consideration of *New Prime Inc. v. Oliveria*. (*See* Order [D.I. 157], Dec. 11, 2018.) The Supreme Court's decision in *New Prime, Inc.*, 139 S. Ct. 532 (2019) on January 15, 2019 resolved the threshold question of whether Plaintiff falls under the FAA exemption. Specifically, the Supreme Court found that the FAA excludes from its coverage contracts such as the one here regardless of the status of the driver as an employee or independent contractor. *Id.* at 543-44. Following the Supreme Court's decision, this Court reopened the case and directed the parties to provide additional briefing on the issue of what law governed the determination of whether Plaintiff's claims were subject to arbitration and whether there was an enforceable arbitration position in light of the FAA exemption. (*See* Text Order [D.I. 162], Feb. 28, 2019; Scheduling Order [D.I. 181], Jan. 22, 2020.)

The Court first addresses Defendant's argument in the most recent briefing that this Court has never held that the FAA exemption applies and that the Court has not yet issued a formal opinion on this issue. (*See* Defendant's Brief in Response to Plaintiff's Supplemental Brief [D.I. 190], Feb. 28, 2020, p. 3.) This position runs counter to the parameters from which the parties operated following the Supreme Court's decision in *New Prime Inc.* Indeed, at a telephone conference the Court held on February 27, 2019 following the *New Prime Inc.* decision by the Supreme Court, the Court stated that in light of the decision in *New Prime, Inc.*, "We just now no longer have to have a trial on whether the [P]laintiff is a transportation worker engaged in interstate commerce as an independent contractor or an employee because in either event, he's exempt from the Federal Arbitration Act which means that the language of the arbitration provision which references the Federal Arbitration Act is not viable, so the question becomes what happens, if anything, to the issue of arbitration." (*See* Transcript [D.I. 169] at 16:10 to 16:16.) Neither party objected to that statement by the Court on the record. Moreover, in the briefing that followed, Defendant did not argue that Plaintiff was not exempt under the FAA Section 1 exemption. (*See generally*, Defendant's Brief in Further Support of Motion to Compel Arbitration and Enforce the Class Action Waiver Provision [D.I. 165], Mar. 22, 2019; Defendant's Brief in

Response to Plaintiff's Supplemental Brief [D.I. 190], Feb. 28, 2020.) In order, however, to avoid any further debate on the issue, the Court expressly holds that under *New Prime Inc.*, Plaintiff falls under the Section 1 exemption of the FAA – the transportation worker exemption. In so holding, the Court notes that "[i]f an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination – even if it is the last leg of the journey - that employee falls within the transportation worker exemption." *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1201 (W.D. Wash.), *appeal filed*, No. 19-35381 (9th Cir. May 3, 2019). *See also Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 590-93 (3d Cir. 2004). Plaintiff argues that he and members of the proposed class "are unequivocally engaged in interstate commerce, given the fact that they delivered medicines and pharmaceutical products . . . from a supplier's warehouse to various customers that included long term care centers, hospitals, and other medical facilities on behalf of" Defendant. (*See* Plaintiff's Supplemental Brief Regarding the Enforceability of Defendant's Arbitration Clause in Light of the FAA's Inapplicability [D.I. 166], Mar. 22, 2019, n.1 at p. 9, citing to Compl. [D.I. 1], ¶ 18.) Defendant has not disputed these assertions and the Court finds that the Agreement falls under the FAA Section 1 transportation worker exemption (9 U.S.C. § 1) and,

accordingly, Plaintiff cannot be compelled to arbitrate his claim under the FAA.

The question now is whether Plaintiff may be compelled to arbitrate his claims under any other law in light of such a ruling and in the face of an express provision in the Agreement that sets forth the FAA as the basis for arbitration. Suffice it to say that the parties vehemently disagree whether arbitration may proceed and raise a litany of arguments to support their positions. To begin, the Court will restate the relevant language in the Agreement concerning arbitration. The provision provides:

> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts within the locality of the Owner/Operator's residence shall be finally settled by arbitration *in accordance with the Federal Arbitration Act*.

(Agreement [D.I. 17-2], ¶ 26) (emphasis added).

Additional sections of the arbitration provision address the composition of the arbitration panel, discovery, and damages. (*See id.*) In addition, the arbitration provision also includes class action waiver language that provides in relevant part that: "Neither you or SCI shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class[.]" (*Id.*) The last page of the Agreement also includes the following language at the end of the numbered provisions and above the signatories:

"THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION AND CLASS-ACTION WAIVER WHICH AFFECTS YOUR LEGAL RIGHTS AND MAY BE ENFORCED BY THE PARTIES." (*Id.*) In addition, the Agreement contains a choice of law provision in the Twenty-Third paragraph that provides in relevant part that "[t]his Agreement shall be governed by the laws of the State of New York." (*Id.* at ¶ 23.) The severability clause of the Agreement is also found in the Twenty-Third paragraph and provides that if any portion of the Agreement is found to be unenforceable, "said provision or portion thereof shall not prejudice the enforceability of any other provision or portion of the same provision, and instead such provision shall be modified to the least extent necessary to render such provision enforceable while maintaining the intent thereof." (Agreement [D.I. 17-2], ¶ 23.)

The Court notes that the arbitration provision is silent as to the application of any state law in the event that the FAA is deemed inapplicable. The Court further notes that the choice of law provision does not reference arbitration.

Defendant argues that even in the absence of a provision directing that the arbitration be conducted by state law, the choice of law provision set forth in the Agreement demonstrates a clear intent of the parties that New York law governs arbitration. Defendant further argues that the choice of law provision is not limited. Moreover, Defendant asserts that pursuant to the

severability clause in the Agreement, the Court should modify, if necessary, the Agreement to "preserve the memorialized intent of the parties" to arbitrate their dispute. (*See* Defendant's Brief in Response to Plaintiff's Supplemental Brief [D.I. 190], Feb. 28, 2020, p. 22.) Defendant furthers asserts that the issue of mutual assent on contract formation has no bearing on the choice of law provision and that under New Jersey choice of law rules, the Court must not disregard the Agreement's choice of law provision. (*Id.*, pp. 3-5.)

Plaintiff argues that the Agreement for arbitration is unenforceable because there is no language for any state law to govern in the absence of the FAA. (*See* Plaintiff's Supplemental Brief Regarding the Enforceability of Defendant's Arbitration Clause in Light of the FAA's Inapplicability [D.I. 166], Mar. 22, 2019, p. 1.) Plaintiff further argues that since the Agreement specifically provides that disputes other than small claims will be settled by arbitration in accordance with the FAA, and since under *New Prime, Inc.*, the FAA is not applicable, there is simply no mechanism to permit the application of state law. Moreover, Plaintiff asserts that the Agreement's choice of law provision does not control the issue since the Agreement specifically states that the FAA applies to arbitration and therefore specifically excludes arbitration from the choice of law provision. Finally, Plaintiff also argues that the Agreement's silence as to what law

governs the enforcement of the Agreement in the event that the FAA does not apply is fatal to Defendant's claim for arbitration.[5]

In *Palcko*, the Third Circuit addressed a situation in which the FAA was deemed not to apply, but where the agreement specifically provided that state law would apply in the event the FAA was inapplicable. In *Palcko*, the defendant moved to compel arbitration pursuant to an arbitration agreement which provided that "'[e]xcept as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply.'" *Id.* at 590. The *Palcko* court concluded that although the plaintiff's employment agreement was exempt from enforcement under the FAA, the agreement was nonetheless enforceable pursuant to Washington state law. *Id.* at 596. The *Palcko* court reasoned that it was

[5] Plaintiff also argues that even if state law applies to the arbitration provision, New Jersey law applies and the arbitration provision is void under *Moon v. Breathless, Inc.*, 868 F.3d 209 (3d Cir. 2017) and that the arbitration language in the Agreement does not encompass Plaintiff's statutory claims. (*See* Plaintiff's Supplemental Brief Regarding Contract Information and Choice of Law [D.I. 184], p. 9.) Plaintiff raises numerous other arguments to support Plaintiff's position that the Agreement cannot be enforced under New Jersey law and asserts that the Agreement is "rife with unconscionable and unenforceable provisions under New Jersey law." (*See* Plaintiff's Supplemental Brief Regarding the Enforceability of Defendant's Arbitration Clause in Light of the FAA's Inapplicability [D.I. 166], Mar. 22, 2019, p. 4.)

"telling that the arbitration agreement itself envisioned the possibility that [the] employment contract would be deemed exempt from the FAA's coverage under section 1 of the Act" and that, consequently, the court saw "no reason to release the parties from their own agreement." *Id.*

Unlike the contract in *Palcko*, here there is no express provision of what law governs arbitration in the event the FAA is held not to be applicable. There is a number of recent cases that have examined this specific issue: whether a Court may compel arbitration pursuant to an agreement that expressly provides that disputes be settled in accordance with the FAA; there is no other provision for application of state law in the event the FAA is inapplicable in such a case; and, there is a general choice of law provision. For example, in *Hamrick v. Partsfleet LLC*, 411 F. Supp. 3d 1298 (M.D. Fla.), *stay granted, motion to certify appeal granted*, 2019 WL 6317255 (M.D. Fla. Oct. 10, 2019), the district court concluded that arbitration could not be compelled under a contract interpretation analysis despite a choice of law provision. In *Hamrick*, the district court found that the lack of any reference to state law was fatal to defendant's request to compel arbitration. Specifically, the *Hamrick* case stated that:

> [i]n interpreting contracts, '[w]hen two contract terms conflict, the specific term controls over the general one.' *United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998). Here, the election of governing law

> generally applies to the Agreements, but the Arbitration Provision itself specifically elects to apply the FAA. Because the more specific provision controls, the Arbitration Provision cannot be interpreted pursuant to applicable state law and must rise or fall on the application of the FAA. As 'transportation workers,' Plaintiffs are exempt from arbitration under the FAA. Accordingly, this Court cannot compel arbitration pursuant to the parties' Agreements.

Hamrick v. Partsfleet LLC, 411 F. Supp. 3d at 1302.[6] Other courts have concluded, however, that the inapplicability of the FAA is not fatal to an arbitration demand and have applied state law despite the lack of a state law contingency provision. For example, in *Kauffman v. U-Haul Int'l, Inc.*, No. 16-4580, 2018 WL 4094959, at *5-*6 (E.D. Pa. Aug. 27, 2018), the district court found that even if the FAA was inapplicable, the arbitration provision may be enforced under state law, "despite the absence of a state law

[6] The arbitration provision at issue in *Hamrick* stated: "In the event of a dispute between the parties, the parties agree to resolve the dispute as described in this Section (hereafter 'the Arbitration Provision'). This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and applies to any dispute brought by either CONTRACTOR or PARTSFLEET arising out of or related to this Agreement, CONTRACTOR'S relationship with PARTSFLEET (including termination of the relationship), or the service arrangement contemplated by this Agreement, including cargo claims and payment disputes.... BY AGREEING TO ARBITRATE ALL SUCH DISPUTES, THE PARTIES TO THIS AGREEMENT AGREE THAT ALL SUCH DISPUTES WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL." *Hamrick*, 411 F. Supp. 3d at 1300.

contingency provision." The court in *Kauffman* reasoned that "'the inapplicability of the FAA does not render the parties' arbitration provision unenforceable' [when] the 'arbitration provision clearly demonstrates the parties' intent to arbitrate disputes[,]'" and "a number of courts have determined [that] an arbitration clause can be enforced under state law even in the absence of a state law contingency provision." *Id.* (*citing Atwood v. Rent-A-Ctr. E., Inc.*, 2016 WL 2766656, at *3 (S.D. Ill. May 13, 2016) (collecting cases) and *Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 381 (E.D.N.Y. 2016)).

In considering what law governs the issue of whether the arbitration provision is enforceable in light of the inapplicability of the FAA, the Court requested additional briefing on the contract formation issues which the parties recently completed.[7] Defendant asserts that the Agreement's choice of law provision governs the issue of whether the Court may look to state law to compel arbitration. Specifically, Defendant asserts that the Agreement's choice of law provision provides that the Agreement shall be governed by the laws of the State of New

[7] Plaintiff asserts that this Court need not address the contract formation issue because even if state law is applied, New Jersey law governs and that under *Moon*, the arbitration language in the Agreement does not encompass Plaintiff's statutory claim in this case. (*See* Plaintiff's Supplemental Brief Regarding Contract Formation and Choice of Law [D.I. 184], Jan. 29, 2020, pp. 2-3.)

York, and accordingly, under New York law, the arbitration provision survives despite the FAA exemption. Plaintiff asserts that the Agreement's "selection of the FAA and not any state's arbitration law to govern the clause is fatal" to Defendant's motion to compel arbitration. (*See* Plaintiff's Supplemental Brief Regarding Contract Information and Choice of Law [D.I. 184], p. 2.) Plaintiff further argues that if state law must be applied, New Jersey law governs, and under New Jersey law, the arbitration provision is unenforceable. (*Id.*)

The Court finds that the Agreement's choice of law provision does not control what law governs the issue of whether the Court should utilize state law to enforce the arbitration provision. The Agreement's choice of law provision simply does not govern this analysis. *See Davis v. Dell, Inc.*, No. 07-630, 2007 WL 4623030 at *4 (D.N.J. Dec. 28, 2007), *aff'd*, No. 07-630, 2008 WL 3843837 (D.N.J. Aug. 15, 2008). Indeed, as noted by Plaintiff, the Third Circuit has found general choice-of-law provisions "shed[] little, if any, light on the parties' actual intent" when it comes to the law that will govern the enforcement and review of arbitration agreements. *See Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 288-93 (3d Cir. 2001) (*abrogated in part on other grounds* by *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). In *Roadway*, the Third Circuit stated that a "generic choice-of-law clause, standing alone, raises no inference

that contracting parties intended to opt out of the FAA's default regime" and utilize arbitration rules "borrowed" from state law. *Id.* at 297. Although *Roadway* reviewed the choice of law provision in the context of a request to vacate an arbitration rule, the *Roadway* case is instructive. The Agreement, here, specifically provided for arbitration to be conducted in accordance with the FAA. This reference to the FAA, thus, takes the arbitration provision outside the Agreement's choice of law provision. The express language of the FAA overrides the more generic language in the choice of law provision set forth in the Twenty-Third paragraph of the Agreement. Indeed, the choice of law provision in the Agreement is simply a generic clause which the Court finds does not demonstrate that the parties agreed to incorporate New York arbitration rules or standards into the arbitration agreement. The choice of law provision is narrowly drafted and Defendant has not demonstrated that this provision governs the arbitration provision. Moreover, any ambiguity on this issue should be construed again Defendant. Consequently, the Court rejects Defendant's argument that the choice of law provision dictates that New York law applies to the arbitration provision.

The Court next finds that the lack of any state law in the arbitration provision in the event of the inapplicability of the FAA causes Defendant's attempt to compel arbitration to fail. The Court follows the *Hamrick* case in this regard, although the

Court notes that there is clearly a difference of opinion as to this issue. The Court declines to rewrite the arbitration provision by incorporating state law procedures into the arbitration provision. The Court cannot infer that the parties intended to utilize state law procedures for arbitration when the express provision directed arbitration in accordance with the FAA. Defendant asserts that under both New Jersey and New York law, courts are to interpret contracts to avoid inconsistences. (*See* Defendant's Response to Plaintiff's Notice of Supplemental Authority [D.I. 175], Aug. 29, 2019, p. 4.) Defendant further argues that the Court should not make a new contract by failing to give effect to the arbitration provision, and again cites to both New Jersey law and New York law on this point. (*Id.*) In this regard, as noted by Defendant, under either New Jersey or New York law, the Court should not add terms or "distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (*Id.* at p. 4, citing *In re AMR Corp.*, 485 B.R. 279, 289 (S.D.N.Y. 2013), *Republic Business Credit Corp. v. Camhe-Marcille*, 381 N.J. Super. 563, 568 (App. Div. 2005), *National Reprographics, Inc. v. Strom*, 621 F. Supp. 2d 204, 223 (D.N.J. 2009); *Robshaw v. Health Management, Inc.*, 470 N.Y.S.2d 226, 227 (4th Dept. 1983).) The end result, however, is the opposite of what Defendant argues. The Court shall not make a new contract by interpreting a generic choice of law provision to

apply New York arbitration rules to an arbitration provision that expressly provides for arbitration in accordance with the FAA.

Even if the Court did not conclude that the absence of a state contingency law renders the arbitration provision unenforceable, the Court finds that under a choice of law analysis, New Jersey law applies and arbitration cannot be compelled for the reasons set forth below. Federal courts sitting in diversity apply the forum state's choice of law rules to determine the substantive state law to apply. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-98 (1941), *superseded by statute on other grounds*; *see also Lebegern v. Forman*, 471 F.3d 424, 428 (3d Cir. 2006) (noting "[a]s this was a diversity case filed in New Jersey, New Jersey choice of law rules govern"). Thus, the Court looks to New Jersey conflict of law principles. New Jersey follows the Restatement (Second) of Conflict of Laws.

Under Section 188 of that Restatement, the "general rule in contract actions is that the law of the state with 'the most significant relationship to the transaction and the parties' . . . governs." *Davis*, 2007 WL 4623030 at *4. The Court has already found that the choice of law provision does not govern or is otherwise not effective on this issue; therefore, the Court employs Sections 6 and 188 of the Restatement (Second) of Conflict of Laws. *See Davis*, 2007 WL 4623030, at *4. Restatement (Second) of Conflict of Laws § 188 (1971) provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> *(d) the location of the subject matter of the contract, and*
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.[8]

The Court notes that there exists a true conflict between New Jersey law and New York law as to the application of state law in the event of the inapplicability of the FAA. A recent New Jersey Superior Court has held that there is no mutual assent for arbitration if the contract provision expressly called for arbitration under the FAA and the FAA is deemed inapplicable. *See Arafa v. Health Express Corp.*, No. A-1862-17T3, 2019 WL 2375387

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[8] Section 6 provides:

"[T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

(N.J. Super. Ct. App. Div.), *cert. granted*, 239 N.J. 516 (Oct. 10, 2019). The *Arafa* court found "[b]ecause the FAA cannot govern the arbitration agreement, as contemplated by the parties, . . . their arbitration agreement is unenforceable for lack of mutual assent." *Id.* at *2. However, several courts citing to New York law, have found that arbitration may proceed under state law even in the face of the FAA not applying and no other state law expressly set forth in the contract. *See, e.g., Espinosa v. SNAP Logistics Corp.*, No. 17-6383, 2018 WL 9563311, at *4 (S.D.N.Y. Apr. 3, 2018) (noting that "[a] number of district courts in the Second Circuit have concluded that the FAA's exemption for transportation workers does not preclude enforcement of an arbitration provision in a transportation worker's contract under New York law"). *See also Diaz*, 167 F. Supp. 3d at 380.

Turning to the choice of law issue then, the Court finds that New Jersey has the most significant relationship to the transaction and to parties in this case. First, as argued by Plaintiff, these factors support this conclusion: Plaintiff and the proposed class worked in New Jersey, performed their duties in New Jersey, and the claims are brought under the New Jersey wage and hour laws and New Jersey state common law. (*See* Plaintiff's Reply Brief in Support of Supplemental Submission [D.I. 191], Mar. 6, 2020, pp. 5-7.) Indeed, Plaintiff's allegations are based upon work performed in New Jersey. New

Jersey has a strong interest in applying its law to wage claims of its residents. All of the relevant contacts support application of New Jersey law except for Defendant's assertion that SCI is headquartered in New York City and SCI and Defendant conduct their transactions throughout New York. (*See* Defendant's Brief in Response to Plaintiff's Supplemental Brief [D.I. 190], Feb. 28, 2020, p. 6.) However, these factors do not outweigh New Jersey's interest in applying New Jersey law in this matter; particularly, because applying New York law and reading a state law forum into the arbitration provision is contrary to New Jersey law that contracts for arbitration must specify a forum or otherwise fail for lack of mutual assent. Moreover, although not specifically addressed by the parties, the policy issues under Section 6 of the Restatement further support application of the New Jersey law is applicable. As set forth below, the relevant policy set forth in *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545, 552-53 (App. Div. 2016) and the cases cited *infra*, that an arbitration provision must specify the forum to comport with general contract law governing mutual assent. Moreover, New Jersey has a strong interest in applying those policies to plaintiffs who work in New Jersey, particularly when an arbitration proceeding may very well include the relinquishment of a right to a jury trial and other rights. In addition, under New Jersey law, not inferring some other arbitration forum in the absence of an express reference

and when the stated forum is not applicable provides for consistent application of the law. In addition, application of New Jersey law avoids a situation where a party is forced to arbitrate in a forum to which the party has not agreed and where the party may not have contemplated the ramifications of such a forum.[9]

Under New Jersey law, the Court notes that it is "settled" that an agreement to arbitrate "must be the product of mutual assent, 'as determined under customary principles of contract law.'" *Summers v. SCO, Silver Care Operations, LLC*, No. A-5168-15T2, 2018 WL 2293202, at *3 (N.J. Super. Ct. App. Div. May 21, 2018) (quoting *Atalese v. U.S. Legal Serv. Grp., L.P.*, 219 N.J. 430, 442, 99 *A.*3d 306 (2014), *cert. denied*, --- *336 *U.S.* ----, 135 *S.Ct.* 2804, 192 *L.Ed.*2d 847 (2015)) (quoting *NAACP of Camden Cty. E. v. Foulke Mgmt.*, 421 N.J. Super. 404, 424, 24 *A.*3d 777 (App. Div. 2011)). Moreover, a "party seeking to prove the existence of a contract bears the burden of proving the other party or parties to the alleged contract assented to its terms." *Summers*, 2018 WL 2293202, at *3 citing *Midland Funding LLC v. Bordeaux*, 447 N.J. Super. 330, 336 (App. Div. 2016). Defendant,

[9] Having concluded that these factors demonstrate that New Jersey has the most significant relationship to the case and that New Jersey law applies, the Court need not consider whether the class action waiver further supports application of New Jersey law.

who seeks to enforce the arbitration clause, has the burden to demonstrate by a preponderance of the evidence that Plaintiff assented to arbitration under state law in light of the inapplicability of the FAA. *See Midland*, 147 A.3d at 888.

Here Defendant has failed to demonstrate that there was mutual assent to arbitrate under state law in the face of the inapplicability of the FAA. In that regard, the Court considers the recent New Jersey appellate case *Estate of Bright v. Aristacare at Cherry Hill, LLC,* No. A-3640-18T3, 2020 WL 914724, at *4 (N.J. Super. Ct. App. Div. Feb. 26, 2020). In that case, the New Jersey Appellate Court concluded that the arbitration provision was not enforceable since the stated forum in the clause was inapplicable. *Id.* In so ruling, the state court first noted that it is "well established that when the arbitration forum the parties select in the arbitration agreement is not available at the time the contract is formed, there is no meeting of the minds." *Id.* citing *Kleine v. Emeritus at Emerson*, 445 N.J. Super. 545, 552-53 (App. Div. 2016). In *Estate of Bright*, the arbitration provision at issue stated that arbitration would be conducted according to the rules of the AAA. *The Estate of Bright* court noted "that was not possible because the AAA ceased conducting nursing home arbitrations in 2003 and has no rules governing [such] matters." *Id.* Thus, the court concluded that there was "never a meeting of the minds between the parties" and affirmed

the lower court's denial of the defendant's motion to compel arbitration. *Id.* Similarly, in *Kleine*, the New Jersey Appellate Court reversed the trial judge's order compelling arbitration. 445 N.J. Super. at 554, 139 A3d 148 (App. Div. 2016). In *Kleine*, defendant moved to compel arbitration of plaintiff's personal injury "claims based on a clause contained in plaintiff's admission agreement" to defendant's nursing facility." *Id.* at 547. In *Kleine*, the New Jersey Appellate Court reversed the trial judge's decision to compel arbitration "because the arbitration process contemplated by the clause in question was not available when the parties executed their contract" as the AAA was not "accept[ing] the administration of cases involving individual patients without a post-dispute agreement to arbitrate." *Id.* at 552. The Appellate Court reasoned, "when the parties contracted, their exclusive forum for arbitration was no longer available; there being no agreement to arbitrate in any other forum, arbitration could not be compelled. In short, even assuming the clause was otherwise enforceable and consented to by plaintiff, there was no meeting of the minds as to an arbitral forum if AAA was not available." *Id.* In addition, as noted in *Arafa*, the Appellate Court recently concluded, albeit without much discussion, that because the "FAA cannot apply to the arbitration, as required by the parties, their arbitration agreement is unenforceable for lack of mutual assent." *Id.* at *2. Furthermore,

as pointed out by Plaintiff, in *Flanzman v. Jenny Craig, Inc.*, 456 N.J. Super. 613, 627-30 (App. Div. 2018), *cert. granted*, 237 N.J. 310 (Mar. 27, 2019), the New Jersey Appellate Court noted that the failure to identify in the arbitration agreement the arbitration forum or general method of selecting an arbitration forum deprive the "parties from knowing what rights replaced their rights to judicial adjudication." *Flanzman*, 456 N.J. Super. at 62. (*See* Plaintiff's Reply Brief in Support of Supplemental Submission [D.I. 191], Mar. 6, 2020, pp. 13-15.)

Here, similarly, the dispute cannot be settled by arbitration in accordance with the FAA as the FAA is not available as a result of the transportation worker exemption. The Agreement is otherwise silent with respect to arbitration in any other forum. Thus, the Court concludes that Defendant has failed to demonstrate any meeting of the minds as to arbitration in another forum and, consequently, arbitration cannot be compelled.

Defendant asserts that if the Court were to apply New Jersey law on the contract formation issue, the recent case of *Colon v. Strategic Delivery Solutions, LLC*, 459 N.J. Super. 349 (App. Div.), *cert. granted*, 239 N.J. 519 (Oct. 10, 2019) supports Defendant's position. In *Colon*, the Appellate Court held that "even if plaintiffs are exempt under section one of the FAA, they still are required to arbitrate their claims under the [New Jersey Arbitration Act ("NJAA")]." *Id.* at 360. The court reasoned that

"[t]he NJAA governs arbitration agreements in New Jersey made after January 1, 2003[,] [t]herefore, the parties should have understood that the NJAA would apply to their agreement. The agreement expressly provided that it was governed by the state law where the vendor resided, which in this case meant New Jersey. The agreement did not say that the NJAA did not apply[;] [and] [t]heir detailed arbitration provision showed they intended to arbitrate disputes." *Id.* Plaintiff argues that *Colon* is distinguishable in light of the particular reference to state law expressly within the arbitration provision. The Court agrees. Specifically, the agreement to arbitrate in *Colon* stated that the "parties agree that the issue of arbitrability shall be determined by the arbitrator applying the law of the state of the residence of the Vendor." *Id.* at 357. The arbitration provision in the Agreement does not reference any state law, and as set forth above, the Court rejects Defendant's argument that the general choice of law provision sufficiently demonstrates mutual assent to arbitrate according to state law. Moreover, in light of the *Kleine* and *Estate of Bright* cases, the Court concludes that under New Jersey law, Defendant has failed to demonstrate a mutual assent to arbitrate under state law. Having so concluded, the Court need not address Plaintiff's numerous other arguments as to why the arbitration provision is not enforceable.

The Court also rejects Defendant's argument that the Agreement's severability clause requires this Court to enforce the

arbitration provision. The severability clause does not apply to the issue of whether there is mutual assent under New Jersey law to arbitrate in the face of the inapplicability of the FAA and the failure of the Agreement to include any contingency clause for application of another state law.

In response to the Court's request for additional briefing in February 2020, Defendant also argues that in light of the grant by the New Jersey Supreme Court for certification in *Arafa* and in *Colon*, this Court should stay this decision. The parties have advised that argument was held on February 20, 2020 before the New Jersey Supreme Court. Plaintiff opposes any stay. In determining whether to stay the case, the Court notes first that the movant "'must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay ... will work damage to [someone] else.'" *Actelion Pharm. Ltd. v. Apotex Inc.*, No. 12-5743, 2013 WL 5524078 (D.N.J. Sept. 6, 2013), at *3 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 25 (1936). In determining whether to issue a stay, courts weigh a number of factors in determining whether to grant a stay including: (1) whether a stay unduly prejudices or demonstrates a clear tactical disadvantage to the non-moving party; (2) whether denial of the stay causes a clear case of hardship or inequity for the moving party; (3) whether a stay will simplify case issues and the trial; and (4) whether discovery has been completed and whether

a trial date has been set. *Akishev v. Kapustin*, 23 F. Supp. 3d 440, 446 (D.N.J. 2014) (citations omitted). Moreover, when a party seeks a stay "pending resolution of purportedly related litigation, as here, courts consider whether resolution of the related litigation would substantially impact or otherwise render moot the present action." *Id.* at 446. In addition, Defendant, as the party seeking a stay, bears the burden of demonstrating that a stay is warranted. *Id.* (citations omitted).

Defendant does not address with any specificity all of the factors for a stay and focuses the stay argument on the pending decision of the New Jersey Supreme Court in *Arafa* and *Colon*. The Court does not find an inherent conflict in *Arafa* and *Colon* sufficient to warrant a stay in this matter. Therefore, since Defendant has not addressed the other factors for a stay, the Court concludes that Defendant has not demonstrated a stay is warranted.

For all of the reasons set forth above, and for good cause shown, the Court denies Defendant's renewed request to compel arbitration.

IT IS on this 24th day of April 2020,

ORDERED that Defendant's renewed request to compel arbitration and stay the proceedings shall be, and is hereby, **DENIED**; and it is further

ORDERED that the Court will schedule a telephone conference on **April 30, 2020 at 11:00 A.M.** to address a schedule for completion of discovery.

s/ Ann Marie Donio
ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler