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NOTIFY

Archer, *et al.* v. GrubHub, Inc., *et al.*

Suffolk Superior Court Action No. 1984CV03277-BLS1

Memorandum of Decision and Order Regarding Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or in the Alternative, to Stay Proceedings (Docket Entry No. 7):

Introduction

Plaintiffs Veronica Archer ("Ms. Archer"), Paul Girouard ("Mr. Girouard"), Andrea Krautz ("Ms. Krautz"), and Patrick Lee ("Mr. Lee") (collectively, "Plaintiffs"), on behalf of themselves and all others similarly situated, filed this action against defendant Grubhub, Inc. ("Grubhub") in October 2019. Plaintiffs worked as delivery drivers for Grubhub and allege, among other things, that Grubhub unlawfully retained service and delivery charges in violation of the Massachusetts Tips Act, G.L. c. 149, § 152A, and the Massachusetts Minimum Wage Act, G.L. c. 151. Plaintiffs also allege that Grubhub violated the Massachusetts Wage Act, G.L. c. 149, §§ 148, 150, by failing to reimburse Plaintiffs for travel expenses, and later retaliated against them for raising their wage-related concerns. Plaintiffs seek damages, attorney's fees, and costs from Grubhub for the violations alleged.

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On May 19, 2020, Grubhub filed a Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings (the "Motion"). Grubhub moves pursuant to 9 U.S.C. §§ 1 et seq., the Federal Arbitration Act ("FAA" or the "Act"), and G.L. c. 251, the Massachusetts Uniform Arbitration Act for Commercial Disputes, to compel arbitration of Plaintiffs' claims in this case. Grubhub argues that Plaintiffs entered into valid and binding written arbitration agreements with Grubhub covering all of the claims set out in Plaintiffs' Complaint (the "Complaint," Docket Entry No. 1). It requests the issuance of a court order compelling arbitration and dismissing Plaintiffs' Complaint, or, in the alternative, staying the case pending arbitration. Plaintiffs oppose the Motion. Both sides have thoroughly briefed all of the relevant issues.

The Court conducted a virtual hearing on Grubhub's Motion on October 1, 2020. Counsel for all of the parties attended and participated in the hearing. Upon consideration of the written materials submitted by the parties, the information provided at the motion hearing, and the oral arguments of counsel, Grubhub's Motion will be **DENIED** for the reasons discussed below.

Factual Background

The unchallenged facts, taken from the Complaint and the other materials submitted by the parties, are as follows. See *Gove* v. *Career Sys. Dev. Corp.*, 689 F.3d 1, 2 (1st Cir. 2012) (recognizing that on a motion to compel arbitration made in connection with a motion to dismiss or stay, court draws relevant facts from complaint and the documents submitted to the court).

Grubhub is an online and mobile food ordering and delivery company that allows its customers to order food and other items from various restaurants throughout Massachusetts and in other states. Complaint, ¶ 13. Grubhub describes itself as "a leading online and mobile food-ordering and delivery marketplace with the largest and most comprehensive network of restaurant partners." Affidavit of Eric R. Leblanc, dated Apr. 6, 2020, Exhibit F (Grubhub – About Us). Grubhub features over 300,000 restaurants and partners, with more than 155,000 of those restaurants spread over 3,200 U.S. cities and in London, England. *Id.* In 2019, Grubhub provided nearly $6 billion in gross food sales to local takeout restaurants and processed more than 500,000 daily orders. *Id.* In the same timeframe, GrubHub served more than 22 million active customers and sent more than $2.5 billion in total tips to drivers. *Id.*

Plaintiffs worked, or continue to work, as delivery drivers for Grubhub in the Commonwealth of Massachusetts. Complaint, ¶ 16. Ms. Archer worked for Grubhub from September 19, 2016 through July 25, 2019, and signed a "Mutual Agreement to Arbitrate Claims" ("Arbitration Agreement") on March 27, 2017. Affidavit of Kelley Berlin in Support of Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings, dated Feb. 14, 2020 ("First Berlin Affidavit"), ¶¶ 4, 16.[1] Mr. Girourad worked for Grubhub from February 6, 2017 through May 31, 2019, and signed an Arbitration Agreement on February 13, 2017. *Id.* Ms. Krautz worked for Grubhub from January 8, 2016 through September 27, 2019, and signed an Arbitration Agreement on March 27, 2017. *Id.* Mr. Lee worked for Grubhub from January 1, 2016 through June 11, 2019 and signed an Arbitration Agreement on February 13, 2017. *Id.* Each Plaintiff signed his or her Arbitration Agreement electronically. *Id.*, ¶¶ 6-16. Grubhub has submitted copies of all of Plaintiffs' electronically-signed signature pages, which include time and date stamps. *Id.* Each signature page includes an express acknowledgement that, "[b]y providing [his or her] Electronic Signature and clicking 'E-Sign,'" the relevant Plaintiff acknowledged that he

[1] The First Berlin Affidavit, dated February 14, 2020, is appended as an exhibit to a later affidavit executed by Ms. Berlin that (confusingly) bears the exact same title, but is dated May 18, 2020 (the "Second Berlin Affidavit," Docket Entry No. 9). The Second Berlin Affidavit incorporates and makes certain corrections to the statements contained in the First Berlin Affidavit.

or she had "read, understand[s], and/or agree[s] to be bound by the terms" of the Arbitration Agreement. *Id.*, Exhibits 5(a)-(d).

A copy of the 2017 version of GrubHub's employee Arbitration Agreement is attached to the Second Berlin Affidavit. Second Berlin Affidavit, Exhibit 3. It states, in relevant part,

> **MUTUAL AGREEMENT TO ARBITRATE CLAIMS**
>
> This Mutual Agreement to Arbitrate Claims ("Agreement") is between you (hereafter "Employee") and Grubhub Holdings Inc. (hereafter "EMPLOYER"). Any reference to EMPLOYER will be a reference also to all parent, subsidiary, partners, divisions, and affiliated entities, and all successors and assigns of any of them. The Federal Arbitration Act (9 U.S.C. § 1 et seq.) shall govern this Agreement. **All disputes covered by this Agreement will be decided by an arbitrator in arbitration and not by a judge or jury [in] a trial in court.**
>
> 1. This Agreement applies to any dispute, past, present or future, arising out of or related to Employee's application and/or employment and/or separation of employment with EMPLOYER and will survive after the employment relationship terminates. Except as otherwise provided in this Agreement, this Agreement applies to any claim that EMPLOYER may have against Employee or that Employee may have against: (1) EMPLOYER; (2) any of EMPLOYER's officers, directors, principals, shareholders, members, owners, employees, or agents; (3) any of EMPLOYER's benefit plans or the plan's sponsors, fiduciaries, administrators, affiliates, or agents; or (4) any successor or assign of any of the foregoing.
>
> 2. The only claims that are subject to arbitration are those that, in the absence of this Agreement, would have been resolved in a court of law under applicable law. Except as provided in Section 3, this Agreement applies, without limitation, to any claims based upon or related to discrimination, harassment, retaliation, defamation (including claims of post-employment defamation or retaliation), breach of contract or covenant, fraud, negligence, emotional

distress, breach of fiduciary duty, trade secrets, unfair competition, wages or other compensation, breaks and rest periods, termination, tort claims, equitable claims, and all other statutory and common law claims. The Agreement specifically covers, without limitation, all claims arising under the Civil Rights Act of 1964, the Americans With Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Genetic Information Non-Discrimination Act, and all state or local laws addressing the same or similar subjects.

.....

6. (a) Employee and EMPLOYER agree to bring any dispute in arbitration on an individual basis only, and not as a class action or collective action, which means there will be no right or authority for any dispute covered by this Agreement to be brought, heard, or arbitrated as a class action or collective action. This Section 6(a) is referred to in this Agreement as the "Class Action and Collective Action Waiver."

(b) If Employee does not want the Class Action and Collective Action Waiver to be part of this Agreement, so it will not apply to Employee, Employee may opt out of the Class Action and Collective Action Waiver by causing EMPLOYER to receive, no later than 30 days after the Effective Date of this Agreement (as defined in Section 14), a written notice stating that Employee wants to opt out of the Class Action and Collective Action waiver.... If Employee timely opts out of the Class Action and Collective Action Waiver as just described, then the Class and Collective Action Waiver will not be considered part of this Agreement, and Employee may pursue all available legal remedies against EMPLOYER without regard to the Class Action and Collective Action Waiver. If Employee does not timely opt out of the Class Action and Collective Action Waiver as just described, then the Class Action and Collective Action Waiver will be considered part of this Agreement. EMPLOYER will not treat Employee any

differently based on whether or not Employee decides to opt out of the Class Action and Collective Action Waiver.

.....

15. The Effective Date of this Agreement will be the date on which Employee signs or acknowledges it.

16. Employee has the right to review this Agreement with counsel of Employee's choice before Employee signs it.

17. This Agreement is the full and complete agreement relating to the resolution of disputes covered by this Agreement, and supersedes all prior and contemporaneous agreements relating to such disputes. Except as stated in section 6 above, in the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action and Collective Action Waiver is deemed to be unenforceable, EMPLOYER and Employee agree that this Agreement shall be enforced without regard to any party's ability to bring a class or collective action in arbitration.

Id. (emphasis in original).

As previously noted, each Plaintiff worked as a delivery driver for GrubHub in Massachusetts sometime in the 2016-2019 timeframe. Although GrubHub's primary business focuses on the delivery of locally-prepared food orders from area restaurants, GrubHub acknowledges (for present purposes at least) that its drivers also periodically deliver pre-packaged food items (*e.g.*, canned or bottled soft drinks, chocolate bars, and chips) and various non-food products (*e.g.*, toilet paper, cleaning products, personal care products, and flowers) to GrubHub's customers with GrubHub's knowledge and assent. See Plaintiffs' Affidavits appended as Exhibits A through D to Plaintiffs' Opposition to Defendant GrubHub Holdings, Inc.'s Motion to Compel Arbitration ("Plaintiffs' Opp."). For example, Ms. Krautz asserts in her affidavit, without contradiction by GrubHub, that she "frequently" picked up medication and other products at CVS for delivery to one of GrubHub's "good customer[s]" in Boston with GrubHub's express approval. Affidavit of Andrea Krautz, ¶ 3 (Plaintiffs' Opp., Exhibit D). Indeed, each Plaintiff has testified that he or she delivered both food and non-food items while working for GrubHub. See Affidavit of Veronica Archer, ¶ 2 (Plaintiffs' Opp.,

Exhibit A); Affidavit of Paul Girouard, ¶ 2 (Plaintiffs' Opp., Exhibit B); Affidavit of Patrick Lee, ¶ 2 (Plaintiffs' Opp., Exhibit C).

Discussion

I. The Applicable Standard.

"Adjudication of a motion to compel arbitration, including a challenge to the validity of the arbitration agreement, is governed by G.L. c. 251, § 2(a)." *Johnson* v. *Kindred Healthcare, Inc.*, 466 Mass. 779, 781 (2014). See G.L. c. 251, § 2(a) ("A party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one may apply to the superior court for an order directing the parties to proceed to arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall, if it finds for the applicant, order arbitration; otherwise, the application shall be denied."). "Such motions are treated akin to motions ... for summary judgment." *Chambers* v. *Gold Medal Bakery, Inc.*, 83 Mass. App. Ct. 234, 241 (2013). See also *Miller* v. *Cotter*, 448 Mass. 671, 676 (2007). The party moving for arbitration bears the burden of proving that the material facts are established and that it is entitled to arbitration as a matter of law. See *Barrow* v. *Dartmouth House Nursing Home, Inc.*, 86 Mass. App. Ct. 128, 131 (2014). See also *Augat, Inc.* v. *Liberty Mutual Ins. Co.*, 410 Mass. 117, 120 (1991).

The Massachusetts Supreme Judicial Court ("SJC") also has explained that,

> Arbitration agreements in Massachusetts are governed by the MAA [Massachusetts Arbitration Act], G.L. c. 251, §§ 1 et seq., and where the contract involves a transaction affecting interstate commerce, by the FAA, 9 U.S.C. §§ 1 et seq. See *Warfield*, *supra* at 394. "In all relevant respects, the language of the FAA and the MAA providing for enforcement of arbitration provisions are similar, and we have interpreted the cognate provisions in the same manner." *Id.*, citing *Miller* v. *Cotter*, 448 Mass. 671, 678-679 (2007) (*Miller*). Under both G.L. c. 251, § 1, and 9 U.S.C. § 2 (2006), a written agreement (or provision in a written agreement) to submit to arbitration any dispute between the parties, whether existing or arising in the future, "shall be valid . . . save upon such grounds as exist at law or in equity for the revocation of any contract." Under these statutory provisions, where the parties have executed an arbitration agreement and the agreement is not invalid on legal or

> equitable grounds, the agreement to arbitrate is enforceable against the parties. See *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745-1746 (2011).
>
> .....
>
> Although the MAA governs the procedures to be applied where an issue arises regarding the arbitrability of a dispute, where the underlying contract affects interstate commerce, the arbitration agreement is governed by the FAA and the substantive law to be applied is Federal. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984), quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983) (FAA "creates a body of federal substantive law" that is applicable in both State and Federal court). See also *Preston* v. *Ferrer*, 552 U.S. 346, 349 (2008) (FAA "rests on Congress' authority under the Commerce Clause" and "calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration"); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445-446 (2006).

McInnes v. *LPL Fin., LLC*, 466 Mass. 256, 260-262 (2013).

"While a court's authority under the [FAA] to compel arbitration may be considerable," however, "it isn't unconditional." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 537 (2019) ("*New Prime*"). Section 1 of the FAA expressly exempts from the Act's reach "contracts of employment of ... workers engaged in foreign or interstate commerce." 9 U.S.C.A. § 1. Thus, the FAA does not authorize a court to enforce an arbitration provision in an employment contract with an employee who is "engaged in foreign or interstate commerce." *New Prime*, 139 S. Ct. at 537. Employees "engaged in ... interstate commerce" for purposes of the FAA are "transportation workers, defined, for instance, as those workers actually engaged in the movement of goods in interstate commerce." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 112 (2001) ("*Circuit City*") (internal quotation marks and citation omitted). The question of whether the exemption applies is one that "a court should decide for itself ... before ordering arbitration." *New Prime*, 139 S. Ct. at 537.

II. GrubHub's Motion.

Grubhub's Motion asks the Court to dismiss Plaintiffs' Complaint and compel arbitration of their claims in this action or, in the alternative, to stay the case pending arbitration.

Grubhub argues that Plaintiffs are bound by the terms of the Arbitration Agreements they signed, discussed above, in which they agreed to have all of their employment-related disputes "decided by an arbitrator in arbitration and not by a judge or jury...." See Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings (Docket Entry No. 7) ("Grubhub's Memo.") at 6-9. Grubhub contends that the Arbitration Agreement is valid and enforceable under both federal and state law and should be given effect by this Court.

Plaintiffs oppose Grubhub's Motion on effectively two grounds.

First, they contend that Grubhub has not met its burden to show that Plaintiffs actually agreed to arbitrate their claims in this action because the electronic signature pages provided by Grubhub do not specifically reference the Arbitration Agreement and do not unambiguously reference Plaintiffs' consent to arbitration. See *Ajemian* v. *Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 574-575 (2013), quoting *Specht* v. *Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.").

Second, Plaintiffs argue that, as GrubHub delivery drivers, they are (or were) "workers engaged in foreign or interstate commerce" who are exempt from the enforcement provisions of the FAA, and that Grubhub's related class action waiver is unenforceable under Massachusetts law. Plaintiffs' Opposition to Defendant Grubhub Holdings, Inc.'s Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings ("Plaintiffs' Opp."), at 4-7. Plaintiffs argue that the Court should follow other courts which have held that "where plaintiffs are exempt under the FAA, Massachusetts law prohibiting class action[] ... [waivers] bars enforcement of arbitration agreements." Plaintiffs' Opp. at 5. See *Waithaka* v. *Amazon.com, Inc.*, 404 F. Supp. 3d 335, 342, 351 (D. Mass. 2019), citing *Lenz* v. *Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005).[2] See also *Cunningham* v. *Lyft, Inc.*, 450 F. Supp. 3d 37, 47 (D. Mass. 2020) ("*Cunningham*").

The Court separately addresses each of Plaintiffs' arguments below.

A. Plaintiffs' "Lack of Consent" Argument.

Plaintiffs assert that the electronic signature pages submitted by GrubHub in support of its Motion are insufficient to establish their consent to the terms of the Arbitration

[2] On July 17, 2020, the U.S. Court of Appeals for the First Circuit affirmed the District Court's decision in *Waithaka*, denying a motion to compel arbitration. *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10, 35 (1st Cir. 2020).

Agreement. The Court disagrees. As previously noted, GrubHub has supplied an executed electronic signature page for each Plaintiff. Each signature page is time and date stamped, each explicitly references the Arbitration Agreement, and each informs the signor that "[b]y providing your Electronic Signature and clicking 'E-Sign,' you are acknowledging that you have read, understand, and/or agree to be bound by the terms of any ... document(s) provided here within." First Berlin Affidavit, ¶¶ 6-17 & Exhibits 2-5. This evidence, viewed reasonably, is sufficient to demonstrate that Plaintiffs indeed signed and agreed to be bound by the conspicuous terms of the Arbitration Agreement. See *Cullinane* v. *Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018) ("Under Massachusetts law, 'conspicuous' means that a term[] is 'so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it.'") (citation omitted). See also *Kauders* v. *Uber Techs., Inc.*, No. SJC-12883, 2021 WL 18927, at *10 (Mass. Jan. 4, 2021) (concluding that two-prong test "focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, is the proper framework for analyzing issues of online contract formation"). Thus, Plaintiffs cannot avoid arbitration of their claims against GrubHub based upon a purported lack of consent.[3]

B. Plaintiffs' Section 1 Exemption Argument.

Plaintiffs' argument that their Arbitration Agreements with GrubHub are not enforceable under Section 1 of the FAA because they are "workers engaged in ... interstate commerce" is more persuasive. It is undisputed that each Plaintiff, while working as a delivery driver for GrubHub, periodically transported and delivered both pre-packaged food items (*e.g.*, canned or bottled soft drinks, chocolate bars, and chips) and non-food items (*e.g.*, toilet paper, cleaning products, personal care products, and flowers) to his or her Massachusetts customers with GrubHub's knowledge and consent. Many, if not most of the pre-packaged food items and non-food items that Plaintiffs transported and delivered on GrubHub's behalf undoubtedly were manufactured, in whole or in part, outside of the Commonwealth of Massachusetts. Thus, the question this Court must decide is whether Plaintiffs, as the final participants in the moving stream of commercial transactions that delivered those products to their ultimate users and/or consumers, qualify as "workers engaged in foreign or interstate commerce" for purposes of the FAA.

[3] Plaintiffs' assertions that they do not presently recall executing their respective electronic signature pages do not change the result. "[F]ailing memories do not absolve a party from its contractual obligations, or create a triable issue of fact." *Kutluca* v. *PQ New York Inc.*, 266 F. Supp. 3d 691, 701-702 (S.D.N.Y. 2017) (internal citations omitted). See also *Vardanyan* v. *Close-Up Int'l, Inc.*, 315 Fed. Appx. 315, 317-318 (2d Cir. 2009) (noting that a party's "statement that he does not remember whether he signed the document does not conflict with the testimony and evidence that defendants have submitted about the terms of that agreement") (internal quotation marks omitted).

GrubHub, for its part, argues that Plaintiffs are not exempt from the FAA as "workers engaged in foreign or interstate commerce" simply because they "occasionally delivered prepackaged items in addition to prepared meals from local restaurants, making them analogous to so called 'last-mile' workers." Grubhub's Reply in Further Support of Defendant's Motion to Compel Arbitration ("Grubhub's Reply") at 2. Grubhub cites several cases in support of this argument, including the Seventh Circuit's recent decision in *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) ("*Wallace*") ("Section 1 of the FAA carves out a narrow exception to the obligation of federal courts to enforce arbitration agreements. To show that they fall within this exception, the plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong. They did not even try do that, so both district courts were right to conclude that the plaintiffs' contracts with Grubhub do not fall within § 1 of the FAA."). See also *Austin* v. *Doordash, Inc.*, No. 1:17-cv-12498-IT, 2019 WL 4804781, *4 (D. Mass. Sept. 30, 2019) (Talwani, J.) ("*Austin*") (concluding that food delivery drivers were not transportation workers exempted from the FAA even though plaintiff argued that drivers delivered prepared food as well as packaged goods like sodas and other products that traveled interstate and had not been altered by restaurant); *Lee* v. *Postmates Inc.*, Case No. 18-cv-03421-JCS, 2018 WL 4961802, *8 (N.D. Cal. Oct. 15, 2018) (Spero, J.) ("The Court is aware of no authority holding that couriers who deliver goods from local merchants to local customers are 'engaged in ... interstate commerce' within the meaning of § 1 of the FAA merely because some such deliveries might include goods that were manufactured out of state -- a possibility that, while likely here, Lee has also provided no evidence to support.").

Luckily, the United States Supreme Court long ago answered the question currently facing this Court in its decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943) ("*Walling*"). *Walling* involved an attempt by the U.S. Department of Labor to enforce the provisions of the Fair Labor Standards Act, 29 U.S.C. § 29 *et seq.*, against Jacksonville Paper Co. (the "Company"), which was a wholesaler of paper products that distributed to customers in multiple states in the southeastern part of the country. *Id.* at 565. The products distributed by the Company came from "a large number of manufacturers and other suppliers located in other states and in foreign countries." *Id.* Although a portion of the products that the Company sold were shipped directly to the Company's customers by the Company's suppliers, the "bulk" were delivered first to one of the Company's twelve "branch warehouses," from which they delivered to Company's customers by the Company's employees. *Id.* at 565-566. Five of the Company's branch warehouses delivered products to customers in other states, while the seven remaining branch warehouses delivered products only to the Company's in-state customers. The "sole issue" presented in *Walling*, as described by the Supreme Court, was whether the FLSA,

> applies to employees at the seven ... branch houses which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, do not ship or deliver any of it across state lines.

Id. The answer to that question hinged, in turn, on whether the employees who delivered merchandise solely to the defendant's in-state customers were "engaged in interstate commerce" notwithstanding the fact that they "[did] not ship or deliver any of it across state lines."[4] *Id.*

The Supreme Court unanimously ruled that the employees who delivered products solely to the Company's in-state customers were nonetheless "engaged in interstate commerce." In explaining its ruling, the Court explicitly rejected the argument that "any pause at the [Company's] warehouse" of the products sold was "sufficient to deprive the remainder of the journey of its interstate status." *Id.* at 567. It said,

> [t]here is no indication ... that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the [FLSA]. As in the case of an agency ... if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal

[4] Technically, the phrase "interstate commerce" does not appear in the FLSA. Rather, the FLSA applies to all "employees ... engaged in commerce." 29 U.S.C. § 206. "Commerce" is expressly defined in the FLSA, however, as "trade, commerce, transportation, transmission, or communication *among the several States or between any State and any place outside thereof.*" 29 U.S.C. § 203(b) (emphasis added). Thus, the FLSA has long been interpreted to apply only to employees who are engaged in "interstate commerce." See, e.g., *United States* v. *Darby*, 312 U.S. 100, 109 (1941) ("The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act."). See also *Walling*, 317 U.S. at 572 ("If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established ..., he is covered by the [FLSA].").

> the continuous nature of the interstate transit which constitutes commerce.

Id. at 567-568.

The holding of *Walling* is clear. "Interstate commerce" encompasses the "entire movement of [goods] until their interstate journey was ended," which end occurs when "they reach the customers for whom they are intended."[5] *Id.* at 568. To conclude otherwise would improperly ignore "the continuous nature of the interstate transit which constitutes commerce." *Id.*

The implications of *Walling* for this case also are clear. Plaintiffs' job duties for GrubHub included the transportation and delivery of both pre-packaged food items and non-food items to GrubHub's Massachusetts customers with GrubHub's knowledge and consent. It is undisputed that some portion of those pre-packaged food items and non-food items came from manufacturers located outside this Commonwealth. It also is beyond dispute that the ultimate "customers for whom ... [those items] are intended" are the GrubHub customers who consumed or used them. *Id.* Therefore, the pre-packaged and non-food products delivered by Plaintiffs constitute part of the continuous flow of "interstate commerce," and Plaintiffs' function in physically transporting those products to their final destinations necessarily qualifies them as "transportation workers" who were "engaged in ... interstate commerce" for purposes of the exemption contained in Section 1 of the FAA. 9 U.S.C.A. § 1.

This Court does not stand alone in its conclusion that "last mile" delivery drivers such as Plaintiffs are exempt from the provisions of the FAA. For example, the U.S. Court of Appeals for the First Circuit recently considered whether certain AmFlex delivery workers who delivered packages for Amazon to consumers in the final miles of the packages' journeys were covered by the FAA.[6] The First Circuit held that,

> Waithaka and other last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers 'engaged in ... interstate commerce,' regardless of whether the workers themselves physically cross state lines. By virtue of their work transporting goods

[5] Although *Walling* involved the application of the FLSA rather than the FAA, "it does provide valuable guidance to interpret the phrase 'engaged in commerce" with respect to the provisions of the FAA. See *Waithaka* v. *Amazon.com, Inc.*, 404 F. Supp. 3d 335, 341-342 & n.2 (D. Mass. 2019), aff'd, 966 F.3d 10 (1st Cir. 2020).

[6] "AmFlex" is a reference to the "Amazon Flex" smartphone application that some of the delivery workers at issue in *Waithaka* used to sign up for work shifts with Amazon. *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d at 14.

> or people 'within the flow of interstate commerce,' see *Circuit City*, 532 U.S. at 118, 121 S.Ct. 1302, Waithaka and other AmFlex workers are 'a class of workers engaged in ... interstate commerce.' Accordingly, the FAA does not govern this dispute, and it provides no basis for compelling the individual arbitration required by the dispute resolution section of the Agreement at issue here.

Waithaka v. *Amazon.com, Inc.*, 966 F.3d at 26. See also *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 919 (9th Cir. 2020) (holding that Amazon "AmFlex delivery providers fall within the [FAA] exemption [for workers "engaged in ... interstate commerce"], even if they do not cross state lines to make their deliveries.").

The Court recognizes, at the same time, that other courts have reached contrary conclusions in similar circumstances. See *Wallace*, 970 F.3d at 802-803; *McWilliams* v. *Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("*McWilliams*"); *Levin* v. *Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152-1153 (N.D. Cal. 2015) ("*Levin*"); *Lee* v. *Postmates Inc.*, Case No. 18-cv-03421-JCS, 2018 WL 4961802, at *8. The courts' reasoning in these contrary cases generally falls into two categories.

First, in some cases, such as *Wallace*, the court has ruled that the exemption contained in Section 1 of the FAA applies only to transportation workers who directly participate in "the act of moving ... goods across state or national borders." *Wallace*, 970 F.3d at 802. See also *McWilliams*, 143 F.3d at 576 (construing Section 1 exemption "narrow[ly]" to include "only employees actually engaged in the channels of foreign or interstate commerce"); *Lee* v. *Postmates Inc.*, Case No. 18-CV-03421-JCS, 2018 WL 4961802, at *8 (rejecting application of exemption where plaintiff "presented no evidence that ... her job involved handling goods *in the course of interstate shipments*," or that the defendant "itself was in the business of transporting goods between states") (emphasis in original). These cases, however, directly contravene the Supreme Court's holding in *Walling* that goods "remain 'in [interstate] commerce'" until they reach their "final destinations," and that workers who transport such goods solely within state boundaries nonetheless are engaged in "interstate commerce." *Id.* at 567-568. Accordingly, the Court declines to follow *Wallace* and any similarly-reasoned decisions in the circumstances of this case.[7]

In other cases, such as *Levin*, the court ruled that drivers who delivered locally-prepared meals to customers within the same state were not "engaged in ... interstate commerce" because "[i]ngredients contained in the food that Plaintiff [drivers] ultimately delivered

[7] Significantly, neither *Wallace*, nor *McWilliams* makes any attempt to distinguish, or even cites, the Supreme Court's decision in *Walling*.

from restaurants ended their interstate journey when they arrived at the restaurant where they were used to prepare meals." *Levin*, 146 F. Supp. 3d at 1154. See also *Grice* v. *Uber Techs., Inc.*, No. CV18-2995 PSG (GJSx), 2020 WL 497487, at *6 (C.D. Cal. Jan. 7, 2020) ("There is broad consensus that intrastate deliveries of local goods do not fall within the [FAA's] interstate transportation worker exemption."). However, in this case, Plaintiffs also delivered pre-packaged food items and non-food items originating from outside the Commonwealth of Massachusetts that undeniably form part of the "continuous nature of the interstate transit which constitutes commerce." *Walling*, 317 U.S. at 568. Accordingly, the Court likewise declines to follow *Levin* and any similarly-reasoned decisions in the present case.[8]

C. Plaintiffs' Class Action Waiver Argument.

Although Plaintiffs are exempt from the FAA under Section 1, there is still the issue of whether the class action waiver contained in the Arbitration Agreements is enforceable under Massachusetts law. The Court concludes that it is not, for the reasons recently articulated by the U.S. District Court for the District of Massachusetts in *Cunningham*, *supra*.

The plaintiffs in *Cunningham* were drivers who worked for defendant Lyft, Inc. ("Lyft") in the Commonwealth of Massachusetts after signing Lyft's "Terms of Service" (the "Terms"), which include a provision requiring binding arbitration of all employment-related disputes and a class action waiver. 450 F. Supp. 3d at 39-40. Notwithstanding Lyft's Terms, the plaintiffs filed a putative class action against Lyft in federal court under the Massachusetts Wage Act, G.L. c. 149, §§ 148 and 148B, and G.L. c. 151, §§ 1 and 1A, alleging that Lyft had misclassified them as independent contractors and failed to pay them the required minimum wage and overtime. *Id.* at 41. Lyft responded by filing a motion to compel arbitration of the plaintiffs' claims and to stay all court proceedings under the FAA. *Id.* The District Court, however, denied Lyft's motion on the ground that the plaintiff drivers, who admittedly transported Lyft passengers "into or out of Massachusetts," fell within the FAA's exemption for transportation workers "engaged in ... interstate commerce." *Id.* at 46. The District Court further held that the class action waiver contained in Lyft's Terms was unenforceable in circumstances where the parties' associated arbitration agreement was not subject to the FAA. *Id.* at 48. It explained its reasoning as follows,

> In [*Feeney* v. *Dell, Inc.*, 454 Mass. 192 (2009) ("*Feeney I*")], the Supreme Judicial Court ... concluded that class action

[8] No evidence has been presented to the Court regarding the relative percentage of locally-prepared food products versus pre-packaged food products and non-food products delivered by Plaintiffs to GrubHub's customers. The Court regards such evidence as largely irrelevant to its analysis, however, because the exemption from arbitration set out in Section 1 of the FAA has no *de minimus* exception.

> waivers, like the one in Lyft's Terms, "contravenes Massachusetts public policy." The court explained that "public policy sometimes outweighs the interest in freedom of contract, and in such cases the contract will not be enforced." ... The court further stated that "'[p]ublic policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." "[E]xpressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G.L. c. 93A class actions."
>
> The SJC subsequently found this public policy applicable to Wage Act cases, noting the "very legitimate policy rationales underlying the Legislature's decision to provide for class proceedings under the Wage Act," including "the deterrent effect of class action lawsuits and, unique to the employment context, the desire to allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights under the Wage Act." *Machado* v. *System4 LLC*, 465 Mass. 508, 515, n.12 (2013) ["*Machado*"].
>
> As Plaintiffs[] note, ... *Feeney I* was abrogated as to arbitration agreements under the FAA by the Supreme Court's decision in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). However, while the rule in *Feeney I* prohibiting class action waivers based on public policy is preempted *when the FAA applies* to a contract, ... the court finds no basis for concluding that *Feeney I*'s rule against class action waivers is abrogated where the FAA does not apply.
>
> *****
>
> *Feeney I* is still good law for agreements that are not covered by the FAA, and that the public policy prohibiting class action waivers precludes arbitration here.

Id. at 47-48 (some citations omitted & emphasis in original).

This Court agrees with the U.S. District Court that the policy-based prohibition on class action waivers announced by the SJC in *Feeney I*, and extended to Wage Act actions in *Machado*, remains the law of this Commonwealth in cases where the FAA does not apply. As this is one such case, the Court declines to enforce the class action waiver provision contained in GrubHub's Arbitration Agreement on public policy grounds. See *Feeney I*, 454 Mass. at 208. See also *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d at 29-33 ("Thus, based on the SJC's reasoning in *Machado*, we are confident that the SJC would conclude that, like the statutory right to proceed as a class in the context of Massachusetts Chapter 93A consumer claims, the statutory rights to proceed as a class articulated in the Massachusetts Wage Act, Independent Contractor Misclassification Law, and Minimum Wage Law -- as well as the statutory provision that precludes contractual waiver of these rights -- represent the fundamental public policy of Massachusetts, and that the SJC would therefore invalidate a class waiver in an employment contract, like that of Waithaka, not covered by the FAA.").

Order

For the foregoing reasons, defendant Grubhub, Inc.'s Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint, or, in the Alternative, to Stay Proceedings (Docket Entry No. 7) is **DENIED** in its entirety.

Brian A. Davis
Associate Justice of the Superior Court

Date: January 11, 2021