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Documents (5)

1. *Dhillon v. Anheuser-Busch, LLC, 2022 Cal. App. Unpub. LEXIS 7782*

   Client/Matter: -None-

   Search Terms: "antitrust law"

   Search Type: Natural Language

   Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

2. *Golightly v. Uber Techs., Inc., 2022 U.S. Dist. LEXIS 229911*

   Client/Matter: -None-

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

3. *Barboza v. Mercedes-Benz USA, LLC, 2022 U.S. Dist. LEXIS 232366*

   Client/Matter: -None-

   Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

4. *Augustson v. Realpage, Inc., 2022 U.S. Dist. LEXIS 233401*

   Client/Matter: -None-

   Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

5. *Hurley v. Nat'l Basketball Players Ass'n, 2022 U.S. App. LEXIS 35964*

   Client/Matter: -None-

   Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Aug 31, 2021 to Dec 31, 2022

Dhillon v. Anheuser-Busch, LLC

Court of Appeal of California, Fifth Appellate District

December 21, 2022, Opinion Filed

F082763

Reporter
2022 Cal. App. Unpub. LEXIS 7782 *; 2022 WL 17826505

MANMOHAN DHILLON et al., Plaintiffs and Appellants, v. ANHEUSER-BUSCH, LLC et al., Defendants and Respondents.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: **[*1]** APPEAL from an order of the Superior Court of Fresno County, No. 14CECG03039, Kimberly A. Gaab, Judge.

Manmohan v. Anheuser-Busch, 2016 Cal. Super. LEXIS 45077 (Cal. Super. Ct., Dec. 12, 2016)

Core Terms

retailers, coupons, trial court, favored, beer, wholesale price, prices, cause of action, common issue, class certification, plaintiffs', predominate, putative class member, named plaintiff, class member, redeemed, alleges, disfavored, putative class, unfair, declarations, secret rebate, first cause, certification, discounts, proposed class, retail price, wholesaler, business practice, overcharges

Counsel: Gustafson Gluek, Dennis Stewart, Daniel C. Hedlund, Michelle J. Looby, Joshua J. Rissman; Coleman & Horowitt, Darryl J. Horowitt, Sherrie M. Flynn; Freedman Boyd Hollander Goldberg Urias & Ward, Joseph Goldberg and Frank T. Davis, Jr., for Plaintiffs and Appellants.

Wanger Jones Helsley, Oliver W. Wanger, Patrick D. Toole; Cadwalader, Wickersham & Taft, Brian D. Wallach and Gregory W. Langsdale for Defendant and Respondent Anheuser-Busch, LLC.

Chielpegian Cobb and Mark E. Chielpegian for Defendant and Respondent Donaghy Sales, LLC.

Judges: HILL, P. J.; SMITH, J., DE SANTOS, J. concurred.

Opinion by: HILL, P. J.

Opinion

Plaintiffs appeal from the second denial of their motion for class certification. Initially, their motion was denied by the trial court on the ground the proposed class was not ascertainable. Plaintiffs appealed that order, and we affirmed.

The Supreme Court granted review, then transferred the matter back to this court for reconsideration in light of its decision in *Noel v. Thrifty Payless, Inc. (2019) 7 Cal.5th 955, 250 Cal. Rptr. 3d 234, 445 P.3d 626*. Applying the rules governing ascertainability, as clarified by the Supreme Court in that case, we concluded class certification was not **[*2]** properly denied on that basis. We reversed the trial court's order and remanded for a redetermination of the class certification motion.

The trial court again denied the motion. It concluded plaintiffs met their burden of demonstrating ascertainability and numerosity but failed to demonstrate that common issues of law or fact predominate, that the named plaintiffs have claims typical of the claims of the proposed class, that they can adequately represent the proposed class, and that a class action would provide a superior procedure for litigating the case. Plaintiffs again appeal. We conclude the trial court abused its discretion in denying class certification. Accordingly, we reverse and remand to the trial court for a redetermination of the motion for class certification.

FACTUAL AND PROCEDURAL BACKGROUND

Five named plaintiffs filed this action on behalf of themselves and a class of persons similarly situated. The operative pleading, the second amended complaint, alleges the following: Plaintiffs and the class they seek to represent own and operate retail convenience stores in Fresno and Madera Counties; they sell beer manufactured by defendant Anheuser-Busch, LLC (Anheuser-Busch) and **[*3]** distributed by defendant Donaghy Sales, LLC (Donaghy) (collectively, defendants). California law requires wholesalers of beer to sell to retailers on a nondiscriminatory basis and to charge only the prices they have filed with the Department of Alcoholic Beverage Control (ABC). A wholesaler may not charge a different price to a special customer. The wholesaler's prices may be modified by filing a new or amended schedule of prices with the ABC.

Plaintiffs allege that, in violation of the wholesale beer pricing and unfair competition laws, during the class period,[1] Donaghy sold beer to certain favored retailers at effective wholesale prices that were lower than the prices it filed with the ABC. It did this by providing the favored retailers with disproportionate numbers and amounts of consumer coupons for discounts off the retail price of beer. Instead of providing the coupons to consumers, however, the favored retailers redeemed the coupons themselves, not related to a particular sale of beer to a consumer as required by the coupons. The favored retailers redeemed the coupons by presenting them to Donaghy for credit against a subsequent purchase of beer, by redeeming them through a third **[*4]** party redemption center, or, if in the form of a check, by depositing the check in the retailer's bank account.

As a result of this scheme, favored retailers who received and redeemed coupons effectively paid wholesale prices below the prices filed with the ABC and below the prices paid by disfavored retailers, who are the members of the proposed class. Plaintiffs seemed to concede some members of the proposed class also received coupons from Donaghy, but they alleged class members received substantially fewer than the favored retailers. This coupon scheme gave the favored retailers an unfair competitive advantage because they could sell beer at retail at a price below the wholesale price paid by the disfavored retailers. This forced the disfavored retailers to match, or attempt to match, the favored retailers' lower prices, which were often at or below the disfavored retailers' wholesale prices. Some aspects of this scheme were known to the disfavored retailers, but the full extent of the scheme was concealed from them.

Plaintiffs allege Vinay Vohra and Vikram Vohra, as well as others to be identified later, were favored retailers and coconspirators with Anheuser-Busch and Donaghy. **[*5]** These favored retailers allegedly accepted large numbers of coupons and used them to compete unfairly, including by selling at retail below the wholesale price Donaghy filed with the ABC, "in active cooperation with the Defendants."

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[1] The class definition in plaintiffs' motion indicates the class period is October 10, 2010, through December 31, 2014. As defendants point out, *Business and Professions Code section 25600.3*, which took effect on January 1, 2015, now prohibits the use of coupons for beer. Plaintiffs do not appear to contend defendants have provided coupons to, or reimbursed retailers for, coupons after that date.

The second amended complaint also alleges defendants sometimes dictated the retail prices the disfavored retailers could charge, requiring them, through threats of retaliation, to charge higher retail prices than the favored retailers. Also, Donaghy personnel sometimes demanded or accepted kickbacks in exchange for coupons, communicated pricing changes to favored retailers in advance of their effective date, took orders from favored retailers at the new prices prior to their effective date, and imposed shelving requirements on disfavored retailers by threatening not to sell to retailers who did not agree to them.

The second amended complaint contains four causes of action: (1) unfair competition by means of unlawful business practices (*Bus. & Prof. Code,*[2] *§ 17200 et seq.*); (2) unfair competition by means of unfair business practices, including allegations of incipient violation of antitrust laws (*§ 17200 et seq.*); (3) secret payment or allowance of rebates (§ 17045); and (4) soliciting or participating in the secret **[*6]** payment or allowance of rebates in violation of section 17045 (§§ 17047, 17048).

Plaintiffs filed a motion for class certification, redefining the class and adding Hardeep Singh as an additional favored retailer and alleged coconspirator; the class definition expressly excluded the favored retailers from the class. Defendants opposed the motion, and the trial court denied it, concluding plaintiffs failed to demonstrate the existence of an ascertainable class. On appeal, we affirmed, but the Supreme Court granted plaintiffs' petition for review and transferred the matter back to this court to reconsider it in light of the decision in *Noel v. Thrifty Payless, Inc., supra, 7 Cal.5th 955, 250 Cal. Rptr. 3d 234, 445 P.3d 626*, which clarified the standards applicable to the ascertainability of a proposed class. On reconsideration, we concluded the trial court applied a standard inconsistent with that set out in *Noel*; we reversed the trial court's order denying certification and remanded for the trial court to determine ascertainability using the *Noel* standard and to determine whether the other elements necessary for class certification were met.

On remand, the parties filed further papers. The trial court again denied the motion. It found that, while plaintiffs demonstrated ascertainability and numerosity **[*7]** of the class, they failed to demonstrate that common issues of law and fact predominated as to all their claims. On the claim that plaintiffs were overcharged for beer, the expert declaration of Marianne DeMario, a forensic accountant, demonstrated there were common issues. The trial court concluded, however, that plaintiffs' allegations of price fixing and other antitrust violations required a showing of harm to competition, but plaintiffs failed to demonstrate such an injury could be proven by common evidence.

The trial court also found plaintiffs failed to demonstrate that the named plaintiffs have claims typical of the class and that they can adequately represent the interests of all class members. Further, it concluded that, because of the lack of common questions and typical claims, plaintiffs had not demonstrated the superiority of proceeding with the case as a class action; plaintiffs had not demonstrated that the benefits of certifying the class would outweigh the burdens.

Plaintiffs appeal the second denial of their motion for class certification. They contend the trial court misapprehended the theory of their case and misapplied the law governing class certification.

DISCUSSION [*8]

I. Standard of Review

"The denial of certification to an entire class is an appealable order." (*Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.) "A trial court's order granting or denying class certification is subject to review for abuse of discretion. [Citation.] 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.'" (*In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, 409, 17 Cal. Rptr. 3d 1*.) In the absence of other error, a certification

[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. (*Fireside Bank v. Superior Court (2007) 40 Cal.4th 1069, 1089, 56 Cal. Rptr. 3d 861, 155 P.3d 268 (Fireside Bank)*; *Linder, at pp. 435-436*.)

"An appeal from an order denying class certification presents an exception to customary appellate practice by which we review only the trial court's ruling, not its rationale." (*Alberts v. Aurora Behavioral Health Care (2015) 241 Cal.App.4th 388, 399, 193 Cal. Rptr. 3d 783*.) "'[W]hen denying class certification, the trial court must state its reasons, and we must review those reasons for correctness.'" (*Hendershot v. Ready to Roll Transportation, Inc. (2014) 228 Cal.App.4th 1213, 1221, 175 Cal. Rptr. 3d 917*.) "'[W]e review only the reasons given by the trial court for denial of class certification, and ignore any other grounds that might support denial.'" (*Corbett v. Superior Court (2002) 101 Cal.App.4th 649, 658, 125 Cal. Rptr. 2d 46*.)

II. Standards for Class Certification

"*Code of Civil Procedure section 382* authorizes class actions 'when the question is one **[*9]** of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court ....'" (*Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 326, 17 Cal. Rptr. 3d 906, 96 P.3d 194 (Sav-On Drug Stores)*.) "Class certification requires proof (1) of a sufficiently numerous, ascertainable class, (2) of a well-defined community of interest, and (3) that certification will provide substantial benefits to litigants and the courts, i.e., that proceeding as a class is superior to other methods. [Citations.] In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank, supra, 40 Cal.4th at p. 1089*.) "The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.'" (*Sav-On Drug Stores, at p. 326*.)

"On a motion for class certification, the plaintiff has the 'burden to establish that in fact the requisites for continuation of the litigation in that format are present.'" (*Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644, 654, 22 Cal. Rptr. 2d 419*.) In reviewing a certification order, the court considers "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, **[*10]** likely to prove amenable to class treatment. [Citations.] 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.'" (*Sav-On Drug Stores, supra, 34 Cal.4th at p. 327*.)

III. Trial Court's Ruling

The trial court found plaintiffs met their burden of demonstrating the putative class is ascertainable and sufficiently numerous to support class certification. It concluded plaintiffs did not meet their burden of establishing a well-defined community of interest. The trial court observed that the second amended complaint alleges the putative class suffered at least two types of harm: (1) overcharges for the purchase of beer from Donaghy because the putative class allegedly paid an effective wholesale price higher than the effective wholesale price paid by the favored retailers, who were given an illegal secret rebate; and (2) damages from an illegal price-fixing scheme in which defendants coerced the putative class members to price the beer they sold above, or not below, the prices charged by the favored retailers, which allowed the favored retailers to compete unfairly and illegally with the putative class members by allowing the favored **[*11]** retailers to charge retail prices below those of the putative class members.

As to the alleged price-fixing scheme, plaintiffs offered the expert opinion of Dr. J. Douglas Zona, an economist, which concluded the alleged use of coupons caused harm to competition. The trial court found Zona's expert opinion was insufficient to demonstrate there were common issues of law or fact regarding plaintiffs' claims of price fixing or other antitrust violations because his opinion concerning harm to competition was not based on any empirical evidence; Zona did not determine whether any putative class members actually reduced their retail prices

in order to compete with the favored retailers. Accordingly, the trial court refused to "certify a class with regard to any claim of price fixing or damage to competition."

As to the alleged overcharges, the trial court found DeMario's expert report concluded that all, or nearly all, of the putative class members were injured in a similar manner by the common scheme of providing coupons that acted as secret rebates, resulting in putative class members effectively paying higher wholesale prices for beer than the favored retailers. The trial court concluded **[*12]** plaintiffs "met their burden of showing that there are common issues of law and fact regarding the injuries suffered by the proposed class."

The trial court found, however, that plaintiffs failed to show that their claims were typical of those of the putative class members and they could adequately represent the putative class. It purportedly based these conclusions on the declarations of the named plaintiffs, which showed they were pressured by Donaghy to lower their retail prices for Anheuser-Busch beer in return for coupons that reimbursed them for doing so; the declarations did not show that plaintiffs received fewer coupons than the favored retailers or that they were instructed to use them to effectively give themselves a secret rebate off the wholesale price of the beer. Further, the deposition testimony of plaintiffs stated they paid the prices filed with the ABC when they purchased beer from Donaghy, the coupons did not reduce the invoice price they paid Donaghy for beer but merely reimbursed them for discounts they gave to retail customers, and the money from the coupons did not go into their pockets but was passed through to retail customers.

The trial court also found plaintiffs **[*13]** had not shown the benefits of proceeding as a class action would outweigh the disadvantages and burdens; that is, they did not show the superiority of the class procedure as a means of litigating their claims. The named plaintiffs did not suffer the same injuries as the putative class; there was no evidence the alleged coupon scheme caused any harm to competition by compelling putative class members to reduce retail prices, lose profits, or go out of business; and it was unclear how many, if any, of the other putative class members might have suffered injury as a result of the alleged coupon scheme. The trial court opined that a multitude of minitrials would be necessary to determine whether each putative class member had a valid claim and how much damage that class member sustained. Additionally, plaintiffs did not offer a trial plan or strategy that showed the case could be tried in a manageable and efficient way.

IV. Numerous, Ascertainable Class

The first requirement for class certification is the existence of a "sufficiently numerous, ascertainable class." (*Fireside Bank, supra, 40 Cal.4th at p. 1089*.) The trial court determined that plaintiffs met their burden of demonstrating the elements of ascertainability and numerosity **[*14]** exist as to the proposed class. This conclusion has not been challenged, and we need not address it.

V. Well-defined Community of Interest

The second requirement for certification of a class action is a well-defined community of interest among the putative class members. (*Sav-On Drug Stores, supra, 34 Cal.4th at p. 326*.) "[T]he 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Fireside Bank, supra, 40 Cal.4th at p. 1089*.)

A. Predominant common questions of law or fact

"Plaintiffs' burden on moving for class certification ... is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." (*Lockheed Martin Corp. v. Superior Court (2003) 29 Cal.4th 1096, 1108, 131 Cal. Rptr. 2d 1, 63 P.3d 913*.) "Predominance is a comparative concept." (*Medrazo v. Honda of North Hollywood (2008) 166 Cal.App.4th 89, 99, 82 Cal. Rptr. 3d 1*.) It "requires a

showing 'that questions of law or fact common to the class predominate over the questions affecting the individual members.'" (*In re Cipro Cases I & II, supra, 121 Cal.App.4th at p. 410*.) "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance **[*15]** of a class action would be advantageous to the judicial process and to the litigants.'" (*Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021, 139 Cal. Rptr. 3d 315, 273 P.3d 513 (Brinker)*.)

"To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.'" (*Brinker, supra, 53 Cal.4th at p. 1024*.) The legal elements of the causes of action must be considered in determining whether common issues predominate. (*Apple Inc. v. Superior Court (2018) 19 Cal.App.5th 1101, 1116, 228 Cal. Rptr. 3d 668*.) The court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Alberts v. Aurora Behavioral Health Care, supra*, 241 Cal.App.4th at p. 398.) "In deciding whether the common questions 'predominate,' courts must do three things: 'identify the common and individual issues'; 'consider the manageability of those issues'; and 'taking into account the available management tools, weigh the common against the individual issues to determine which of them predominate.'" (*Id. at p. 397*.)

The trial court's ruling did not separately address the four causes of action alleged in the second amended complaint. It did not discuss the elements of the causes of action, or whether they raised issues susceptible of common proof. The trial court reached general conclusions without **[*16]** associating them with the elements of any specific cause of action. Consequently, it is not clear to which cause or causes of action some of its findings were intended to apply. Nonetheless, we will discuss each cause of action separately and attempt to relate the trial court's conclusions to the cause or causes of action that include the element to which the conclusion is relevant.

1. First Cause of Action—Unlawful Business Practices

Plaintiffs' first and second causes of action allege violations of California's unfair competition law (UCL) (*§ 17200 et seq.*). The UCL defines unfair competition to "mean and include any unlawful, unfair or fraudulent business act or practice." (*§ 17200*.) Because the statute "is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." (*Podolsky v. First Healthcare Corp. (1996) 50 Cal.App.4th 632, 647, 58 Cal. Rptr. 2d 89*.) Plaintiffs' first cause of action is alleged under the "unlawful" prong of *section 17200*.

"The purpose of the UCL 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" (*Solus Industrial Innovations, LLC v. Superior Court (2018) 4 Cal.5th 316, 340, 228 Cal. Rptr. 3d 406, 410 P.3d 32*.) It also "'provides an equitable means through which ... private individuals can bring suit to prevent unfair business practices **[*17]** and restore money or property to victims of these practices.'" (*Ibid.*, italics omitted.) "While the scope of conduct covered by the UCL is broad, its remedies are limited. [Citation.] A UCL action is equitable in nature; damages cannot be recovered." (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937*.) "[U]nder the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" (*Ibid*, first bracketed insertion added.) A restitution order compels "'a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.'" (*Ibid.*)

"An unlawful business practice under *section 17200* is "'an act or practice, committed pursuant to business activity, that is at the same time forbidden by law.'"" (*Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 287, 37 Cal. Rptr. 3d 434*, italics omitted.) "By prohibiting unlawful business practices, "'*section 17200* 'borrows' violations of other laws and treats them as unlawful practices" that the unfair competition law makes independently actionable.'" (*De La Torre v. CashCall, Inc. (2018) 5 Cal.5th 966, 980, 236 Cal. Rptr. 3d 353, 422 P.3d 1004*.) "Virtually any state, federal or local law can serve as the predicate for an action under ... *section 17200*." (*Podolsky v. First Healthcare Corp., supra*, 50 Cal.App.4th at p. 647.)

Plaintiffs' first cause of action alleges defendants committed unlawful business practices by violating sections 25000, 25001, 25004, and 17045.

Section 25000 provides, in part:

"(a) Each ... wholesaler **[*18]** of beer shall file and thereafter maintain on file with the department ... a written schedule of selling prices charged by the licensee for beer sold and distributed by the licensee to customers in California .... Each ... wholesaler of beer shall file a price schedule for each county in which his or her customers have their premises .... Different prices for different trading areas within a county shall be based upon natural geographical differences justifying the different prices, and shall not be established for special customers." (§ 25000, subd. (a).)[3]

Section 25001 authorizes a wholesaler to modify its schedule of prices by filing a new schedule or an amendment to its existing schedule. Section 25004 provides that, once a new or amended schedule has become effective, "all prices therein stated shall be strictly adhered to by the filing licensee, and any departure or variance therefrom by a licensee is a misdemeanor." (§ 25004.) Thus, these sections would be violated if a wholesaler charged a retailer a price other than the applicable wholesale price on file with the ABC at the time. A wholesale customer's remedies under the UCL would be injunctive relief and restitution of any money wrongfully obtained from that customer.

In their **[*19]** motion for class certification, plaintiffs asserted that, pursuant to sections 25000, 25001, and 25004 they are seeking amounts they were overcharged for beer during the class period. They contend Anheuser-Busch and Donaghy used coupons to unlawfully give the favored retailers discounts from the filed wholesale price of beer. Plaintiffs maintain that, in order to reduce the wholesale price to any retailer, Donaghy was required by these statutes to file a new or modified schedule of wholesale prices with the ABC, reflecting the price reduction, and charge the new price to all retailers. Plaintiffs concede that many of the putative class members received coupons from Donaghy and redeemed them. They contend, however, that, because Anheuser-Busch and Donaghy used larger numbers of coupons to give larger discounts to the favored retailers, effectively lowering the wholesale price those favored retailers were charged below the price charged to the putative class members, they were in violation of the pricing statutes; consequently, all disfavored retailers who were charged a higher effective wholesale price than the effective wholesale price charged to the favored retailers at the time are entitled to recover the **[*20]** overcharges.

In their motion, plaintiffs argued that the central issues presented by their claims can be determined on a class-wide basis. They identified the central issues as: "Whether the couponing practices Plaintiffs complain about constitute effective discounts from the posted wholesale prices for beer and hence violate *B&P Code §§ 17200* [*sic*] and the Unfair Practices Act § 17045; and whether these violations harmed all or nearly all class members." Plaintiffs asserted evidence of the coupon program is largely documentary, and would show the operation of the rebate scheme, sales transactions within the class period, the filed wholesale prices, the rebates given, to whom they were given, and on what products and in what amounts they were given. Plaintiffs supported their motion with the expert report of DeMario, which analyzed the information found in Donaghy's sales records and the records of the third party redemption center that redeemed many of the coupons. DeMario concluded "that all or nearly all of the proposed class members were injured in a similar manner by the alleged scheme, as they effectively had to pay higher wholesale prices for [Anheuser-Busch] beer purchased from Donaghy as compared to the favored retailers." **[*21]** DeMario offered two methods of calculating restitution of the overcharges for all the putative class members collectively.

The trial court concluded that, to the extent plaintiffs and the putative class are seeking recovery of overcharges for the purchase of beer products from Donaghy, DeMario's expert opinion satisfied plaintiffs' burden "of showing that there are common issues of law and fact regarding the injuries suffered by the proposed class." The trial court's conclusion appears to apply to plaintiffs' first cause of action, which alleges plaintiffs were overcharged for

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[3] Plaintiffs' class definition includes retail business establishments in Fresno and Madera Counties that plaintiffs refer to generally as convenience stores.

Anheuser-Busch beer products through the coupon scheme. Plaintiffs interpret the trial court's statement as a finding that common issues predominate in the first cause of action.

The issue presented by a class certification motion is not whether some common issues exist, but whether plaintiffs have shown that common issues predominate. (*Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th at p. 1108.) The trial court did not find that common issues predominate in the overcharge claims, but only that there are common issues "regarding the injuries suffered by the proposed class." In considering whether common issues predominate, a court "must determine whether the elements **[*22]** necessary to establish liability are susceptible of common proof, or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Brinker, supra, 53 Cal.4th at p. 1024*.) By its terms, the trial court's ruling addressed only issues regarding class injuries, not issues that would establish defendants' liability. It did not reflect a weighing of common issues against individualized issues, determine whether any individualized issues may be managed effectively within a class action, or conclude common issues predominate. Thus, it is not clear whether the trial court intended its ruling to mean that common issues of law or fact predominate in the first cause of action.

Additionally, the first cause of action includes allegations of violation of section 17045. Plaintiffs' motion for class certification did not address these allegations at all in its discussion of the first cause of action. The trial court also did not specifically address them in its ruling.

Section 17045 is part of the Unfair Practices Act (§ 17000 et seq.) and provides:

"The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or **[*23]** privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful." (§ 17045.)

Thus, as alleged in this case, a violation of section 17045 requires a (1) secret (2) payment or allowance of rebates that (3) injures a competitor and (4) tends to destroy competition. A violation of this section requires proof of elements beyond those required for a violation of sections 25000, 25001, and 25004. The trial court did not analyze the issues raised by the section 17045 claim along with those raised by sections 25000, 25001, and 25004, or determine whether, as to the first cause of action as a whole, common issues predominate. Consequently, the trial court's analysis of the first cause of action to determine whether common issues of law or fact predominate is incomplete. It did not identify the issues raised by all the elements of the cause of action, consider all the proper criteria related to those issues, or reach a conclusion on the proper legal question: predominance of common issues.

2. Second Cause of Action—Unfair Business Practices

The second cause of action of plaintiffs' second amended complaint alleges that the same couponing conduct alleged **[*24]** in the first cause of action also constitutes a violation of the "unfair" business practices prong of the UCL. The second cause of action alleges violations of: the fair and equal, nondiscriminatory pricing policies of sections 25000, 25001, and 25004; the policy expressed in section 17001, "to 'foster and encourage competition by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented'"; the policies underlying section 17045, the secret rebate statute; the policies underlying sections 17043 and 17049, which prohibit selling below cost for the purpose of injuring competitors or destroying competition; and the policies underlying the Cartwright Act (§ 16720 et seq.), which is California's ***antitrust law***.

Section 17045 prohibits secret rebates to purchasers that injure a competitor, where the allowance of the rebate tends to destroy competition. Section 17043 makes it unlawful for any person engaged in business to sell below its cost "for the purpose of injuring competitors or destroying competition"; section 17049 extends the reach of section 17043 to any scheme of special rebates that has the effect of violating section 17043. The Cartwright Act "'generally outlaws any combinations or agreements which restrain trade or competition or which fix or **[*25]** control prices.'"

(*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1147, 69 Cal. Rptr. 2d 329, 947 P.2d 291*.)

Plaintiffs argue that, with the exception of the element of harm to competition, the elements of the second cause of action are substantially similar to the elements of the first cause of action. They interpret the trial court's ruling as finding that common issues predominate in the first cause of action and argue the same common elements are present in the second cause of action. As to the element of harm to competition, plaintiffs cite *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 166, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cel-Tech)* for the proposition that actual harm to competition is not required in order to prove an unfair business practice; a threatened effect on competition is sufficient for that purpose. Plaintiffs argue they demonstrated, through the declaration of their expert witness, Zona, that the element of harm, or threatened harm, to competition can be proven by the class through common evidence.

In *Cel-Tech*, the Supreme Court determined that the definitions the Courts of Appeal had developed for the term "unfair" business practices, as used in the unfair competition law, were "too amorphous and provide too little guidance to courts and businesses." (*Cel-Tech, supra, 20 Cal.4th at pp. 184-185*.) It devised a more precise test:

"[T]o guide courts and the business community adequately and to promote **[*26]** consumer protection, we must require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes *section 17200*, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Cel-Tech, supra, 20 Cal.4th at pp. 186-187*.)

Cel-Tech "defined 'unfair' in the context of a UCL action by one competitor against a direct competitor" and "made clear that its discussion about 'unfair' practices was limited to actions by competitors alleging anticompetitive practices, and did not relate to actions by consumers." (*Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1254, 99 Cal. Rptr. 3d 768*.) Here, plaintiffs and the putative class are not direct competitors of Anheuser-Busch and Donaghy; they claim to be direct competitors of the favored retailers, who are named defendants. Plaintiffs also allege practices of Anheuser-Busch and Donaghy that they contend interfere **[*27]** with their ability to compete on fair terms with the favored retailers. Accordingly, we apply the *Cel-Tech* test.

Under the *Cel-Tech* test, actual harm to competition is not required in order to establish that defendant's business practices are unfair. "[C]onduct that threatens an incipient violation of an ***antitrust law***" or "otherwise significantly threatens ... competition" is sufficient to establish a business practice is "unfair" under the UCL. (*Cel-Tech, supra, 20 Cal.4th at p. 187*.)

In its order, the trial court concluded that "plaintiffs have failed to meet their burden of showing that there are common issues of law or fact with regard to their claims to the extent that they rely on harm to competition based on the alleged price fixing or other antitrust violations. Indeed, in their reply, plaintiffs deny that they are alleging they were forced to fix or reduce their prices by defendants' coupon scheme, and instead contend that they are only alleging claims for restitution based on the alleged overcharges for wholesale beer prices caused by the coupon scheme. However, their contention is inconsistent with the allegations of their own second amended complaint, which clearly alleges that plaintiffs are seeking damages for defendants' **[*28]** conduct in coercing the class members to keep their prices artificially high and other anticompetitive conduct."

As the trial court pointed out, the second cause of action raises issues beyond those raised by plaintiffs' claims that they were overcharged through the discriminatory use of coupons. The second cause of action alleges Anheuser-Busch and Donaghy sometimes dictated retail prices to class members, requiring that they price their beer above, or at least not below, the price of the favored retailers, and threatening retaliation for noncompliance. Donaghy agreed with favored retailers not to supply disfavored retailers with coupons so the favored retailers could underprice the disfavored retailers, often below the disfavored retailer's cost. Donaghy's employees sometimes

demanded or accepted kickbacks in exchange for coupons; sometimes communicated pricing intentions to favored retailers in advance of the effective date of filed pricing changes; took orders from favored retailers at the new prices prior to their effective date; timed amendments that lowered prices on the filed pricing schedule to benefit favored retailers who would receive deliveries on weekends, unlike disfavored **[*29]** retailers; and frequently imposed shelving requirements on disfavored retailers, requiring the retailer to devote a certain percentage of its shelf space to Anheuser-Busch products and backing the requirement with threats that Donaghy would not sell beer to that retailer at all or would limit its allocation of products to the retailer at the filed sale price if the retailer did not comply. Plaintiffs' motion did not attempt to demonstrate that these activities, which allegedly occurred "sometimes" or "frequently," could be proven on a class-wide basis.

The trial court declined to "certify a class with regard to any claim of price fixing or damage to competition." Most of the statutes cited as the basis for the second cause of action require a business practice that "tends to destroy competition" (§ 17045), is engaged in "for the purpose of injuring competitors or destroying competition" (§ 17043), or destroys or prevents fair and honest competition (§ 17001). The trial court based its decision on its conclusion that plaintiffs had presented no evidence the alleged price-fixing activities actually harmed competition. It concluded Zona's declaration did not establish any such harm because his opinion was **[*30]** not based on any empirical evidence of actual price effects caused by the alleged coupon scheme. Under *Cel-Tech*, however, actual harm to competition is not an essential element of a claim of unfair business practices under the UCL. A significant threat to competition or a threat of an incipient antitrust violation suffices. (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) Thus, the trial court applied an improper legal standard.

Plaintiffs' second cause of action alleges that price fixing at the retail level and selective discounting of wholesale prices through the use of coupons threatened an incipient violation of ***antitrust law***: they tended "to impede and delay the dissemination of lower prices in the market," because, if Donaghy had lowered prices generally, by filing a new price schedule with the ABC instead of offering coupons to some retailers, but not others, retailers would have learned of the reduced prices more quickly, resulting in "more broadly based price reductions at the retail level across Fresno and Madera [C]ounties." The trial court did not consider whether plaintiffs made a sufficient showing, through Zona's declaration or other evidence, that these allegations raise common issues regarding a significant threat to **[*31]** competition or a threat of an incipient antitrust violation that could be addressed on a class-wide basis. The trial court also failed to weigh the common issues that may be jointly tried against those issues that require individual adjudication to determine which predominate. We conclude the trial court applied an incorrect standard, requiring a showing of actual harm to competition, rather than presentation of evidence that a significant threat to competition or a threat of an incipient antitrust violation could be demonstrated on a class-wide basis. It also failed to weigh the common issues against the issues requiring separate adjudication to determine whether the common issues predominate. Thus, the decision regarding the second cause of action rests on improper criteria and erroneous legal assumptions.

3. Third and Fourth Causes of Action—Secret Rebates

Plaintiffs' third cause of action alleges a violation of section 17045, which requires a (1) secret (2) payment or allowance of rebates that (3) injures a competitor and (4) tends to destroy competition. The fourth cause of action alleges violation of sections 17047 and 17048, which make it unlawful for any manufacturer or wholesaler to solicit or participate **[*32]** in a violation of section 17045 or to collude with another in a violation of section 17045.

Plaintiffs broadly claim these causes of action present common questions regarding whether defendants violated these sections by "not filing and posting, and selectively implementing, coupon rebates." They contend the trial court abused its discretion by failing to address and analyze these causes of action in its ruling.

Because one of the elements of these causes of action is a tendency of the secret rebates to destroy competition, the trial court's refusal to certify a class "with regard to any claim of ... damage to competition" appears to apply to these causes of action. As previously discussed, the trial court did not apply the proper criteria in its analysis of the element of damage to competition. Consequently, to the extent the trial court intended to deny certification of these

causes of action based on plaintiffs' failure to demonstrate that damage to competition could be proven on a class-wide basis, that denial would be based on improper criteria and erroneous legal assumptions.

Additionally, the trial court did not analyze all of the elements of these causes of action, identify the common or individual issues **[*33]** raised by them, or determine whether plaintiffs showed that common issues predominate.

B. Typical claims

Class "[c]ertification requires a showing that the class representative has claims or defenses typical of the class." (*Fireside Bank, supra, 40 Cal.4th at p. 1090*.) The class representatives must be members of the class they claim to represent and must be situated similarly to the class members. (*Caro v. Procter & Gamble Co., supra*, 18 Cal.App.4th at p. 663.) "The typicality requirement's purpose '"is to assure that the interest of the named representative aligns with the interests of the class. [Citation.] '"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought."' [Citations.] The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'"'" (*Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362, 375, 179 Cal. Rptr. 3d 867*.)

The trial court concluded the evidence did not support a finding that the named plaintiffs had claims typical of the class. It found their declarations merely stated they were pressured by Donaghy to lower their retail prices for Anheuser-Busch beer and they would **[*34]** receive coupons to compensate them for lowering their retail prices.[4] "Plaintiffs do not allege that they were not given the same number of coupons as the favored retailers, or that they were instructed to use the coupons they did receive to effectively give them a secret rebate off the wholesale price of beer. At most their allegations show that they were given coupons to reimburse them for reducing their retail prices, which apparently resulted in no net loss to them. Thus, plaintiffs' declarations fail to establish that they were subjected to a discriminatory scheme where they did not receive as many coupons as the favored retailers."

The primary theory of plaintiffs' case, asserted on behalf of the named plaintiffs and the class, is that coupons were given to the favored retailers in relatively large numbers while they were either not given to or given in significantly smaller numbers to the disfavored retailers making up the putative class. As a result, the class members effectively paid a higher wholesale price for Anheuser-Busch beer than the favored retailers; this violated the beer pricing and unfair competition laws, which required wholesalers to sell beer to all retailers **[*35]** in Fresno and Madera Counties at the same price. Regardless whether the coupons ostensibly were given to reimburse the retailer for a reduction in price given to the retail customer, plaintiffs contend redemption of the coupons effectively lowered the wholesale price paid by the redeeming retailer to Donaghy for Anheuser-Busch beer products. Whether this was actually the legal effect of coupon redemption is a merits question that is not relevant to the certification issue. Thus, declarations stating that named plaintiffs or putative class members were pressured by Donaghy to lower their retail prices in exchange for coupons are not inconsistent with plaintiffs' theory of the case and do not render the named plaintiffs' claims atypical of the claims asserted by the putative class in the second amended complaint.

The trial court's concern that the declarations did not state they were given fewer coupons than the favored retailers is unfounded. That information is contained in DeMario's report. Her report included a summary of the information she collected from the records of Donaghy and the third party redemption center, indicating the value of coupons redeemed by each of the retailers **[*36]** in the putative class, including the named plaintiffs, to the extent that information was available.

The trial court's observation that the named plaintiffs did not declare they were instructed to use the coupons they received to effectively give them a secret rebate off the wholesale price of beer does not make their claims atypical.

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[4] We note that only one of the seven declarations cited by the trial court in support of these statements was the declaration of a named plaintiff. The others were declarations of putative class members.

The second amended complaint does not allege that any member of the class was so instructed. Rather, plaintiffs contend that redemption of the coupons had the effect of reducing the wholesale price paid by the redeeming retailers for Anheuser-Busch beer products purchased from Donaghy.

The trial court also cited deposition testimony of the named plaintiffs that they were not charged wholesale prices different from the prices Donaghy filed with the ABC, the coupons did not reduce the invoice price plaintiffs paid for beer products purchased from Donaghy, and the coupon discount was passed on to the retail customer and reimbursed later. Again, these are the same allegations made by the named plaintiffs on behalf of the class: the wholesale price of the beer products was effectively reduced by the use of coupons subsequent to the purchase of the products, **[*37]** and the favored retailers received a greater reduction because they received more coupons than the disfavored retailers.

We conclude the trial court misconstrued the nature of plaintiffs' claims and misapplied the standards for determining the typicality of a class representative's claims. A class representative is not required to have identical interests with all of the class members. (*Classen v. Weller (1983) 145 Cal.App.3d 27, 46, 192 Cal. Rptr. 914*.) Here, the class representatives claim the same type of injury, arising from the same conduct by the defendants, as the putative class. We conclude the trial court erred in determining that the named plaintiffs do not have claims typical of the class.

C. Adequacy of representation

"To maintain a class action, the representative plaintiff must adequately represent and protect the interests of other members of the class. [Citation.] This requirement is a natural consequence of the equitable origins of the action and is the product in part of the relation between the res judicata effect of the class judgment on absent members and the requirements of due process." (*City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 463, 115 Cal. Rptr. 797, 525 P.2d 701*.) "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's **[*38]** interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America (1976) 60 Cal.App.3d 442, 450, 131 Cal. Rptr. 482*.) "'It is axiomatic that a putative representative cannot adequately protect the class if his [or her] interests are antagonistic to or in conflict with the objectives of those he [or she] purports to represent. But only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. Moreover, if the court can ... divide the class into subclasses or ... separate those issues that merit class action treatment so as to remove any antagonism, then the action need not be dismissed.'" (*Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470-471, 174 Cal. Rptr. 515, 629 P.2d 23*.)

"When a court decides a proposed class certification request, to consider issues of adequacy and fairness of representation, it will evaluate 'the seriousness and extent of conflicts involved compared to the importance of issues uniting the class; the alternatives to class representation available; ... the procedures available to limit and prevent unfairness; and any other facts bearing on the fairness with which the absent class member is represented.'" (*Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 851, 7 Cal. Rptr. 3d 28*.)

The trial court did not separately consider whether the class representatives demonstrated that they could adequately represent the **[*39]** class. It lumped together the typicality and adequacy of representation requirements and concluded that, for the same reasons their claims were not typical, the named plaintiffs would not be adequate representatives of the putative class. The trial court did not consider whether any conflicts or antagonistic interests exist between the named plaintiffs and the other members of the proposed class.

We note that, according to *G.H.I.I. v. MTS, Inc. (1983) 147 Cal.App.3d 256, 195 Cal. Rptr. 211*, an action for unfair business practices founded on a violation of the secret rebate statute (§ 17045) may be maintained not only against the seller who granted the secret rebate to the buyer, but also against the buyer who received it. (*G.H.I.I., at p. 271*.) If, as plaintiffs contend, redemption of coupons violated section 17045, because it constituted receipt of a

secret rebate which resulted in the redeeming retailer paying a lower wholesale price for beer products, then the members of the class who redeemed coupons reaped the benefits of the secret rebates. That may put the members of the putative class who did not redeem coupons in a significantly different position than those who redeemed coupons, which may result in antagonistic or conflicting interests.

Further, the methods of calculating restitution **[*40]** proposed by DeMario do not distinguish between the putative class members who did not receive or redeem any coupons and the members who redeemed some coupons but allegedly not as many as the favored retailers. She combines the two groups in her calculations. In Alternative One, she compares the average discount received by the favored retailers through the use of coupons with the average discount received by the putative class. In Alternative Two, she compares the largest discount received by any retailer (favored or disfavored) during a promotion period with the average discount received by the putative class. In either case, she averages the discounts received by all 808 putative class members, although only 310 or 372 putative class members (depending on which data is consulted) redeemed coupons; plaintiffs admit at least 436 putative class members did not redeem any coupons and therefore did not receive any reductions from the filed wholesale price. The effect of her calculations is to attribute price reductions to at least 436 putative class members who received none.

We recognize that DeMario's calculations are a means of presenting the restitution claims on behalf of the class **[*41]** as a whole and do not necessarily address distribution of any recovery among the class members. In determining the adequacy of the named plaintiffs' representation of the class as a whole, however, it appears the status of the named plaintiffs, who in this case all appear to have redeemed coupons, and the potential for a conflict of interest caused by the difference in status, are valid considerations.[5]

Because the trial court did not separately consider whether the named plaintiffs would adequately represent the class and did not analyze potentially conflicting or antagonistic interests in making that determination, we conclude the trial court's analysis of this element is incomplete.

VI. Superiority of Class Procedure

In addition to demonstrating there is a sufficiently numerous, ascertainable class and a well-defined community of interest, plaintiffs seeking class certification must demonstrate that certification will provide substantial benefits to the litigants and the court, that is, that proceeding as a class is superior to other methods. (*Fireside Bank, supra, 40 Cal.4th at p. 1089*.) Regarding the superiority of the class method, the trial court stated the same problems it identified with regard to community of interest **[*42]** also weighed against finding that a class action would be a superior procedure. "The named plaintiffs apparently did not suffer the same injuries as the other proposed class members, and, in fact, they denied that the coupons were used to lower the wholesale price they paid to Donaghy for [Anheuser-Busch] beer. There is also no evidence that the alleged coupon scheme caused any harm to competition by forcing the class members to reduce their prices, lose profits, or go out of business. It is unclear how many, if any, of the other class members might have suffered injury due to the alleged coupon scheme." The trial court concluded "a multitude of mini-trials" would be required to adjudicate the individual claims of the class members to determine whether each has a valid claim and how much damage they sustained.

Regarding the named plaintiffs' denial that the coupons were used to lower the wholesale price they paid, the theory of plaintiffs' case is that the coupons in fact had that effect; whether plaintiffs and the class members understood they had that effect would not change the outcome. Plaintiffs contend the effect of the coupons is a common issue suitable for litigation on a class-wide **[*43]** basis. The trial court, earlier in its ruling, appeared to agree when it accepted DeMario's declaration as showing a common scheme of providing coupons that acted as secret rebates and showing all or nearly all of the putative class members were injured in a similar manner by the

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[5] "Case law imposes fiduciary duties on the trial courts, class counsel, and class representatives, who must ensure the action proceeds in the class members' best interest." (*Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260, 266, 228 Cal. Rptr. 3d 106, 409 P.3d 281*.)

alleged coupon scheme. The trial court's conclusion that "[i]t is unclear how many, if any, of the other class members might have suffered injury due to the alleged coupon scheme" appears to contradict its earlier statement that DeMario's declaration showed all or nearly all of the putative class members were injured in a similar manner by the alleged coupon scheme.

As previously discussed, actual harm to competition is not a required element of plaintiffs' second cause of action for unfair business practices under the UCL. The trial court did not analyze, for any cause of action, whether plaintiffs demonstrated that the type of harm or threatened harm to competition required for each cause of action can be proven on a class-wide basis by common evidence.

Thus, the trial court did not consider the appropriate factors in determining whether proceeding by class action would be superior to proceeding by individual **[*44]** actions.

We conclude the trial court abused its discretion by denying plaintiffs' motion for class certification.

DISPOSITION

The order denying class certification is reversed. We remand the matter to the trial court for further consideration of the motion for class certification consistent with the views expressed in this opinion. Plaintiffs are awarded their costs on appeal.

HILL, P. J.

WE CONCUR:

SMITH, J.

DE SANTOS, J.

Golightly v. Uber Techs., Inc.

United States District Court for the Southern District of New York

December 21, 2022, Decided; December 21, 2022, Filed

21-cv-3005 (LJL)

Reporter
2022 U.S. Dist. LEXIS 229911 *

GOLIGHTLY, on behalf of himself and all others similarly situated, Plaintiff, -v- UBER TECHNOLOGIES, INC., et al., Defendants.

Prior History: *Golightly v. Uber Techs., Inc., 2021 U.S. Dist. LEXIS 151100, 2021 WL 3539146 (S.D.N.Y., Aug. 11, 2021)*

Core Terms

drivers, trips, transportation, interstate commerce, interstate, arbitration, exemption, residuary clause, airport, courts, passengers, train, yellow cab, commerce, railroad employee, airline, parties, station, interstate transit, Terminal, fares, nationwide, discovery, riders, intrastate, purposes, taxicab, interstate travel, job description, contracts

LexisNexis® Headnotes

Labor & Employment Law > Discrimination > Actionable Discrimination

HN1 **Discrimination, Actionable Discrimination**

The New York City Human Rights Law protections include the Fair Chance Act, which provides important protections to those with criminal histories to ensure that they are not unfairly discriminated against in the job market and helps to promote racial justice.

Admiralty & Maritime Law > Arbitration > Federal Arbitration Act

HN2 **Arbitration, Federal Arbitration Act**

9 U.S.C.S. § 1, exempts contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce from the FAA. *9 U.S.C.S. § 1*.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Orders to Compel Arbitration

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] Federal Arbitration Act, Orders to Compel Arbitration

When deciding a motion to compel arbitration, courts apply a standard similar to that applicable for a motion for summary judgment. On a motion for summary judgment, courts consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, and draw all reasonable inferences in favor of the non-moving party. Summary judgment is appropriate where there is no genuine issue as to any material fact.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Orders to Compel Arbitration

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN4[] Arbitration, Arbitrability

In a motion to compel arbitration, once the existence of a valid arbitration agreement has been established, the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Thus, the party claiming that 9 U.S.C.S. § 1 exempts an arbitration agreement from the FAA's coverage bears the burden of proving that the exemption applies. A party to an arbitration agreement seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable or invalid. As the party opposing arbitration, plaintiffs have the burden of proving that the exemption applies.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN5[] Arbitration, Arbitrability

9 U.S.C.S. § 2 makes agreements to arbitrate valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. The FAA signifies a liberal federal policy favoring arbitration agreements. The FAA is a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice.

Admiralty & Maritime Law > Arbitration > Federal Arbitration Act

Labor & Employment Law > ... > Conditions & Terms > Arbitration Provisions > Enforcement

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN6[] Arbitration, Federal Arbitration Act

While the scope of the FAA is broad, like most laws, the FAA bears its qualifications. 9 U.S.C.S. § 1 provides that the FAA shall not apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. 9 U.S.C.S. § 1. The Supreme Court has surmised that the purpose behind this exception was that by the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers and it seems Congress did not wish to unsettle those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate.

Admiralty & Maritime Law > Arbitration > Federal Arbitration Act

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

HN7 **Arbitration, Federal Arbitration Act**

The residual part of the exception, i.e., any other class of workers engaged in foreign or interstate commerce, does not exclude all employment contracts from the FAA's reach but instead exempts only contracts of employment of transportation workers. The application of the maxim ejusdem generis, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Under this rule of construction the residual clause should be read to give effect to the terms 'seamen and railroad employees, and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it.

Governments > Courts > Judicial Precedent

HN8 **Courts, Judicial Precedent**

The district court is bound by the decisions of the Supreme Court.

Transportation Law > Interstate Commerce > Definition of Commerce

HN9 **Interstate Commerce, Definition of Commerce**

While the phrase "involving commerce" signals an intent to exercise Congress' commerce power to the full, the specific phrase "engaged in commerce" is understood to have a more limited reach.

Transportation Law > Interstate Commerce > Arbitration

Transportation Law > Interstate Commerce > Definition of Commerce

HN10 **Interstate Commerce, Arbitration**

The phrase "class of workers" within *9 U.S.C.S. § 1* is defined based on what a person does at a specific company, not what the company does generally. Thus, the fact that a person works for a company that is generally engaged in interstate commerce does not by that fact alone make that person a transportation worker under *§ 1*.

Transportation Law > Interstate Commerce > Arbitration

Transportation Law > Intrastate Commerce

HN11 **Interstate Commerce, Arbitration**

The decisions addressing the 9 U.S.C.S. § 1 exemption also make clear that when applying § 1, courts should look not to the individual conduct or experience of the plaintiff, but whether the class of workers to which the complaining worker belonged engaged in interstate commerce. A court focuses its analysis on the overall class of workers to which plaintiffs belong. The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class. Accordingly, a person may occasionally provide transportation services in interstate commerce but not be part of a class of transportation workers engaged in foreign or interstate commerce.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN12 **Contract Conditions & Provisions, Arbitration Clauses**

There is a public interest in the enforcement of agreements voluntarily reached between two parties, even when that agreement will result in one or the other party being denied a federal court forum with respect to a dispute that arises between them.

Transportation Law > Interstate Commerce > Arbitration

HN13 **Interstate Commerce, Arbitration**

While courts are split on the issue of whether Uber drivers are transportation workers engaged in foreign or interstate commerce, the majority of courts hold that Uber or Lyft drivers are not exempt from the FAA's coverage under 9 U.S.C.S. § 1.

Labor & Employment Law > ... > Conditions & Terms > Arbitration Provisions > Enforcement

HN14 **Arbitration Provisions, Enforcement**

In determining whether 9 U.S.C.S. § 1 applies, courts generally start by determining the scope of the relevant class of workers to which the plaintiff belongs.

Labor & Employment Law > ... > Conditions & Terms > Arbitration Provisions > Enforcement

HN15 **Arbitration Provisions, Enforcement**

Courts are largely in agreement that the proper geographic scope of the class of workers for purposes of 9 U.S.C.S. § 1 is nationwide. All courts addressing this question, even those that have ultimately concluded that Uber drivers do fall within the interstate commerce exemption, have rejected attempts to cabin their analyses to a specific geographic area.

Transportation Law > Interstate Commerce > Arbitration

HN16 **Interstate Commerce, Arbitration**

In the Supreme Court's decision in Southwest Airlines Co. v. Saxon and the Second Circuit's decision in Bissonnette v. LePage Bakeries Park St., LLC, the courts looked not only to the plaintiffs' job titles but also to the

plaintiffs' specific job responsibilities and job descriptions in determining whether they were part of a class of workers engaged in interstate commerce under 9 U.S.C.S. § 1. Depending on how a company doing business nationwide organizes its workforce and how and whether the nature of the work performed differs from region to region, it might be more faithful to the FAA exemption to consider the employee as a member of a more local class.

Labor & Employment Law > ... > Conditions & Terms > Arbitration Provisions > Enforcement

HN17 **Arbitration Provisions, Enforcement**

An employer should not be able to defeat the employee's right to litigate by the contrivance of grouping him with a number of other persons who bear the same job title but whose work otherwise bears no resemblance to the work the employee does.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

HN18 **Interstate Commerce, Tests**

The Sherman Act applies if some appreciable part of interstate commerce is involved.

Antitrust & Trade Law > Sherman Act > Claims

Transportation Law > Interstate Commerce > Arbitration

HN19 **Sherman Act, Claims**

The Sherman Act, outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. 9 U.S.C.S. § 1, by contrast, applies only to those workers "engaged in commerce", a term of art which does not regulate to the outer limits of authority under the Commerce Clause. Hence, conduct that does not affect interstate commerce under the Sherman Act would seem a fortiori not to be conduct engaged in interstate commerce under the § 1 exception.

Admiralty & Maritime Law > Arbitration > Federal Arbitration Act

Transportation Law > Interstate Commerce > Definition of Commerce

HN20 **Arbitration, Federal Arbitration Act**

When determining the scope of 9 U.S.C.S. § 1 residual clause, courts must apply the maxim of ejusdem generis. Under this rule, the phrase any "other class of workers engaged interstate commerce" must embrace objects similar in nature to the words seamen and railroad employees. § 1. Thus, to fall within the scope of the residual clause, the class of workers must perform work analogous to that of seamen and railroad employees. The Supreme Court has also stated, in a related context, that interstate commerce is an intensely practical concept drawn from the normal and accepted course of business and, in determining what falls under it, common understanding of certain activities is relevant.

Transportation Law > Intrastate Commerce

HN21[] **Transportation Law, Intrastate Commerce**

Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

HN22[] **Contract Conditions & Provisions, Forum Selection Clauses**

Forum selection clauses, are enforced because they provide certainty and predictability in the resolution of disputes.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

Transportation Law > Interstate Commerce > Definition of Commerce

HN23[] **Interstate Commerce, Tests**

The relevant criteria for determining whether a transportation worker operates in interstate commerce is not what underlying activity she performs, nor is it how often she performs such an activity. Instead, the key inquiry is whether interstate activity is other than a merely casual and incidental part of the employee's job responsibilities.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Orders to Compel Arbitration

Civil Procedure > Appeals > Reviewability of Lower Court Decisions

HN24[] **Federal Arbitration Act, Orders to Compel Arbitration**

If dismissal is entered, a party has a right to immediate appeal of an order compelling arbitration, which would impede the expeditious resolution of the arbitral proceeding.

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Stay Pending Arbitration

HN25[] **Arbitration, Arbitrability**

Where a defendant seeks dismissal rather than a stay, the district court has discretion whether to stay or dismiss plaintiffs' action under the FAA. This approach is consistent with Congress's intent to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible as well as comports with the FAA's statutory scheme.

Counsel: **[*1]** For Job Golightly, on behalf of himself and all others similarly situated, Plaintiff: Carolyn Elizabeth Coffey, Michael Noah Litrownik, Mobilization for Justice, New York, NY; Juno Emmeline Turner, Towards Justice, Denver, CO.

For Uber Technologies, Inc., Defendant: Andrew M. Spurchise, LEAD ATTORNEY, Littler Mendelson, P.C. (NYC), New York, NY; Miguel Angel Lopez, Littler Mendelson, P.C., New York, NY.

For Checkr, Inc., Defendant: Daniella Adler, Littler Mendelson, P.C. (NYC), New York, NY.

Judges: LEWIS J. LIMAN, United States District Judge.

Opinion by: LEWIS J. LIMAN

Opinion

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Defendant Uber Technologies, Inc. ("Uber") moves to compel individual arbitration and to dismiss the complaint or, in the alternative, to strike plaintiff Job Golightly's class allegations, and to stay proceedings. Dkt. Nos. 21, 22, 43.

For the following reasons, the motion to compel individual arbitration is granted. The Court stays the action with respect to Job Golightly's claims against Uber.

BACKGROUND

The following facts are taken from the complaint and the evidence submitted in connection with the present motion to compel arbitration.

I. Present Action

On April 8, 2021, Job Golightly **[*2]** ("Plaintiff") initiated the present action through the filing of a class action complaint. Dkt. No. 1. Plaintiff is a Black resident of the Bronx, New York who worked as a driver for Uber from 2014 until August 2020. *Id.* ¶ 10. In August of 2020, Plaintiff was deactivated from Uber's driving platform, without notice, process, or further communication, after Uber discovered, through a background check, that he had a 2013 misdemeanor speeding ticket from Virginia. *Id.* ¶ 11. If Plaintiff had received the same speeding ticket in New York, it would not have been characterized as a misdemeanor. *Id.*

Plaintiff brings a number of claims, both on behalf of himself and others, asserting that Uber's actions violate Plaintiff's and other drivers' rights under New York City Human Rights Law ("NYHRL") and the federal and New York Fair Credit Reporting Acts. *Id.* HN1[] The NYHRL protections include the Fair Chance Act, which provides important protections to those with criminal histories to ensure that they are not unfairly discriminated against in the job market and helps to promote racial justice. *Id.* ¶¶ 8-9. Specifically, Plaintiff alleges that "Uber's unlawful policy of using criminal history to summarily deactivate current drivers from its labor platform or reject new drivers **[*3]** without even attempting to comply with the Fair Chance Act process [] disparately impacts hundreds of Black and Latinx individuals, like Mr. Golightly, who drove or hoped to drive for Uber, and who have disproportionately higher rates of criminal history due to the overcriminalization of communities of color." *Id.* ¶ 17.

On January 7, 2020, however, Plaintiff entered into a January 6, 2020 Platform Access Agreement (the "2020 PAA") through Uber's application for drivers ("Driver App") in order to continue to provide transportation services for Uber. Dkt. No. 22-1 at 3; Dkt. No. 44 at 4. The 2020 PAA contains an optional arbitration clause that purports to cover this dispute; Plaintiff did not opt out. Dkt. No. 22-1 at 3-5; Dkt. No. 44 at 4. That arbitration clause includes a class action waiver. Dkt. No. 22-1 at 4; Dkt. No. 44 at 4.

The parties agree that the Federal Arbitration Act ("FAA") governs the arbitration provision unless Plaintiff demonstrates that he is exempt from the FAA pursuant to the residual clause of *Section 1 of the FAA*. Dkt. No. 22-1 at 7; Dkt. No. 44 at 1, 4. ***HN2***[⬆] *Section 1 of the FAA*, discussed in more detail below, exempts "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate* ***[*4]*** *commerce*" from the FAA. *9 U.S.C. § 1* (emphasis added).

II. Uber and Trip Statistics

Uber is a technology company that, among other services, matches individuals in need of a car ride with drivers. Dkt. No. 22-2 ¶¶ 4-5. Uber operates in 150 cities across the United States. *Id.* ¶ 5. Riders who wish to use Uber's services download Uber's application for riders, while drivers willing to provide transportation services through Uber download Uber's Driver App. *Id.* ¶ 6. The software in the apps matches riders and drivers based on their location. *Id.* In nearly all cities where Uber is available, riders are able to schedule a ride within a 10-minute pick-up window anywhere from five minutes to thirty days in advance. Dkt. No. 45-1 at 50. If there is no driver available to complete the scheduled trip, the rider is notified. *Id.*

The vast majority of Uber trips are intrastate. Dkt. No. 22-4 ¶ 4. For Uber trips taken between January 1, 2018 and December 31, 2020, the average distance was approximately six miles and the average duration was approximately sixteen minutes. *Id.* Nationwide, the percentages of trips arranged using Uber's Driver App that were interstate for the years 2018 to 2021 were 2.5%, 2.3%, 2.1%, **[*5]** and 2.2%, respectively. Dkt. No. 45-1 at 23-25. The percentages of trips that were interstate arranged using Uber's Driver App in New York City, New York City Suburbs (*e.g.*, Long Island, Westchester, and surrounding counties), New Jersey, and Connecticut (collectively, the "NY Metro Area") for the years 2018 to 2021 were 3.0%, 2.9%, 2.3%, and 2.7%, respectively. *Id.* at 25. Nationally, the percentages of gross fares for Uber drivers derived from interstate travel nationally for the years 2018 to 2021 were 5.8%, 5.5%, 4.6%, and 4.7%, respectively. *Id.* at 31. The percentages of driver gross fares that were derived from interstate trips in the NY Metro Area for the years 2018 to 2021 were 11.2%, 10.1%, 7.7%, and 8.1%, respectively. *Id.*

Nationally, the percentages of airport trips arranged using Uber's Driver App for the years 2018 to 2021 were 9.4%, 10.1%, 7.3%, and 8.7%, respectively. *Id.* at 33. The percentages of airport trips arranged using Uber's Driver App in the NY Metro Area for the years 2018 to 2021 were 6.6%, 7.2%, 3.9%, and 4.6%, respectively. *Id.* at 34-35. Nationally, the percentages of driver gross fares derived from airport trips for the years from 2018 to 2021 were 19.9%, **[*6]** 20.4%, 14.2%, and 16.6%, respectively. *Id.* at 38. The percentages of driver gross fares derived from airport trips in the NY Metro Area from 2018 to 2021 were 16.9%, 17.7%, 9.0%, 10.3%, respectively. *Id.*

The table below presents the percentages of Uber trips in the NY Metro Area terminating at each of the following locations:

	2018	2019	2020	2021 (through Nov. 9, 2021)
GWB Bus Station	0.01%	0.01%	0.01%	**Nov. 9, 2021)**0.01%
Grand Central Terminal	0.15%	0.14%	0.11%	0.14%
Manhattan Cruise Terminal	0.01%	<0.01%	<0.01%	<0.01%
Penn Station (includes Moynihan Train Hall)	0.33%	0.29%	0.24%	0.26%
Pier 11	0.01%	0.01%	0.01%	0.01%
Pier 79	0.02%	0.02%	0.01%	0.01%
Port Authority Midtown Bus Terminal	0.09%	0.07%	0.06%	0.06%
Red Hook Cruise Terminal	<0.01%	<0.01%	<0.01%	<0.01%
Total Percentage of Trips to All of These Locations as Percentage of All NY Metro Area Trips	0.63%	0.54%	0.44%	0.49%

Id. at 41-42. The table below presents the percentages of gross fares for Uber drivers in the NY Metro Area for trips terminating at each of the following locations:

	2018	2019	2020	2021 (through Nov. 9, 2021)
GWB Bus Station	0.01%	0.01%	0.01%	0.01%
Grand Central Terminal	0.16%	0.17%	0.11%	0.14%
Manhattan Cruise Terminal	0.01%	<0.01%	<0.01%	<0.01%
Penn Station (includes Moynihan Train **[*7]** Hall)	0.36%	0.39%	0.26%	0.27%
Pier 11	0.01%	0.01%	0.01%	0.01%
Pier 79	0.02%	0.02%	0.01%	0.01%
Port Authority Midtown Bus Terminal	0.11%	0.10%	0.08%	0.08%
Red Hook Cruise Terminal	<0.01%	<0.01%	<0.01%	<0.01%
Total Percentage of Trips to All of These Locations as Percentage of All NY Metro Area Trips	0.68%	0.71%	0.48%	0.52%

Id. at 46.

Despite the existence of some number of interstate trips, Uber's advertising and marketing materials do not address interstate trips. Dkt. No. 45-1 at 12. Uber also does not maintain any guidelines, policies, or practices applicable to drivers that concern interstate trips. *Id.* at 14. Riders who take trips between New York City and New Jersey are charged a surcharge, which Uber states is due to state and local regulations. Dkt. No. 43 at 7-8; Dkt. No. 43-1. Uber also has no partnerships or arrangements with Amtrak, any airline, or any motorcoach company. Dkt. No. 45-1 at 16.

PROCEDURAL HISTORY

Plaintiff initiated this action through the filing of a complaint on April 8, 2021, asserting claims against Uber and Checkr, Inc. ("Defendants"). Dkt. No. 1. On June 2 and 16, 2021, Checkr, Inc. and Uber, respectively, filed letters to inform the Court that they intended to move to compel arbitration. **[*8]** Dkt. No. 15. On June 23, 2021, the parties filed a proposed case management plan. Dkt. No. 18. Uber took the position that the Court should rule on its arbitration motion before engaging in substantive discussions regarding discovery and case scheduling. *Id.* On June 30, 2021, the Court issued an order allowing Plaintiff to conduct limited discovery in the form of document requests and interrogatories in support of its argument that it was exempted from application of the FAA pursuant to *Section 1 of the FAA*. Dkt. No. 19. The Order also permitted Defendants to move to stay all remaining discovery in conjunction with their consolidated motion to compel arbitration and stayed Plaintiff's time to respond to any motion to compel arbitration pending a ruling on the motion to stay discovery. *Id.* On August 4, 2021, Checkr, Inc. was voluntarily dismissed from the action, leaving Uber as the only remaining defendant.

On July 19, 2021, Uber moved to compel individual arbitration, dismiss the lawsuit (or alternatively, to strike Plaintiff's class allegations), and stay discovery. Dkt. No. 22. In that motion, Uber argued that Plaintiff's claims are subject to arbitration and are not exempt under *Section 1 of the FAA* as a matter of law. **[*9]** *Id.*; *9 U.S.C. § 1*. Specifically, Uber argued that the *Section 1* exemption does not apply because Uber drivers are not engaged in interstate commerce as the nature of their trips are primarily local, the relevant contract between Uber and Plaintiff is not a contract of employment but instead a licensing agreement, and Uber drivers transport passengers, not goods. Dkt. No. 22-1 at 7-16. Uber also argued that discovery was unnecessary as Uber's motion to compel arbitration establishes, as a matter of law, that the parties must arbitrate Plaintiff's claims. *Id.* at 33. On July 30, 2021, Plaintiff filed a memorandum of law in opposition to Uber's motion to stay discovery. Dkt. No. 25. On August 4, 2021, Uber filed a reply memorandum of law in further support of its motion to stay discovery. Dkt. No. 29.

On August 11, 2021, the Court issued an Opinion and Order denying Uber's motion to stay discovery. *See generally* Dkt. No. 30. The Court noted that neither party disputed, for purposes of the discovery motion, that Plaintiff's claim was subject to arbitration unless Plaintiff was one of a class of workers under the "residual clause" of the FAA, which exempts "contracts of employment of seamen, railroad employees, **[*10]** or any other class of workers engaged in foreign or interstate commerce" from its reach. *Id.* at 2; *9 U.S.C. § 1*. The Court stated that the contract Plaintiff entered into with Uber "contains an arbitration provision that would cover this dispute" and "contains a class waiver." Dkt. No. 30 at 3. After concluding that a valid arbitration clause existed, the Court dismissed Uber's argument that the residual clause of the FAA would not apply because Uber drivers transport passengers, not goods. *Id.* Quoting a district court opinion by then-Judge Jackson, the Court stated that "[t]he *Section 1* 'exemption' 'is not limited to classes of workers who transport goods in interstate commerce,' but also 'extend[s] to the transportation of passengers as well as physical goods.'" *Id.* (quoting *Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1, 13 (D.D.C. 2021)*). The Court then noted that courts were divided on whether Uber and Lyft drivers fall within the residual clause, there was no Second Circuit precedent directly on point, and Plaintiff had not had the opportunity to present evidence on the issue. *Id. at 3-4*.

The Court thus concluded that Uber's request for arbitration could not be determined based on the allegations of the complaint and the documents incorporated therein, as it ultimately **[*11]** depended on whether Plaintiff was a "transportation worker" for purposes of the residual clause. *Id. at 7-8*. The Court stated that Plaintiff's requested

discovery was narrow and Uber had not demonstrated any prejudice it would suffer from responding to the limited discovery requests. *Id. at 8*. The Court also noted that while Uber's position may ultimately be meritorious, Uber had not demonstrated that the merit of its position was self-evident. *Id. at 9*. Specifically, the Court stated that the case law makes clear that the applicability of the *Section 1* residual clause does not depend alone on the frequency of interstate trips taken by a class of workers, but might also be applied when the transportation of people and goods was solely intrastate but was part of the "stream of interstate commerce." *Id. at 10* (quoting *United States v. Yellow Cab Co., 332 U.S. 218, 228-29, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*). The Court, however, noted in a footnote that it did not prejudge whether and how Uber workers would fall within *Section 1* and left "open for briefing after the limited discovery the precise standards the Court should adopt in measuring the reach of *Section 1* and the application of those standards to the facts." *Id. at 10 n.5*. For these reasons, the Court denied the motion to stay discovery and noted that it would return **[*12]** to Uber's motion to compel arbitration following limited discovery. *Id.* at 12.

Limited discovery was conducted, and Uber subsequently filed a supplemental memorandum of law in support of its motion to compel on November 29, 2021. Dkt. No. 43. On December 21, 2021, Plaintiff filed a memorandum of law and declaration in opposition to the motion to compel. Dkt. Nos. 44-45. On January 10, 2022, Uber filed a reply memorandum of law in further support of its motion to compel. Dkt. No. 46.

On June 6, 2021, the Court asked the parties to file letter briefs addressing the impact, if any, on the pending motion to compel arbitration of the Supreme Court's recent decision in *Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1784, 213 L. Ed. 2d 27 (2022)*. Dkt. No. 47. On June 13, 2022, both parties filed letter motions addressing *Saxon*. Dkt. Nos. 48-49.

LEGAL STANDARD

I. Motion to Compel Arbitration

HN3[] When deciding a motion to compel arbitration, courts apply a standard "similar to that applicable for a motion for summary judgment." *Meyer v. Uber Techs., Inc., 868 F.3d 66, 74 (2d Cir. 2017)* (quoting *Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016)*). On a motion for summary judgment, courts consider "all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," and draw **[*13]** "all reasonable inferences in favor of the non-moving party." *Id.* (cleaned up). Summary judgment is appropriate where "there is no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (quoting *Fed. R. Civ. P. 56(c)*).

HN4[] "Once the existence of a valid arbitration agreement has been established, [] 'the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" *Osvatics, 535 F. Supp. 3d at 9* (quoting *Sakyi v. Estee Lauder Cos., 308 F. Supp. 3d 366, 375 (D.D.C. 2018)*). "Thus, the party claiming that *section 1* exempts an arbitration agreement from the FAA's coverage bears the burden of proving that the exemption applies." *Id.*; *see Harrington v. Atl. Sounding Co., 602 F.3d 113, 124 (2d Cir. 2010)* ("A party to an arbitration agreement seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable or invalid."); *Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 928 (N.D. Cal. 2020)*, *aff'd*, *7 F.4th 854 (9th Cir. 2021)* ("As the party opposing arbitration, Plaintiffs have the burden of proving that the exemption applies.").

II. The Federal Arbitration Act

"*Section 2 of the Federal Arbitration Act (FAA)* ***HN5***[] makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Haider v. Lyft,*

Inc., 2021 U.S. Dist. LEXIS 62690, 2021 WL 1226442, at *2 (S.D.N.Y. Mar. 31, 2021)* (Nathan, J.) (quoting *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)*). The FAA signifies a "liberal federal policy favoring arbitration agreements." *Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 660 (2d Cir. 2022)*; *see Capriole, 7 F.4th at 868*. As the Supreme Court has stated, "the FAA was a response to hostility of American courts to the enforcement **[*14]** of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 111, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)*.

HN6[↑] But, while the scope of the FAA is broad, "like most laws," the FAA "bears its qualifications." *New Prime Inc. v. Oliveira, 139 S. Ct. 532, 536, 202 L. Ed. 2d 536 (2019)*. At issue, here, is *Section 1 of the FAA*. *Section 1* provides that the FAA shall not apply "to 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 Cir. City Stores, Inc., 532 U.S. at 112*. The Supreme Court has surmised that the purpose behind this exception was that "[b]y the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers" and "it seems Congress 'did not wish to unsettle' those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate." *New Prime Inc., 139 S. Ct. at 537* (citation omitted).

The Supreme Court has discussed the scope of this exception on several different occasions. *See, e.g.*, *Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 213 L. Ed. 2d 27 (2022)*; *New Prime Inc., 139 S. Ct. 532*; *Cir. City Stores, Inc., 532 U.S. 105*. ***HN7***[↑] Notably, in *Circuit City*, the Court held that the residual part of the exception—*i.e.*, "any other class of workers engaged in foreign or interstate commerce"—does not exclude "all employment contracts" from the FAA's reach but instead exempts "only contracts of **[*15]** employment of transportation workers."[1] *532 U.S. at 114-19* (quoting *9 U.S.C. § 1*). In reaching this holding, the Court reasoned that the "wording of *§ 1* calls for the application of the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id. at 114-15* (cleaned up). The Court then stated that "[u]nder this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id. at 115*.

In its decision, the Court also elaborated on the meaning of the language "engaged in foreign or interstate commerce" contained in the residual clause. *Id.* The Court stated that "even if the term 'engaged in commerce' stood alone in *§ 1*, we would not construe the provision to exclude all contracts of employment from the FAA." *Id.* The Court explained that the specific modifier Congress uses to the word "commerce" in a particular statute is relevant to the statute's **[*16]** scope. *Id.* ***HN9***[↑] Specifically, while the phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full," the specific phrase "engaged in commerce" is "understood to have a more limited reach." *Id.* (quoting *Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)*.

Within the last year, both the Supreme Court and the Second Circuit have decided cases raising the issue of what exactly it means to be a "transportation worker" engaged in interstate commerce under *Circuit City*. *See Saxon, 142 S. Ct. 1783*; *Bissonnette, 49 F.4th 655*. In *Saxon*, the Supreme Court held that an airline ramp supervisor for Southwest Airlines whose "work frequently require[d] her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country" fell within the *Section 1* exemption. *Saxon, 142 S. Ct. at 1787*. ***HN10***[↑] First, the Court held that "class of workers" within *Section 1* is defined based on what a person does at a specific company, not what the company does generally. *Id. at 1788*. Thus, the fact that a person works for a company that is generally engaged in interstate commerce does not by that fact alone make that person a

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[1] Plaintiff appears to argue that *Circuit City* was wrongly decided, and the Supreme Court improperly restricted the residual clause of Section 1 in *Circuit City.* Dkt. No. 44 at 13-14. ***HN8***[↑] This Court, however, is bound by the decisions of the Supreme Court. *See Hoeffner v. D'Amato, 2022 U.S. Dist. LEXIS 98903, 2022 WL 1912942, at *9 (E.D.N.Y. June 2, 2022)*.

transportation worker under Section 1 of the FAA. Second, the Court stated that, based on the text of the statute, "any class of workers directly involved in transporting goods across state or international **[*17]** borders falls within § 1's exemption," and cargo "loaders exhibit this central feature of a transportation worker." Id. at 1789. In particular, the Supreme Court reasoned:

> [O]ne who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (*e.g.*, transportation) of that cargo. There could be no doubt that interstate transportation is still in progress, and that a worker is engaged in that transportation, when she is doing the work of unloading or loading cargo from a vehicle carrying goods in interstate transit.

Id. at 1790 (cleaned up). The Court, however, stated in a footnote that it was not addressing whether a "class of workers [who] carries out duties further removed from the channels of interstate commerce or the actual crossing of borders," such as "last leg delivery drivers" or "food delivery drivers," fell within Section 1's ambit. Id. at 1789 n.2 (internal quotation marks and citations omitted).

Following *Saxon*, the Second Circuit issued a revised opinion in Bissonnette, a case which raised the issue of whether truck drivers who delivered baked goods to stores and restaurants on behalf of a bakery were transportation workers under Section 1 of the FAA. 49 F.4th 655. The Second Circuit held that they were not, noting that the term **[*18]** "transportation worker" in the FAA was defined "by affinity" and that the two examples that the FAA gave— *i.e.*, "seamen" and "railroad employees"—are "telling because they locate the 'transportation worker' in the context of a transportation industry." Id. at 660. Thus, the court concluded that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement" and "[b]ecause the plaintiffs do not work in the transportation industry, they are not excluded from the FAA." Id. at 661-62.

HN11[⬆] The decisions addressing the Section 1 exemption also make clear that when applying Section 1, courts should look not to the individual conduct or experience of the plaintiff, "but whether *the class of workers to which the complaining worker belonged* engaged in interstate commerce." Capriole, 7 F.4th at 861 (quoting Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 800 (7th Cir. 2020) (Barrett, J.)); Davarci v. Uber Techs., Inc., 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 (S.D.N.Y. Aug. 20, 2021) ("[T]he Court focuses its analysis on the overall class of workers to which Plaintiffs belong, *i.e.*, Uber drivers nationwide."); Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020) ("The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class."). **[*19]** Accordingly, a person may occasionally provide transportation services in interstate commerce but not be part of *a class of transportation workers* engaged in foreign or interstate commerce. *See* Bissonnette, 49 F.4th 655.

DISCUSSION

The fundamental question at issue is whether Plaintiff belongs to a "class of workers engaged in foreign or interstate commerce," such that he is exempt from the FAA pursuant to Section 1. 9 U.S.C. § 1. The parties do not dispute that Uber drivers are transportation workers for purposes of Section 1 of the FAA. Instead, they largely dispute whether Uber drivers are transportation workers "engaged in foreign or interstate commerce" based on the facts that they conduct some interstate trips and drive people to and from airports, train stations, and other primarily interstate modes of travel. 9 U.S.C. § 1. The issue is consequential. Plaintiff's claims raise a question of substantial public importance. There is a public good in the question of the legality and discriminatory impact of Uber's background check policies being aired publicly and resolved by an official who enjoys judicial independence. **HN12**[⬆] At the same time, there is a public interest in the enforcement of agreements voluntarily reached between two parties, even when that agreement **[*20]** will result in one or the other party being denied a federal court forum with respect to a dispute that arises between them.

There is no Supreme Court or Second Circuit opinion directly on point.[2] Several other Circuit Courts and courts in this District, however, have addressed this issue or a substantially similar one and have come out on both sides. For example, both the First and Ninth Circuits have held that Lyft and "Uber drivers, as a nationwide 'class of workers,' are not 'engaged in foreign or interstate commerce' and are therefore not exempt from arbitration under the FAA." *Capriole, 7 F.4th at 863* (quoting *9 U.S.C. § 1*); *see Cunningham v. Lyft, Inc., 17 F.4th 244, 253 (1st Cir. 2021)*. On the other hand, the Seventh Circuit has held that truck drivers who occasionally transport loads interstate are interstate transportation workers within *Section 1 of the FAA*. *See Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012)*; *see also Islam v. Lyft, Inc., 524 F. Supp. 3d 338, 342 (S.D.N.Y. 2021)* (finding Lyft drivers exempt under *Section 1 of the FAA*). ***HN13***[↑] But, while courts are split on this issue, the majority of courts hold that Uber or Lyft drivers[3] are not exempt from the FAA's coverage under *Section 1*. *See, e.g.*, *Capriole, 7 F.4th at 861* ("[W]e join the growing majority of courts holding that Uber drivers as a class of workers do not fall within the 'interstate commerce' exemption from the FAA."); *Osvatics, 535 F. Supp. 3d at 12* ("A majority of courts faced with this question have concluded **[*21]** that rideshare drivers do not fall within the *section 1* residual clause.") (collecting cases); *Golightly v. Uber Techs., Inc., 2021 U.S. Dist. LEXIS 151100, 2021 WL 3539146, at *3 (S.D.N.Y. Aug. 11, 2021)* (collecting cases).

Although this is a close case, the Court ultimately agrees with the majority of courts and concludes, based on the evidence in front of it, that Uber drivers are not a "class of workers engaged in foreign or interstate commerce" within *Section 1 of the FAA*. *9 U.S.C. § 1*. Thus, Plaintiff's claims are not exempt from the FAA pursuant to the residual clause and Uber's motion to compel individual arbitration is granted.[4]

I. Motion to Compel

HN14[↑] In determining whether *Section 1* applies, courts generally start by determining the scope of the relevant "class of workers" to which the plaintiff belongs. *See Capriole, 7 F.4th at 862*; *Davarci, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *8*. Plaintiff here is an Uber driver in New York City and brings his claims on behalf of certain Uber drivers in New York City. Dkt. No. 1 ¶ 82. However, despite the class definition in the complaint, Uber argues that the inquiry for purposes of Section 1's application is whether Plaintiff was "part of a class of workers who, *at a nationwide level*, engage in interstate commerce as a central part of their job description." Dkt. No. 43 at 2 (emphasis added). Plaintiff does not appear **[*22]** to disagree; despite noting that "[c]ourts are split on the proper geographic scope of the class of workers for purposes of the *Section 1* exemption," Plaintiff primarily focuses on "nationwide data" in its opposition brief. *See* Dkt. No. 44 at 17 n.45.

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[2] A case presently before the Second Circuit raises this issue and is scheduled for argument on February 6, 2023. *Aleksanian v. Uber Technologies Inc.*, 22-98 (2d Cir.).

[3] For purposes of this motion, neither side argues that there is a material difference between a Lyft driver and an Uber driver.

[4] Because the Court concludes that Uber drivers are not transportation workers engaged in interstate commerce under *Section 1*, the Court does not address Uber's argument that Plaintiff may not rely on the exclusionary clause in *Section 1 of the FAA* because the 2020 PAA is not a "contract of employment," but instead a licensing agreement. Dkt. No. 22-1 at 16. The Court, however, is skeptical of this argument as the Supreme Court has defined the term "contracts of employment" broadly. *See* ***New Prime Inc., 139 S. Ct. at 541*** ("Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*." (quoting *9 U.S.C. § 1*)). Moreover, Uber fails to identify any court that has agreed with this argument.

The Court previously rejected Uber's argument that the *Section 1* exemption does not apply because Plaintiff transports people, not goods, in its August 11, 2021 Opinion and Order. Dkt. No. 30 at 3 ("The *Section 1* exemption is not limited to classes of workers who transport goods in interstate commerce, but also extends to the transportation of passengers as well as physical goods." (cleaned up)).

HN15[] Courts are largely in agreement that the proper geographic scope of the class of workers for purposes of Section 1 is nationwide.[5] *See* Capriole, 7 F.4th at 862 ("[A]ll courts addressing this question, even those that have ultimately concluded that Uber drivers do fall within the interstate commerce exemption, have rejected attempts to cabin their analyses to a specific geographic area."); Davarci, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *8; Osvatics, 535 F. Supp. 3d at 15; Islam, 524 F. Supp. 3d at 350. Those courts state that this conclusion "follows from the text and structure of the section 1 exemption." Osvatics, 535 F. Supp. 3d at 15. Because the scope of the residual clause should be interpreted in connection with the company it keeps—specifically, the words "seamen" and "railroad employees," 9 U.S.C. § 1; *see* Saxon, 142 S. Ct. at 1789; Bissonnette, 49 F.4th at 660, and neither of these "class[es] of workers" are defined by any geographic scope, courts have concluded that "the most natural inference is that Congress intended those terms to encompass all seamen and railroad employees nationwide." *Id.*; *see* Davarci, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *8.

The Court pauses to note that such an absolute, unqualified rule is not free from **[*23]** question. HN16[] In the Supreme Court's decision in *Saxon* and the Second Circuit's decision in Bissonnette, the courts looked not only to the plaintiffs' job titles but also to the plaintiffs' specific job responsibilities and job descriptions in determining whether they were part of a class of workers engaged in interstate commerce under Section 1 of the FAA. Saxon, 142 S. Ct. at 1789; Bissonnette, 49 F.4th at 662. Depending on how a company doing business nationwide organizes its workforce and how and whether the nature of the work performed differs from region to region, it might be more faithful to the FAA exemption to consider the employee as a member of a more local class. HN17[] An employer should not be able to defeat the employee's right to litigate by the contrivance of grouping him with a number of other persons who bear the same job title but whose work otherwise bears no resemblance to the work the employee does.

The Court, however, need not adopt an absolute rule now to resolve this case. Uber argues and Plaintiff appears to concede that the relevant class of workers is nationwide Uber drivers for purposes of whether Section 1's residual clause applies. *See* Dkt. No. 43 at 2; Dkt. No. 44 at 17 n.45. Plaintiff does not claim that Uber's agreements with its drivers are **[*24]** anything but uniform nationwide and no party argues that the essential job responsibilities differ from one state to another. The Court therefore concludes, on the record in front of it, that the relevant "class of workers" for determining whether the Section 1 exemption applies is nationwide Uber drivers. Moreover, as discussed in more detail below, even if this Court were to find that the relevant class of workers was New York Uber drivers, Plaintiff has not presented any evidence that the nature of the job description or the nature of the work of an Uber driver nationally differs materially from that of New York State or New York City Uber drivers. Thus, the Court would still conclude that Plaintiff does not fall within Section 1's residual clause.

The next question is whether Uber drivers are engaged in interstate commerce. In support of their argument that they are, Plaintiff points to the following evidence: (i) statistical evidence that Uber drivers transport a number of passengers to transportation hubs such as airports, train stations, bus depots, and ferry terminals and earn a percentage of their fares through such trips; (ii) statistical evidence that Uber drivers sometimes transport **[*25]** passengers interstate and earn a percentage of their fares through such interstate trips; and (iii) evidence that Uber seeks individuals with interstate transportation experience for the driver role and partners with airlines, airports, and cities to facilitate the flow of interstate commerce. Dkt. No. 44 at 19.

First, the fact that Uber drivers occasionally transport passengers intrastate to interstate transportation hubs does not suffice to place them within the ambit of Section 1's residual clause. In reaching this conclusion, the Court is informed by the Supreme Court's decision in United States v. Yellow Cab Co., 332 U.S. 218, 222, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947). In that case, the Court addressed whether a cab company that transported passengers and their luggage "between railroad stations in Chicago, pursuant to [exclusive] contracts with railroads and railroad

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[5] This Court declines to address a "challenging side question that no court seems to have grappled with to date" as to whether the relevant class for purposes of considering the exemption under the FAA is Uber drivers nationwide or rideshare drivers. Osvatics, 535 F. Supp. 3d at 16 n.8. Neither of the parties argue in favor of the latter definition of the class or argue that there is a meaningful difference among rideshare companies that would impact the analysis if the Court were to adopt the latter definition of the class for purposes of the Section 1 exemption. Thus, the Court declines to resolve this issue.

terminal associations" was part of the stream of interstate commerce for purposes of the application of the Sherman Act. *Id. at 221-25*. ***HN18***[↑] After noting that the Sherman Act applied "if some appreciable part of interstate commerce" was involved, *id. at 225*, the Court held that the cab company was part of the stream of commerce for purposes of the ***antitrust law***. *Id. at 228*. Specifically, the Court noted that "[w]hen persons or goods move from a point of origin in one **[*26]** state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character." *Id. at 228-29*.

By contrast, the Court held that "when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." *Id. at 233*. The Court stated:

> Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, *at least in the absence of some special arrangement*, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many **[*27]** that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare.

Id. at 231-33 (emphasis added).

Yellow Cab forecloses Plaintiff's argument that the mere occasional picking up and dropping off passengers at transportation hubs such as airports or train stations is enough for Uber drivers to be "engaged in . . . interstate commerce." *9 U.S.C. § 1*. The fact that an Uber driver might occasionally make an intrastate trip to an interstate transportation hub *alone* is not sufficient for Uber drivers to be covered by *Section 1*'s residual clause. Uber drivers are much more like the local taxicabs in *Yellow Cab* than the cab company that had exclusive contracts with the railroads. Like the local taxi drivers in *Yellow Cab*, Uber drivers conduct an independent local service and sometimes "convey interstate train passengers between their homes and" these transportation hubs "in the normal course of their independent local service." *Id. at 231-33*. If, for purposes of train transportation, the "common understanding" **[*28]** is that the interstate trip begins once the passenger arrives at the rail station and not before (absent a special relationship between the rail station and the taxi company), the common understanding must also be that the interstate trip for plane transportation begins at the airport and not before. Passengers have numerous ways of arriving at the airport—by train, by bus, by yellow taxicab, by personal car, or by Uber. By the same token, the service the Uber driver performs is identical regardless of the passenger's ultimate destination. From her perspective, she is indifferent as to whether the passenger wants a lift to the airport, a train, a bus station, or to some purely local destination. She will perform the same service in the same way. Indeed, the driver might be entirely ignorant as to the nature of the trip until shortly before it begins. The rider contracts with the Uber driver directly and separately from the source of her interstate travel, exactly like the taxicab rider in *Yellow Cab*.

Plaintiff also has not identified any "special arrangement" between Uber and these airports, train stations, and other modes of interstate travel that would make Uber drivers more similar **[*29]** to the cab drivers in *Yellow Cab* who transported passengers and luggage between railroad stations pursuant to a contract with the railroads. Where, for example, a company is engaged in a business to "serve[] only [airport] passengers" or has an arrangement that the fares it receives will be shared with an airline or augmented by the fare that the airline is paid, it might make sense to say that the Uber driver is "engaged in interstate commerce." *See Yellow Cab Co., 332 U.S. at 231*. Where a car company and an airline have a revenue-sharing agreement, it might be said that the car company is part of the stream of interstate commerce—the trip by car and the trip by plane would not be contracted for independently and the car trip would not be "distinct and separate from the interstate journey." *Id. at 232*. There is no such evidence here. While Plaintiff claims that Uber partners with airlines, airports, and cities to facilitate the flow of interstate commerce, the only evidence Plaintiff offers in support of this claim is that Uber has partnered with "most major

U.S. airports . . . to allow the use of [the Uber] platform within airport boundaries," Dkt. No. 44 at 7 & n.11, and allows riders to preschedule a ride to the airport, **[*30]** *id.* at 7 & n.12. But, this type of evidence is wholly different from the type of special arrangement which *Yellow Cab* held may result in a cab service being part of the stream of interstate commerce. At most, it establishes that Uber has contracted for the right and ability to pick passengers up or drop them off at the airport. It does not establish that Uber drivers are engaged in interstate commerce any more than the fact that an airport may have a dedicated space for yellow cabs to pick up passengers suggests that these yellow cab drivers are engaged in interstate commerce. It also does not establish that an airline or airport has an interest in Uber's business such that the Uber ride can be considered part of a continuous whole with the airplane flight. The passenger who alights at LaGuardia, Newark, or Kennedy airports in the New York City area makes an independent decision upon arrival how to get to his or her destination. Moreover, Uber appears to allow its customers to preschedule a ride *anywhere*, not just from or to airports. This evidence thus does not establish the type of "practical, economic continuity" required to transform purely intrastate trips into trips that are **[*31]** part of the flow of interstate commerce. *Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)*; *Osvatics, 535 F. Supp. 3d at 21* ("[T]here must be an established link between such intrastate rideshare trips and the channels of commerce that are designed to facilitate passengers' interstate journeys.").

In a case such as this, in which under *Yellow Cab*, Uber drivers would not be considered to "affect[]" interstate commerce under the Sherman Act, such drivers are also not "'engaged in . . . interstate commerce' under *section 1 of the FAA*." *Cunningham, 17 F.4th at 251* (citations omitted). ***HN19***[⬆] The Sherman Act, as stated by the Court in *Yellow Cab*, "outlaws unreasonable restraints on interstate commerce, *regardless of the amount of the commerce affected*." *332 U.S. at 225* (emphasis added). *Section 1 of the FAA*, by contrast, applies only to those workers "engaged in commerce"—a term of art which does not "regulate to the outer limits of authority under the *Commerce Clause*." *Cir. City Stores, Inc., 532 U.S. at 115-16*. "Hence, conduct that does not affect interstate commerce under the Sherman Act (*e.g.*, local cab rides to the station) would seem *a fortiori* not to be conduct 'engaged in interstate commerce' under the FAA's *section 1* exception." *Cunningham, 17 F.4th at 251*.

This holding is consistent with decisions of other courts holding that last-leg Amazon delivery drivers are exempt from the FAA under *Section 1*. *See Rittmann v. Amazon.com, Inc., 971 F.3d 904, 908 (9th Cir. 2020)*; *Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020)*. Those cases focus on the fact that an essential aspect of Amazon's business model is delivering goods worldwide **[*32]** and interstate and Amazon specifically contracts with its last-leg delivery drivers to carry out an essential chain in that foreign or interstate delivery. Thus, "AmFlex drivers' transportation of goods wholly within a state are still a part of a continuous interstate transportation, and those drivers are engaged in interstate commerce for *§ 1*'s purposes." *Rittmann, 971 F.3d at 916*. In this case, Plaintiff identifies no such contractual relationship between Uber and an interstate transportation service provider—*e.g.*, an airline, railroad, or seaport—and thus the same reasoning does not apply.

The Supreme Court's decision in *Saxon* is also not to the contrary. In that case, the plaintiff worked for Southwest Airlines and the Court stated that "one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (*e.g.*, transportation) of that cargo" and "there could be no doubt that interstate transportation is still in progress, and that a worker is engaged in that transportation." *Saxon, 142 S. Ct. at 1790*. Thus, the *Saxon* plaintiff was like the cab drivers with special contractual relationships with the railroads in *Yellow Cab*. The Supreme Court specifically declined to address whether classes of workers—such **[*33]** as last-leg delivery drivers and food delivery drivers—who carry out "duties further removed from the channels of interstate commerce or the actual crossing of borders" would fall within the residual clause of *Section 1*. *Id. at 1789 n.2*.

Plaintiff further argues that the fact that Uber drivers sometimes make interstate trips qualifies them as being engaged in interstate commerce. The statistical evidence indicates that approximately 2-3% of Uber trips in the United States are interstate and Uber drivers nationally derive anywhere from around 4-11% of their revenue from interstate trips. Dkt. No. 45-1 at 23-31. *Yellow Cab* does not directly address this issue since the local taxicab drivers in that case did not claim to cross state lines. *332 U.S. at 230-31*.

The Court concludes that the evidence of interstate trips is insufficient to qualify Uber drivers as being engaged in interstate commerce. ***HN20***[⬆] As noted, when determining the scope of the *Section 1* residual clause, courts must

apply the maxim of *ejusdem generis. See* Cir. City Stores, Inc., 532 U.S. at 114-15; Bissonnette, 49 F.4th at 660 (applying maximum to hold that transportation workers must work in the "transportation industry"). Under this rule, the phrase any "other class of workers engaged . . . interstate commerce" must embrace "objects similar in **[*34]** nature to" the words "seamen" and "railroad employees." 9 U.S.C. § 1; *see, e.g.*, Cir. City Stores, Inc., 532 U.S. at 114-15; Bissonnette, 49 F.4th at 660. "Thus, to fall within the scope of the residual clause, the class of workers must 'perform[ ] work analogous to that of seamen and railroad employees.'" Osvatics, 535 F. Supp. 3d at 17 (quoting Wallace, 970 F.3d at 802). The Supreme Court has also stated, in a related context, that "interstate commerce" is an "intensely practical concept drawn from the normal and accepted course of business" and, in determining what falls under it, "common understanding" of certain activities is relevant. Yellow Cab Co., 332 U.S. at 231-32.

In common parlance, "seamen" and "railroad employees" are the types of workers for which "the interstate movement of goods and passengers over long distances and across national or state lines is" considered "an indelible and 'central part of the job description.'" Capriole, 7 F.4th at 865 (quoting Wallace, 970 F.3d at 803); *see* Cunningham, 17 F.4th at 253 ("In section 1, those enumerated objects are 'seamen' and 'railroad employees,' two classes of transportation workers primarily devoted to the movement of goods and people beyond state boundaries."); Osvatics, 535 F. Supp. 3d at 17 (noting that seamen and railroad employees' occupations "are centered on the transport of goods [or persons] in interstate or foreign commerce"). While there are certainly some seamen and railroad workers who transport **[*35]** goods or people solely intrastate, trains and boats are characterized by the fact that they carry people long distances, including between states and countries. In fact, at the time that the FAA was enacted in 1925, trains and boats were presumably two of the chief methods of traveling in interstate and foreign commerce.

Interstate travel, however, is not a central or indelible feature of Uber drivers' jobs, unlike that of seamen and railroad employees. Although it is undoubtedly true that Uber drivers occasionally transport people across state lines, the evidence in the record supports that such trips are not a central or inherent part of their job. The vast majority of Uber trips are local and the average Uber trip is very short. Nationally, only approximately 2% of Uber rides are interstate, Dkt. No. 45-1 at 23-25, and only about 5% of gross fares for Uber drivers are derived from instate travel, Dkt. No. 45-1 at 31. Between January 1, 2018 and December 31, 2020, the average Uber trip covered a distance of 6.3 miles and took 15.6 minutes to complete. Dkt. No. 22-4 ¶ 4. Similarly, Plaintiff's average trip was approximately six miles and approximately nineteen minutes long. *Id.* ¶ 5. **[*36]** It appears to be an accident of geography—*i.e.*, the proximity of a certain city to the border of another state—that some Uber trips cross state lines rather than of deliberate plan or job description. *See* Capriole, 7 F.4th at 864 **HN21**[↑] ("Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers." (citation omitted)).

While even a small number of interstate trips may be sufficient to satisfy Section 1's residual clause in the presence of evidence that these trips are an expected and required part of the job, there is no such evidence here. Plaintiff presents no evidence that interstate travel is a part of an Uber driver's job description or that Uber drivers view interstate trips as much more than "another local fare"—albeit with a potentially higher gross pay by virtue either of the distance traveled or a toll that might be reimbursed. There is no evidence that Uber requires its drivers to accept interstate trips as a condition of being able to accept rides through the Uber application. As the evidence shows, Uber's advertisement and marketing materials do not address interstate trips, Dkt. No. 45-1 at 12, nor is there any evidence that **[*37]** Uber attempts to hold itself out as a method of getting from state-to-state. Uber also does not maintain any guidelines, policies, or practices applicable to drivers that concern interstate trips. *Id.* at 14. In fact, interstate trips, if anything, appear to be discouraged as riders, for example, who take trips between New York City and New Jersey incur a surcharge. Dkt. No. 43 at 7-8; Dkt. No. 43-1. The "common understanding" of the job of an Uber driver also does not support that they are engaged in interstate travel in the same way as a railroad employee or a seaman. Yellow Cab Co., 332 U.S. at 231-32. One is much more likely to think of Uber as a substitute for a local cab service than as a substitute for a bus, train, or airplane—key forms of interstate travel.

The evidence in this record that Uber drivers occasionally cross state lines alone cannot make an Uber driver—who primarily engages in short, local travel—similar in kind to a train worker or a seaman. Indeed, if the question of

whether a class of employees were engaged in interstate commerce turned solely on the number of trips that crossed state lines, the determination of whether the Section 1 residual clause applied and thus whether a particular claim could be **[*38]** litigated or would be subject to arbitration could fluctuate from year to year. In some years (for example, when ridership and interstate travel was reduced due to a recession or a national health crisis), there might be few such trips. In other years (say, during a booming economy or an airline-pilot strike), the number of trips might dramatically increase. The question of whether the employee was engaged in interstate commerce and whether the dispute was subject to arbitration might turn on the time frame over which the data is analyzed. Neither the employee nor the employer could know for sure in advance of the issue being litigated, let alone at the time of contracting, the forum in which disputes between the two would be resolved. Such a result would "undermine[] the certainty and predictability which arbitration agreements are meant to foster." Menorah Ins. Co. v. INX Reinsurance Corp., 72 F.3d 218, 223 (1st Cir. 1995); *see* Osvatics, 535 F. Supp. 3d at 16; *see also* Conopco, Inc. v. Pars Ice Cream Co., 2013 U.S. Dist. LEXIS 146234, 2013 WL 5549614, at *4 (S.D.N.Y. Sept. 26, 2013) **HN22**[] ("Forum selection clauses, after all, 'are enforced because they provide certainty and predictability in the resolution of disputes.'" (citation omitted)).

In addition, although Plaintiff claims that the "Uber 'job description' for the driver role confirms that experience in interstate transport is a key qualification **[*39]** for the position," the underlying evidence does not support the claim. Dkt. No. 44 at 7. The job description that Plaintiff identifies states the following:

> If you have previous employment experience in transportation (such as a delivery driver, driver, professional driver, driving job, truck driver, heavy and tractor-trailer driver, cdl truck driver, class a or class b driver, local truck driver, company truck driver, taxi driver, taxi chauffeur, cab driver, cab chauffeur, taxi cab driver, transit bus driver, bus driver, coach bus driver, bus operator, shuttle driver, bus chauffeur) you might also consider driving with Uber and earn extra money.

Dkt. No. 45-2. This job description does not include the word "interstate" or any similar phrase. Nor does the job criteria list any jobs that are inherently interstate—even the job of truck driver or heavy and tractor-trailer driver may be purely intrastate. Rather, the key qualification is that that the prospective Uber driver must have experience in "transportation," driving a vehicle for pay, not "experience in interstate transport." Dkt. No. 44 at 7.

The Court thus concludes that the evidence does not show that Uber drivers are "engaged **[*40]** in foreign or interstate commerce" and Plaintiff's claims are therefore not exempt from arbitration under the FAA. 9 U.S.C. § 1. This Court is informed in its conclusion that interstate travel must be central to the transportation worker's job to fall under Section 1 by the Supreme Court's decision in *Yellow Cab*. **HN23**[] As is evident from *Yellow Cab*, the relevant criteria for determining whether a transportation worker operates in interstate commerce is not what underlying activity she performs (in that case, both cab drivers transported passengers to and from railroad stations), nor is it how often she performs such an activity. In fact, the Supreme Court did not even inquire in *Yellow Cab* how often the local taxicab drivers took passengers to and from the railroad stations. Instead, *Yellow Cab* specifies that the key inquiry is whether interstate activity is other than a merely "casual and incidental" part of the employee's job responsibilities. 332 U.S. at 231-32. Here, Plaintiff has presented no evidence that interstate activity is anything other than a casual and incidental feature of the otherwise largely local services that he provides.

While the Court's holding in this case is in line with the majority of courts to address **[*41]** this issue, the Court recognizes that its opinion is in tension with the Seventh Circuit's holding in Int'l Bhd. Of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 955 (7th Cir. 2012). In *Kienstra Precast*, the Seventh Circuit held that Section 1 applied to a trucking company that only made a small number of interstate deliveries, concluding that "there is no basis in the text of § 1 for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely" and "both sorts of worker are 'engaged in foreign or interstate commerce.'" 702 F.3d at 958 (citation omitted). Kienstra Precast is, in part, distinguishable as it did not involve a rideshare company and because the Seventh Circuit was addressing the applicability of Section 1 to a trucking company—arguably a business that is more often associated with interstate than intrastate commerce. To the extent it is not so distinguishable, the Seventh Circuit's reasoning appears to be contrary to the Supreme Court's guidance in *Circuit City* that the residual clause calls for application of the "maxim *ejusdem generis*, under which the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should be controlled and defined by reference to those terms." 532 U.S. at 106.

The Court's **[*42]** decision is also in tension with the holdings of other courts in this District, which held that rideshare drivers are exempt from the FAA under the residual clause in Section 1. *See, e.g.*, Islam, 524 F. Supp. 3d at 356; Haider, 2021 U.S. Dist . LEXIS 62690, 2021 WL 1226442, at *5. However, those opinions involve Lyft and the factual records in those cases were more extensive than and different from the factual record that Plaintiff has offered in this case. *See, e.g.*, Islam, 524 F. Supp. 3d at 356; Haider, 2021 U.S. Dist . LEXIS 62690, 2021 WL 1226442, at *5. For example, in *Haider*, the evidence showed that "Lyft's corporate disclosures reflect marketing partnerships with airlines and hotels," Lyft "offers riders priority pick-ups at airports with a paid subscription, and Lyft has '"worked to integrate its transportation services' with at least one air carrier." 2021 U.S. Dist . LEXIS 62690, 2021 WL 1226442, at *4 (citation omitted). Similarly, in *Haider*, there was evidence that "Lyft has 'worked to integrate its transportation services with Delta Airlines,' allowing passengers to book Lyft rides through the Delta app and to pay for the rides using Delta SkyMiles." 524 F. Supp. 3d at 348. In the case at hand, Plaintiff has offered no such evidence of any special commercial arrangement between Uber and any airline or hotel.

The Court thus concludes that Plaintiff's claims are subject to the FAA and the Court grants Uber's request to compel **[*43]** individual arbitration of Plaintiff's claims.

II. Staying Plaintiff's Claims

Uber asks this Court to dismiss Plaintiff's claims upon compelling individual arbitration. Dkt. No. 22 at 1. Plaintiff does not address this request in their opposition to Uber's motion to compel.

In *Katz v. Cellco Partnership*, the Second Circuit addressed when a stay versus dismissal of an action is warranted after a district court compels arbitration pursuant to a binding arbitration agreement between the parties. 794 F.3d 341 (2d Cir. 2015). In that case, the district court, after compelling arbitration of all claims, "dismissed—rather than stayed—the action, but recognized that whether district courts have such dismissal discretion remains an open question in this Circuit." Id. at 344. The Second Circuit vacated the dismissal and remanded with instructions for the district court to stay the action, id. at 343, and held that it would "join those Circuits that consider a stay of proceedings necessary after all claims have been referred to arbitration and a stay requested," id. at 345. The Second Circuit noted that such a result was required by the "FAA's text, structure, and underlying policy command"; the FAA provides that a court "*shall* on application of one of **[*44]** the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." Id. at 345 (quoting 9 U.S.C. § 3 (emphasis added)). The Second Circuit further reasoned that "[a] stay enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award." Id. at 345. The Second Circuit also stated that "the FAA explicitly denies the right to an immediate appeal from an interlocutory order that compels arbitration or stays proceedings." Id. at 346. The court noted: "The dismissal of an arbitrable matter that properly should have been stayed effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order" and thus would "[afford] judges such discretion . . . to confer appellate rights expressly proscribed by Congress." *Id.*

More recently, the Second Circuit in Bissonnette affirmed the district court's order compelling arbitration and dismissing the case. 49 F.4th at 663. Judge Jacobs, who wrote the opinion in Bissonnette, filed a separate concurrence to discuss a district court's decision to dismiss or stay a case after claims are compelled to arbitration. **[*45]** *See* id. at 663 (Jacobs, J., concurring). Judge Jacobs wrote that while *Katz* held that a stay was mandatory where a stay was requested by one of the parties, "*Katz* can be read to mean that, when no stay is requested," as was the case in Bissonnette, "the district court retains discretion to stay the case or dismiss it." Id. at 664. Judge Jacobs then, however, stated that such a reading was not consistent with the FAA, which "requires a court that enforces" an arbitration clause to "stay proceedings in the interim." Id. at 664-65. In support of this position, he noted that while the FAA states that a court "shall on application of one of the parties stay the trial of the action," "[r]ead naturally and in context, the referenced 'application of one of the parties' is the application to enforce the arbitration clause," not a separate request for a stay. Id. at 665 (quoting 9 U.S.C. § 3). He also noted that such an approach is "consistent with the FAA's pro-arbitration posture" and with the "FAA provision governing appeals." *Id.* **HN24**[↑] If dismissal is entered, a party has a right to immediate appeal of an order compelling

arbitration, which would impede the expeditious resolution of the arbitral proceeding. *Id. at 666*. He thus stated that "[i]n short, the stay of a suit **[*46]** pending arbitration is (in my view) arguably compelled and certainly prudent." *Id. at 667*.

In the present case, neither party has requested a stay and so *Katz* does not squarely address the issue. Nonetheless, the Court exercises its discretion to stay the current proceedings. *See Zambrano v. Strategic Delivery Sols., LLC, 2016 U.S. Dist. LEXIS 130533, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016)* ("[B]ecause Defendants seek dismissal rather than a stay, this Court has discretion whether to stay or dismiss Plaintiffs' action under the FAA." (citation omitted)). ***HN25***[] This approach is consistent with Congress's intent to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible" as well as comports with the FAA's statutory scheme. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)*. The opportunity for a final answer as to whether claims of Uber drivers fall within the residual clause will not be frustrated by a stay in this case. As noted, *supra* p. 14 n.2, the issue is currently before the Second Circuit. "A stay would also allow the Court, at a later stage, to address any claim by Plaintiff[] that [he was] not able to vindicate all [his] statutory rights due to costs or fees imposed on [him] in arbitration." *Zambrano, 2016 U.S. Dist. LEXIS 130533, 2016 WL 5339552, at *10*. The Court thus stays the action pending arbitration. *See China Media Express Holdings, Inc. by Barth v. Nexus Exec. Risks, Ltd., 182 F. Supp. 3d 42, 53 (S.D.N.Y. 2016)* (granting stay even though it was not requested **[*47]** by either party); *Merrick v. UnitedHealth Grp. Inc., 127 F. Supp. 3d 138, 154 (S.D.N.Y. 2015)* (staying case even though there was no request for a stay after finding that the Circuit's logic in *Katz* "applies with equal force to the present situation").

CONCLUSION

The motion to compel individual arbitration is GRANTED and the claims brought by Plaintiff against Uber are STAYED pending arbitration.[6]

SO ORDERED.

Dated: December 21, 2022

New York, New York

/s/ Lewis J. Liman

LEWIS J. LIMAN

United States District Judge

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[6] Because the Court finds that Plaintiff must arbitrate his dispute under the FAA, the Court does not address Defendant's alternate argument that he is compelled to arbitrate his claims under New York law. Dkt. No. 43 at 9.

Barboza v. Mercedes-Benz USA, LLC

United States District Court for the Eastern District of California

December 27, 2022, Decided; December 28, 2022, Filed

CASE NO. 1:22-CV-0845 AWI CDB

Reporter
2022 U.S. Dist. LEXIS 232366 *; 2022 WL 17978408

CRYSTAL M. BARBOZA, Plaintiff v. MERCEDES-BENZ USA, LLC, MERCEDES-BENZ OF BAKERSFIELD, and DOES 1-10 inclusive, Defendants

Subsequent History: Dismissed by, in part, Dismissed by, in part, Without prejudice *Barboza v. Mercedes-Benz USA, LLC, 2023 U.S. Dist. LEXIS 73161 (E.D. Cal., Apr. 26, 2023)*

Core Terms

allegations, warranty, cause of action, express warranty, fraudulent, manufacturer, notice, unfair, implied warranty, leave to amend, repair, prong, written warranty, breached, fails, no allegation, consumers, argues, representations, obligations, conclusory, replace, refund, cure, conclusory allegation, breach of warranty, motion to dismiss, motor vehicle

Counsel: **[*1]** For Crystal M Barboza, Plaintiff: Michael James Avila, Neal F. Morrow, III, LEAD ATTORNEYS, MFS Legal, Inc., Long Beach, CA.

For Mercedes-Benz USA LLC, a Delaware limited liability company, Defendant: Mehgan Anne Gallagher, LEAD ATTORNEY, PRO HAC VICE, Theta Law Firm, LLP, Theta Law Firm, LLP, Lawndale, CA; Soheyl Tahsildoost, Theta Law Firm, LLP, Lawndale, CA.

Judges: Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

ORDER ON DEFENDANT'S MOTION TO DISMISS

(Doc. No. 7)

This case arises out of the sale of an allegedly defective Mercedes-Benz automobile. Plaintiff Crystal M. Barboza brings claims under the *California Song-Beverley Act (Cal. Civ. Code § 1790 et seq.)*, the *California Commercial Code, the California Unfair Competition Law ("UCL") (Cal. Business & Professions Code § 17200 et seq.)*, and the federal *Magnuson-Moss Warranty Act ("MMWA") (15 U.S.C. § 2301 et seq.)*. Defendant Mercedes-Benz USA, LLC ("MBU") removed this case from the Kern County Superior Court on the basis of federal question jurisdiction through the MMWA claim. Currently before the Court is MBU's *Rule 12(b)(6)* motion to dismiss and/or *Rule 12(f)* motion to strike. For the reasons that follow, MBU's motion to dismiss will be granted, and the entire Complaint will be dismissed with leave to amend.

RULE 12(b)(6) FRAMEWORK

Under *Federal Rule of Civil Procedure 12(b)(6)*, a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A dismissal under *Rule 12(b)(6)* may be based on the lack **[*2]** of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. See *Yoshikawa v. Seguirant, 41 F.4th 1109, 1114 (9th Cir. 2022)*. In reviewing a complaint under *Rule 12(b)(6)*, all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Benavidez v. County of San Diego, 993 F.3d 1134, 1144 (9th Cir. 2021)*. However, complaints that offer no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Benavidez, 993 F.3d at 1145*. The Court is "not required to accept as true allegations that contradict exhibits attached to the Complaint or matters properly subject to judicial notice, or allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Seven Arts Filmed Entm't, Ltd. v. Content Media Corp. PLC, 733 F.3d 1251, 1254 (9th Cir. 2013)*. To avoid a *Rule 12(b)(6)* dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal, 556 U.S. at 678*; *Mollett, 795 F.3d at 1065*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*; *Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013)*. Plaintiffs cannot "rely on anticipated discovery to satisfy *Rules 8* and *12(b)(6)*; rather, pleadings must assert well-pleaded factual allegations to advance to discovery." *Whitaker v. Tesla Motors, Inc., 985 F.3d 1173, 1177 (9th Cir. 2021)*. **[*3]** If a motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made . . . ." *Ebner v. Fresh, Inc., 838 F.3d 958, 962 (9th Cir. 2016)*. However, leave to amend need not be granted if amendment would be futile or the plaintiff has failed to cure deficiencies despite repeated opportunities. *Garmon v. County of L.A., 828 F.3d 837, 842 (9th Cir. 2016)*.

FACTUAL BACKGROUND

From the Complaint, on August 21, 2021, Barboza purchased a Mercedes Benz CLA 250 with a VIN ending in 464 ("the Vehicle"). Defendants provided a written warranty that the Vehicle would be free from defects of material and workmanship and that they would remedy any defects through an authorized repair center. Further, the Vehicle is subject to the implied warranty of merchantability. However, the vehicle had defects, malfunctions, and non-conformities. The Vehicle did not comply with written or implied warranties, and Defendants failed to remedy the defects, properly repair the Vehicle, replace the Vehicle, or refund the purchase price to Barboza. As a result, Barboza was harmed. The Complaint alleges that the Vehicle was a 2021 Mercedes Benz automobile. However, the sales contract, which is an exhibit to Defendants' notice of removal, indicates that the Vehicle had over **[*4]** 13,000 miles, was used, and was a 2020 model year. See Doc. No. 1-2.[1]

DEFENDANT'S MOTION

Defendant's Argument

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[1] Th Ninth Circuit has noted that a court may take judicial notice of its own records. *United States v. Author Servs., 804 F.2d 1520, 1523 (9th Cir. 1986)*. However, other courts have found that they may consider filings in their own docket of this case without the necessity of taking judicial notice. *Jones v. County of San Bernardino, 2022 U.S. Dist. LEXIS 141961, *6 (C.D. Cal. May 12, 2022)*; *Harris v. County of Sacramento, 2018 U.S. Dist. LEXIS 133935, *7 n.3 (E.D. Cal. Aug. 7, 2018)*. Through both branches of authority, the Court will consider the Vehicle's sales contract.

MBU argues that the first two causes of action (Song-Beverly Act claims) against it fail. Express warranty liability under Song-Beverly requires that a new vehicle be at issue, but the Vehicle sold to Barboza was a used car. Further, while Song-Beverly does provide for implied warranties regarding used goods, such warranties are against the distributors and retailers, not manufacturers like MBU.

MBU argues that the third cause of action (Commercial Code express warranty) fails because such a claim required Barboza to provide notice of a breach of warranty. However, the Complaint does not allege that Barboza gave any notice after discovering any breaches of warranty. Additionally, no plausible breach of express warranty is alleged because the Complaint does not allege any facts necessary to describe or support this claim.

MBU argues that the fourth cause of action (MMWA) fails for similar reasons. There are no factual allegations that describe the warranty at issue or how the warranty was breached. Further, because the substantive scope of the MMWA relies on state law warranties, **[*5]** the failure of Barboza to allege any valid state law warranty claims necessarily means that the MMWA claim must also fail.

MBU argues that the fifth cause of action fails to plead a plausible UCL claim under any of the three independent UCL prongs. First, the Complaint does not contain sufficient factual allegations to meet the heightened pleading standard for fraudulent or unfair conduct; instead, the Complaint makes conclusory allegations. Second, because no other claims are plausibly pled, the Complaint fails to allege unlawful conduct. Third, with respect to unfair conduct, there are no allegations that explain how any harm caused by unfair conduct outweighs any benefit the conduct may have. Finally, because Barboza has adequate remedies at law for her harm, she cannot pursue equitable remedies, including injunctive relief, through the UCL.

MBU argues that these shortcomings cannot be cured through amendment. Therefore, these claims should be dismissed without leave to amend.

Plaintiff's Opposition

Barboza filed no opposition or response to MBU's motion.

Discussion

1. First & Second Causes of Action - Song Beverly Act

The Song-Beverly Act, which is popularly known as California's automobile **[*6]** lemon law, is a strongly pro-consumer law aimed at protecting consumers. See *Murillo v. Fleetwood Enterps., Inc., 17 Cal. 4th 985, 990, 73 Cal. Rptr. 2d 682, 953 P.2d 858 (1998)*; *Duff v. Jaguar Land Rover N. Am., LLC, 74 Cal.App.5th 491, 500, 289 Cal. Rptr. 3d 533 (2022)*. The Song-Beverly Act regulates warranty terms and imposes service and repair obligations on those who issue warranties. See *Rodriguez v. FCA US, LLC, 77 Cal.App.5th 209, 217, 292 Cal. Rptr. 3d 382 (2022)*[2]; see also *Joyce v. Ford Motor Co., 198 Cal.App.4th 1478, 1486, 131 Cal. Rptr. 3d 548 (2011)*.

a. Express Warranty & "Refund and Replace"

Barboza seeks relief under the "refund and replace" provisions of the *Song-Beverly Act (Cal. Civ. Code § 1793.2(d)(2)*) which requires manufacturers to refund or replace a "new motor vehicle" if the vehicle cannot be repaired so as to conform with an express warranty. See *Cal. Civ. Code § 1793.2(d)(2)*. "New motor vehicle" is a

[2] The California Supreme Court has granted review in *Rodriguez*, but has ordered that *Rodriguez* may be cited as persuasive authority. See Rodriguez v. FCA US, LLC, 295 Cal. Rptr. 3d 351, 512 P.3d 654 (2022).

defined term under the Song-Beverly Act that includes an "other motor vehicle sold with a manufacturer's new car warranty." See *Cal. Civ. Code § 1793.22(e)(2)*. Recently, a California court of appeal examined the statutory history and framework of the "refund and replace" provisions and the definition of "new motor vehicle" in particular. See *Rodriguez, 77 Cal.App.5th at 219-225*. *Rodriguez* concluded that the phrase "other motor vehicle sold with a manufacturer's new car warranty" refers to "cars sold with a full warranty, not to previously sold cars accompanied by some balance [left on] the original warranty." *Id. at 225*. A number of district courts have examined *Rodriguez* as persuasive authority and adopted its reasoning. E.g. *Edwards v. Mercedes-Benz USA, LLC, 2022 U.S. Dist. LEXIS 182894, *5-*7 (C.D. Cal. Oct. 5, 2022)*; *Pineda v. Nissan N. Am., Inc., 2022 U.S. Dist. LEXIS 135400, *8-*9 (C.D. Cal. July 25, 2022)*; *Fish v. Tesla, Inc., 2022 U.S. Dist. LEXIS 87065, *31-*32 (C.D. Cal. May 12, 2022)*. **[*7]** After review, the Court agrees with these cases and the reasoning of *Rodriguez*.

Here, although the Complaint alleges that Barboza bought a 2021 Mercedes-Benz in August 2021, i.e. a new car, that is contrary to the purchase agreement (which, again, is attached to the notice of removal) and the express and repeated representations of MBU that the Vehicle is used. In the absence of an opposition, the Court will credit the representations of MBU and the purchase agreement and view the Vehicle for purposes of this motion as a used vehicle. Under *Rodriguez*, unless the Vehicle was sold to Barboza with a new express warranty, or the original warranty was expressly extended to the Vehicle, the express warranty that accompanied the Vehicle during its first sale does not apply to Barboza. See *Rodriguez, 77 Cal.App.5th at 225*. The Complaint alleges that an express written warranty exists, but it does not identify the terms of any express warranty, specifically describe the Vehicle's malfunctions/explain how the Vehicle failed to conform to a particular term of the express warranty, or explain how Defendants breached the express warranty. That is, there is simply an allegation that a vague written warranty exists and was somehow **[*8]** breached. These conclusory allegations do not sufficiently indicate that the "refund or replace" provisions apply to Barboza or plausibly allege a breach of express warranty.

b. Implied Warranty

The Song-Beverly Act provides for the implied warranties of merchantability and fitness in connection with the sale of a used automobile. See *Cal. Civ. Code § 1795.5(c)*; *Rodriguez, 77 Cal.App.5th at 218*. However, these implied warranties apply only when the sale of the used automobile includes an express warranty. See *Cal. Civ. Code § 1795.5*; *Gavaldon v. DaimlerChrysler Corp., 32 Cal.4t h 1246, 1257, 1260, 13 Cal. Rptr. 3d 793, 90 P.3d 752 (2004)*; *Nunez v. FCA US LLC, 61 Cal.App.5th 385, 399, 275 Cal. Rptr. 3d 618 (2021)*; see also *Rodriguez, 77 Cal.App.5th at 218*. Further, an implied warranty can last a maximum of three months from the date of sale. See *Cal. Civ. Code § 1795.5(c)*; *Rodriguez, 77 Cal.App.5th at 218*. Finally, unless a manufacturer directly sells a used automobile to the public, only distributors or sellers of used goods, not manufacturers of new goods, have implied warranty obligations in the sale of used goods. *Nunez, 61 Cal.App.5th at 399*; *Kiluk v. Mercedes-Benz USA, LLC, 43 Cal.App.5th 334, 337, 339-40, 256 Cal. Rptr. 3d 484 (2019)*.

Here, there are a number of problems with this claim. First, there are no allegations that MBU directly sold the Vehicle to Barboza. Instead, the sales contract shows that Mercedes-Benz of Bakersfield is the entity that sold the Vehicle to Barboza. See Doc. No. 1-2. Thus, *§ 1795.5(c)* does not apply to MBU. *Nunez, 61 Cal.App.5th at 399*. Second, the Complaint and Barboza fail to adequately describe an express warranty that accompanied the sale of the **[*9]** Vehicle. Thus, the Complaint fails to plausibly allege that *§ 1795.5(c)* applies to the sale of the Vehicle. See *Gavaldon, 32 Cal.4th at 1257, 1260*; *Nunez, 61 Cal.App.5th at 399*; see also *Rodriguez, 77 Cal.App.5th at 218*. Finally, there is no description of the problems experienced by Barboza, an explanation of how the problems breached an implied warranty, or any indication that Barboza's claims fit within the ninety day window provided by Song-Beverly for used vehicles. Therefore, the Complaint fails to allege any plausible Song-Beverly implied warranty claims.

2. Third Cause of Action - California Commercial Code

MBU contends that no plausible claim is alleged because there are no allegations that Barboza gave pre-suit notice of the breach.

The California Commercial Code in part requires that a buyer "must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy." *Cal. Comm. Code § 2607(3)(A)*. The Ninth Circuit has recognized that, pursuant to *§ 2607(3)(A)*, a "buyer must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach" in order to avoid dismissal of breach of contract or breach of warranty claim. *Alvarez v. Chevron Corp., 656 F.3d 925, 932 (9th Cir. 2011)*; see also *Cardinal Health 301, Inc. v. Tyco Electronics Corp., 169 Cal.App.4th 116, 135-36, 87 Cal. Rptr. 3d 5 (2008)*. However, the notice requirement applies to the immediate **[*10]** parties to the sale; it does not apply "in actions by injured consumers against manufacturers with whom they have not dealt." *Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 61, 27 Cal. Rptr. 697, 377 P.2d 897 (1963)*; see *Battle v. Taylor James, LLC, 607 F. Supp. 3d 1025, 2022 U.S. Dist. LEXIS 109082, *52-*53 (C.D. Cal. June 15, 2022)*; *Pascal v. Nissan N. Am., Inc., 2022 U.S. Dist. LEXIS 128712, *22-*23 (C.D. Cal. June 8, 2022)*; *Rojas v. Bosch Solar Energy Corp., 386 F. Supp. 3d 1116, 1126 (N.D. Cal. 2019)*; *Baranco v. Ford Motor Co., 294 F. Supp. 3d 950, 972 (N.D. Cal. 2018)*; *In re Trader Joe's Tuna Litig., 289 F. Supp. 3d 1074, 1092 (C.D. Cal. 2017)*.

Here, the sales contract and MBU's repeated representations are that Mercedes-Benz of Bakersfield sold the Vehicle to Barboza, not MBU who is merely the manufacturer. Given MBU's representations and the purchase agreement, the Court can only conclude that MBU was the manufacturer and not the direct seller of the Vehicle to Barboza. Therefore, Barboza is not required to give MBU notice of any breach of warranty, and dismissal on the basis of *§ 2607(3)(A)* is improper.

Nevertheless, MBU also argues that the Complaint's allegations are too conclusory and fail to state a valid breach of warranty claim. MBU is on far firmer ground with this argument., since the Complaint is conclusory. There are allegations that a written warranty exists and that Defendants did not ensure that the Vehicle conformed to the written warranty. However, that is all that can reasonably be said. The relevant terms of the warranty are not adequately described, there are no allegations that describe the problems Barboza encountered with the Vehicle, there are no allegations that describe **[*11]** how the problems with the Vehicle breached the warranty, and there are no allegations that adequately describe how the Defendants breached the terms of the written warranty. The allegations are simply too vague and conclusory and do not provide adequate notice to Defendants. Because the allegations do not state a plausible claim, dismissal of the third cause of action is appropriate.

3. Fourth Cause of Action - Magnuson-Moss Warranty Act

The MMWA permits "a consumer who is damaged by the failure of supplier, warrantor, or service contractor to comply with any obligations under [the MMWA], or under a written warranty, implied warranty, or service contract, [to] bring suit for damages and other legal and equitable relief." *15 U.S.C. § 2310(d)(1)*; *Floyd v. American Honda Motor Co., 966 F.3d 1027, 1032 (9th Cir. 2020)*. Before bringing suit, however, the MMWA requires that a plaintiff give the person obligated under the warranty a reasonable opportunity to cure a breach. See *15 U.S.C. § 2310(e)*; *Rojas v. Bosch Solar Energy Corp., 386 F.Supp.3d 1116, 1128 (N.D. Cal. 2019)*; *De Shazer v. National RV Holdings, Inc., 391 F.Supp.2d 791, 798 (D. Ariz. 2005)*. Except for specific instances in which it prescribes a regulating rule, the MMWA "calls for the application of state written and implied warranty law, not the creation of additional federal law." *Walsh v. Ford Motor Co., 807 F.2d 1000, 1013-14, 257 U.S. App. D.C. 85 (D.C. Cir. 1986)*; see *Nguyen v. Nissan N. Am., Inc., 932 F.3d 811, 817 n.3 (9th Cir. 2019)*. Thus, as a general rule, an MMWA claim will rise or fall with a plaintiff's state law warranty claims. **[*12]** See *Ngo v. BMW of N. Am., LLC, 23 F.4th 942, 945 (9th Cir. 2022)*; *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008)*.

Here, there are a number of problems with Barboza's MMWA claim. First, as discussed above, no plausible state law warranty claims are alleged and no independent obligations under the MMWA are identified in the Complaint. Under these circumstances, the MMWA claim falls with the state law claims. See *Ngo, 23 F.4th at 945*. Second, the Complaint does not adequately allege that Barboza met the MMWA's requirement of a pre-suit opportunity to cure.

The Complaint under the third cause of action (but not the MMWA claim) does allege that Barboza "took reasonable steps to notify Defendants that the vehicle was not as represented." Complaint ¶ 35. However, that is a conclusory allegation. There is no description of the steps that Barboza took and thus, there is nothing to support the legal conclusion that her steps were "reasonable." Moreover, informing Defendants that "the Vehicle was not as represented" is not the same as alleging Barboza gave Defendants the opportunity to cure a breach of warranty. The failure to meet this "opportunity to cure" prerequisite precludes Barboza from pursuing an MMWA claim. See *15 U.S.C. § 2310(e)*; *Rojas, 386 F.Supp.3d at 1128*. Third, the allegations under this cause of action merely parrot the statutory language of the **[*13]** MMWA. Again, there are no allegations that adequately describe the express warranty at issue, the problems encountered with the Vehicle, how the problems breached any express or implied warranty, or how Defendants breached their obligations under any warranty. In other words, the claim is too conclusory and does not allege a plausible claim. Therefore, dismissal of Barboza's MMWA claim is appropriate.

4. Fifth Cause of Action - UCL[3]

The UCL broadly proscribes the use of any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code. § 17200*; *Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1177 (9th Cir. 2016)*. "The UCL operates as a three-pronged statute: 'Each of these three adjectives [unlawful, unfair, or fraudulent] captures a 'separate and distinct theory of liability.'" *Beaver, 816 F.3d at 1177* (citation omitted). The Complaint alleges liability under all three prongs of the UCL.

a. "Unlawful" Prong

The UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL," and "virtually any law or regulation — federal or state, statutory or common law — can serve as a predicate . . . ." *Candelore v. Tinder, Inc., 19 Cal.App.5th 1138, 1155, 228 Cal. Rptr. 3d 336 (2018)*. However, when the underlying legal claim that supports a UCL cause fails, however, "so too will the [the] derivative UCL claim." *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc., 28 Cal.App.5th 923, 950, 239 Cal. Rptr. 3d 577 (2018)*.

Here, the **[*14]** Court has concluded that the four other causes of action are not plausibly alleged. Therefore, because all prior causes of action fail, so too fails Barboza's "unlawful" UCL claim. See id.; see also *Mayen v. California Cent. Harvesting, Inc., 2022 U.S. Dist. LEXIS 150119, *30 (E.D. Cal. Aug. 19, 2022)*.

b. "Unfair" Prong

California law with respect to "unfair" conduct is currently "in flux." *Hodsdon v. Mars, Inc., 891 F.3d 857, 866 (9th Cir. 2018)*. Conduct is "unfair" either when it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition," or when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Id.

The allegations under this cause of action invoke the second method of demonstrating "unfairness." See Complaint ¶ 54. The Complaint alleges that it is an unfair business practice to: (1) fail to provide repair and service facilities reasonably close to where the Vehicle was sold; (2) fail to provide repair facilities with repair literature so as to allow vehicles to conform to warranties; (3) fail to inform consumers of their warranty rights in repair orders; **[*15]** (4) fail to pay authorized repair facilities for work don under express warranties; and (5) coercing Barboza and other into signing confidentiality clauses. See id. The Complaint does not provide further explanation or provide any more detail regarding these alleged acts of unfairness, nor does the Complaint adequately indicate that any of these

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[3] MBU argues that Barboza is not entitled to equitable relief under the UCL. Because the Court finds that no plausible UCL claims are stated, the Court will not address Barboza's claims for equitable relief at this time.

things actually happened to Barboza (apart from acquiescence to an ill-described confidentiality clause). See id. These are short stand-alone allegations that appear for the first time under the fifth cause of action; they are not even hinted at by the prior allegations. Moreover, it is not clear that each of these acts are acts of unfair competition (particularly failing to pay an authorized repair facility). Without additional allegations that actually tether these practices to Barboza and describe why the practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," the allegations are too conclusory and fail to state a plausible claim.

c. "Fraudulent" Prong

The "fraudulent" prong of the UCL requires "only a showing that members of the public are likely to be deceived" and does not require allegations **[*16]** of actual deception, reasonable reliance, and damage. *Brakke v. Econ. Concepts, Inc., 213 Cal.App.4th 761, 772, 153 Cal. Rptr. 3d 1 (2013)*; *Daugherty v. American Honda Motor Co., Inc., 144 Cal.App.4th 824, 838, 51 Cal. Rptr. 3d 118 (2006)*. However, even though the traditional elements of fraud need not be alleged, a "fraudulent" prong UCL claim still sounds in fraud and a plausible claim must be meet *Rule 9(b)*'s heightened pleading standards. See *Moore v. Mars Petcare US, Inc., 966 F.3d 1007, 1016, 1019*; *Davidson v. Kimberly-Clark Corp., 889 F.3d 956, 964 (2018)*. Thus, a complaint must identify the who, what, when, where and how of the fraudulent conduct, as well as how and why a statement or conduct is fraudulent. See *Moore, 966 F.3d at 1019*; *Davidson, 889 F.3d at 964*.

Here, given the nature of most automobile sales, the Court is willing to infer that UCL fraudulent conduct occurred on the date of the sale and at the sales facility of Mercedes-Benz of Bakersfield. However, the Complaint does not identify who made any fraudulent statements/engaged in fraudulent actions, what exactly the fraudulent actions/representations where, and how and why the fraudulent actions/representations were fraudulent/likely to deceive a reasonable consumer. Cf. id. Thus, the Complaint does not meet *Rule 9(b)*'s standard. Because the Complaint does not meet *Rule 9(b)*'s heightened pleading standard, no plausible claim under the "fraudulent" UCL prong is stated. See id.

5. Mercedes-Benz of Bakersfield

This motion to dismiss was brought only by MBU, it was not joined by Mercedes-Benz **[*17]** of Bakersfield. Although the section of this order that address a manufacturer has no application to Mercedes-Benz of Bakersfield, the other sections do apply - particularly the Complaint's reliance on conclusory allegations. Thus, while not all of this order's rationale applies to Mercedes-Benz of Bakersfield, the above analysis shows that the Complaint does not allege any plausible claims against Mercedes-Benz of Bakersfield. Therefore, dismissal of all claims against Mercedes-Benz of Bakersfield is appropriate.

6. Further Amendment

MBU argues that all claims should be dismissed without leave to amend. However, leave to amend is the default rule, even when (as here) a plaintiff does not request leave to amend. See *Ebner, 838 F.3d at 962*. The Complaint alleges that an express written warranty exists. This allegation suggests to the Court that amendment is not necessarily futile, provided that additional factual allegations are pled. Therefore, the Court will dismiss all claims against all Defendants with leave to amend.

Further, in addition to the deficiencies identified above, there are two general pleading practices that Barboza needs to correct through an amended complaint. First, each cause of action incorporates by references **[*18]** all prior paragraphs, irrespective of the prior paragraph's actual relevance to or effect on the cause of action attempted to be plead. This is an all too common pleading practice that is an improper form of shotgun pleading. See *Yellowcake, Inc. v. Morena Music, Inc., 522 F.Supp.3d 747, 769-70 & n.4 (E.D. Cal. 2021)*. Barboza may certainly incorporate *relevant* paragraphs by reference, but she should do so specifically (e.g. "Plaintiff incorporates Paragraphs 1

through 8 and 15 through 19 by reference") and not indiscriminately and serially (e.g. consistently stating "Plaintiff incorporates by reference all prior paragraphs"). See *id. at 770 n.4*

Second, there are two Defendants in this case - a dealership and a manufacturer. The Complaint lumps the Defendants together without differentiating specific acts by a specific Defendant. Generally, lumping Defendants together is an improper pleading practice that does not provide adequate notice. See *Culinary Studios, Inc. v. Newsom, 517 F.Supp.3d 1042, 1074-75 (E.D. 2021)*. Considering that MBU's motion strongly suggests that the two defendants in this case are distinct entities involved in different aspects of the manufacturing and sales of new and used automobiles, lumping is problematic. Moreover, the Complaint often alleges that a claim is against "all Defendants," but then the allegations under a claim simply **[*19]** reference a "Defendant," leaving Defendants and the Court to guess at which Defendant is actually being referenced. Such ambiguities must be eliminated. Therefore, any amended Complaint must differentiate the conduct of each Defendant, or explain in non-boilerplate/conclusory allegations why the conduct of one defendant can be imputed to the other.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. MBU's motion to dismiss (Doc. No. 7) is GRANTED;

2. The Complaint in its entirety is DISMISSED with leave to amend;

3. Within twenty-one (21) days of service of this order, Barboza may file an amended complaint consistent with the analysis of this order and *Rule 11*; and

4. If Barboza fails to file a timely amended complaint, the leave to amend will be automatically withdrawn and this case will be closed without further notice.

IT IS SO ORDERED.

Dated: December 27, 2022

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

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Augustson v. Realpage, Inc.

United States District Court for the District of New Mexico

December 29, 2022, Filed

No. 1:22-cv-00976-LF

Reporter
2022 U.S. Dist. LEXIS 233401 *; 2022 WL 17990213

MIA IRONEYES AUGUSTSON, individually and on behalf of all others similarly situated, Plaintiffs, v. REALPAGE, INC., GREYSTAR WORLDWIDE, LLC, FPI MANAGEMENT, NORTHLAND INVESTMENT CORPORATION, RPM LIVING, MONARCH INVESTMENT AND MANAGEMENT GROUP, NALS APARTMENT HOMES, and LANDMARK REALTY, Defendants.

Core Terms

show cause, allegations, district court, injunctive, asserts, Costs

Counsel: **[*1]** Mia IronEyes Augustson, individually and on behalf of all others similarly situated, Plaintiff, Pro se, Albuquerque, NM.

Judges: Laura Fashing, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Laura Fashing

Opinion

MEMORANDUM OPINION AND ORDER TO SHOW CAUSE

THIS MATTER comes before the Court on *pro se* Plaintiff Mia IronEyes Augustson's ("Plaintiff") Class Action Complaint for a Civil Action, Doc. 1, filed December 27, 2022 ("Complaint"), and Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 3, filed December 27, 2022.

Application to Proceed *in forma pauperis*

The statute for proceedings *in forma pauperis*, *28 U.S.C. § 1915(a)*, provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

> When a district court receives an application for leave to proceed in forma pauperis, it should examine the papers and determine if the requirements of *[28 U.S.C.] § 1915(a)* are satisfied. If they are, leave should be granted. Thereafter, if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.] **[*2]**

Menefee v. Werholtz, 368 Fed.Appx. 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox, 305 F.2d 58, 60 (10th Cir. 1962)*. "The statute [allowing a litigant to proceed *in forma pauperis*] was intended for the benefit of those too poor

to pay or give security for costs...." *Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 344, 69 S. Ct. 85, 93 L. Ed. 43 (1948)*. While a litigant need not be "absolutely destitute," "an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life." *Id. at 339*.

Plaintiff did not sign the "Affidavit in Support of the Application" on page 1 of Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs. The Court orders Plaintiff to either: (i) sign the Affidavit in Support of her Application; or (ii) show cause why the Court should not strike the Application for failure to sign the Affidavit in Support. *See* *Fed. R. Civ. P. 11(a)* ("Every ... paper must be signed ... by a party personally if the party is unrepresented ... The court must strike an unsigned paper unless the omission is promptly corrected after being called to the ... party's attention").

The Complaint

Plaintiff alleges that Defendant RealPage provides software and services to the multifamily housing industry and the other Defendants are multifamily housing Lessor corporations **[*3]** which control millions of apartment housing units nationwide. *See* Complaint at 4-5. Defendant RealPage allegedly suggests rental values to its client Lessors and pressures Lessors to accept the suggested values unaltered resulting in an increase of rental rates. *See* Complaint at 5. Plaintiff alleges that from 2020 to 2021 her rent increased $200 per month and in late 2022 she "lost the apartment anyway, to 'renovation' which is another strategy endorsed by RealPage and commonly used by Lessors to force a unit turnover when nonpayment of rent cannot be cited as a cause." Complaint at 6. Plaintiff alleges that in "letters to the Justice Department and the Federal Trade Commission," "RealPage and its clients are accused of acting in collusion, using inside information in the manner of a cartel, in violation of ***antitrust law***." Complaint at 6.

Asserting Claims on Behalf of Others

Plaintiff filed her "Class Action Complaint" on "behalf of others similarly situated." Complaint at 1. Plaintiff is not a licensed attorney authorized to practice in this Court. The claims Plaintiff is asserting on behalf of others similarly situated should be dismissed because "[a] litigant may bring [her] own claims **[*4]** to federal court without counsel, but not the claims of others." *Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000)*. The Court orders Plaintiff to show cause why the Court should not dismiss the claims Plaintiff is asserting on behalf of others similarly situated.

Jurisdiction

Plaintiff asserts the Court has federal question jurisdiction because "[t]he specific provisions of federal law that apply are *Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1)*, and *Sections 4* and *16 of the Clayton Antitrust Act* (*15 U.S.C. §§ 15* and *26*)." Complaint at 4. *Section 1* states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1* (stating a violation of *Section 1* is a felony and setting forth the monetary and imprisonment penalties). *Section 15* states "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States **in the district in which the defendant resides or is found or has an agent**, without respect to the amount in controversy ..."). *15 U.S.C. § 15* (emphasis added). *Section 26* states:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, **in any court of the United States having jurisdiction over the parties [*5]** , against threatened loss or damage by a violation of the antitrust laws, including *sections 13*, *14*, *18*, and *19* of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper

> bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

15 U.S.C. § 26 (emphasis added).

As the party seeking to invoke the jurisdiction of this Court, Plaintiff bears the burden of alleging facts that support jurisdiction. *See Dutcher v. Matheson, 733 F.3d 980, 985 (10th Cir. 2013)* ("Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction"); *Evitt v. Durland, 243 F.3d 388 *2* [published in full-text format at *2000 U.S. App. LEXIS 29783*] (10th Cir. 2000) ("even if the parties do not raise the question themselves, it is our duty to address the apparent lack of jurisdiction sua sponte") (quoting *Tuck v. United Servs. Auto. Ass'n, 859 F.2d 842, 843 (10th Cir.1988)*.

It appears that the Court does not have jurisdiction over Plaintiff's claims for monetary damages and injunctive relief. The Complaint does not contain any factual allegations that Defendants reside, are found or have an agent **[*6]** in the District of New Mexico or that the Court has jurisdiction over Defendants. The Court orders Plaintiff to show cause why the Court should not dismiss this case for lack of jurisdiction. *See Fed. R. Civ. P. 12(h)(3)* ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). If Plaintiff asserts the Court has jurisdiction, Plaintiff must file an amended complaint containing factual allegations supporting jurisdiction.

Failure to State a Claim

The Complaint fails to state a claim against each Defendant. "[T]o state a claim in federal court, a complaint must explain what each defendant did to him or her; when the defendant did it; how the defendant's action harmed him or her; and, what specific legal right the plaintiff believes the defendant violated." *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe County Justice Center, 492 F.3d 1158, 1163 (10th Cir. 2007)*. The Complaint contains conclusory allegations Defendants colluded to raise rental rates but does not contain factual allegations describing what each Defendant did to Plaintiff, when they did it and how each Defendant harmed Plaintiff. A complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Claims that are "supported by mere conclusory statements, **[*7]** do not suffice." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

The Court orders Plaintiff to show cause why the Court should not dismiss this case for failure to state a claim. If Plaintiff asserts that the Court should not dismiss this case, Plaintiff must file an amended complaint containing factual allegations that state a claim upon which relief can be granted.

Case Management

> Generally, *pro se* litigants are held to the same standards of professional responsibility as trained attorneys. It is a *pro se* litigant's responsibility to become familiar with and to comply with the *Federal Rules of Civil Procedure* and the *Local Rules of the United States District Court for the District of New Mexico* (the "Local Rules").

Guide for Pro Se Litigants at 4, United States District Court, District of New Mexico (November 2019). The Local Rules, the Guide for Pro Se Litigants and a link to the Federal Rules of Civil Procedure are available on the Court's website: http://www.nmd.uscourts.gov .

Compliance with *Rule 11*

The Court reminds Plaintiff of her obligations pursuant to *Rule 11 of the Federal Rules of Civil Procedure*. *See* *Yang v. Archuleta, 525 F.3d 925, 927 n. 1 (10th Cir. 2008)* ("*Pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure."). *Rule 11(b)* provides: **[*8]**

> **Representations to the Court**. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). Failure to comply with the requirements of *Rule 11* may subject Plaintiff to sanctions, including monetary penalties and nonmonetary directives. *See* *Fed. R. Civ. P. 11(c)*.

IT IS ORDERED that:

> **[*9]** (i) Plaintiff shall, within 21 days of entry of this Order, either: (i) sign the Affidavit in Support of her Application; or (ii) show cause why the Court should not strike the Application for failure to sign the Affidavit in Support. Failure to timely sign the Affidavit or show cause may result in the Court striking Plaintiff's Application to Proceed in District Court Without Prepayment of Fees and Costs.
> (ii) Plaintiff shall, within 21 days of entry of this Order, show cause why the Court should not dismiss Plaintiff's claims for the reasons stated above. Failure to timely show cause and file an amended complaint may result in dismissal of this case.

/s/ Laura Fashing

Laura Fashing

UNITED STATES MAGISTRATE JUDGE

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Hurley v. Nat'l Basketball Players Ass'n

United States Court of Appeals for the Sixth Circuit

December 30, 2022, Filed

File Name: 22a0544n.06

Case No. 22-3038

Reporter
2022 U.S. App. LEXIS 35964 *; 2022 FED App. 0544N (6th Cir.); 2022 WL 17998878

ROSEL C. HURLEY, III, Plaintiff-Appellant, v. NATIONAL BASKETBALL PLAYERS ASSOCIATION & NATIONAL BASKETBALL ASSOCIATION, Defendants-Appellees.

Notice: CONSULT *6TH CIR. R. 32.1* FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Subsequent History: Rehearing denied by *Hurley v. Nat'l Basketball Players Ass'n, 2023 U.S. App. LEXIS 1609 (6th Cir., Jan. 20, 2023)*

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

Hurley v. Nat'l Basketball Players Ass'n, 2021 U.S. Dist. LEXIS 244270, 2021 WL 6065783 (N.D. Ohio, Dec. 22, 2021)

Core Terms

exemption, bargaining, player, exam, anti trust law, district court, non-labor

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews the district court's dismissal of those claims de novo, meaning an appellate court accepts as true all well-pleaded allegations in the complaint and ask whether those allegations plausibly suggest an entitlement to relief.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2 **Scope, Monopolization Offenses**

The Sherman Act, 15 U.S.C.S. §§ 1 & 2 prohibits monopolizing or unreasonably restraining trade and commerce. 15 U.S.C.S. §§ 1 & 2.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN3 **Scope, Exemptions**

Drawing upon the spirit of the union exemption, the U.S. Supreme Court, through non-statutory means, has similarly excluded from antitrust scrutiny any anticompetitive effect of a properly bargained collective bargaining agreement.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN4 **Sherman Act, Claims**

In the absence of plausible allegations that the bargaining was not conducted in self-interested ways, there is little basis to find liability under the Sherman Act, 15 U.S.C.S. §§ 1 & 2 exempting restrictions obtained through bona fide, arms-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups; exempting conduct that grew out of, and was directly related to, the lawful operation of the bargaining process, involved a matter that the parties were required to negotiate collectively, and concerned only the parties to the collective-bargaining relationship. The exemption has not been extended to situations where unions are aiding non-labor groups to create business monopolies and to control the marketing of goods and services.

Counsel: ROSEL C. HURLEY, III, Plaintiff - Appellant, Pro se, Shaker Heights, OH.

For NATIONAL BASKETBALL PLAYERS ASSOCIATION, Defendant - Appellee: Sean McGrane, James Michael Brennan, Kristin Lieske Bryan, Frederick R. Nance, Squire Patton Boggs, Cleveland, OH.

For NATIONAL BASKETBALL ASSOCIATION, Defendant - Appellee: Gregory Dubinsky, Holwell, Shuster & Goldberg, New York, NY; Lynn Rowe Larsen, Taft, Cleveland, OH; Philip D. Williamson, Taft, Stettinius & Hollister, Cincinnati, OH.

Judges: Before: SILER, BUSH, and READLER, Circuit Judges.

Opinion by: CHAD A. READLER

Opinion

CHAD A. READLER, Circuit Judge. Lawyer Rosel C. Hurley III had designs on becoming an agent for players in the National Basketball Association. So he applied to take an exam the National Basketball Players Association requires for certification as an agent. The NBPA told Hurley that he was approved to take the exam, only to reverse course and reject his application days before the exam date. Hurley responded by filing an antitrust suit against the NBPA and the NBA. The district court dismissed the case for failure to state a claim. We now affirm.

I.

The NBPA is **[*2]** a non-profit corporation and labor organization within the meaning of the *National Labor Relations Act*. *See* *29 U.S.C. § 152(5)*. Its player agents are the exclusive representatives for NBA players. But becoming an agent is far from a slam dunk. To represent an NBA player, a prospective agent must both pass an exam and be certified by the NBPA.

Hurley applied to take the exam. In his application, he disclosed that, at the time, his law license had been suspended by the Ohio Supreme Court. He also answered follow-up requests from the NBPA. The NBPA informed Hurley that he had been approved to take the online exam. But just two days before the exam date, the NBPA told Hurley that he would not be allowed to do so.

Hurley cried foul. According to him, the reason given for his application's denial—his disciplinary history—was pretextual. In Hurley's view, the NBPA and NBA, for reasons unstated, did not want him to be an agent. So he filed suit against the two associations. The gist of Hurley's complaint was that defendants violated the *Sherman Act, 15 U.S.C. §§ 1* & *2*. Defendants' actions, Hurley alleged, "would cause a reasonable person to believe that the [NBPA was] acting in concert with and at the behest of a non-labor member or group, [the NBA,] in order to ensure **[*3]** [Hurley's] exclusion from the marketplace the [d]efendants completely control." Complaint, R. 1, PageID# 6 ¶ 14.

The district court granted defendants' motions to dismiss the complaint. *See* *Fed. R. Civ. P. 12(b)(6)*. It viewed the NBPA's alleged actions as statutorily exempted from the Sherman Act, and the NBA's purported actions as nonstatutorily exempted from the same. Hurley timely appealed.

II.

Hurley's appeal boils down to one issue: whether he proffered viable Sherman Act claims. In essence, Hurley believes that the NBPA acted in concert with the NBA to deny him the ability to take the player agent exam in violation of *sections 1* & *2 of the Sherman Act*. ***HN1***[↑] We review the district court's dismissal of those claims de novo, meaning we "accept as true all well-pleaded allegations in the complaint and ask whether those allegations plausibly suggest an entitlement to relief." *Grow Mich., LLC v. LT Lender, LLC, 50 F.4th 587, 593 (6th Cir. 2022)*.

Basic principles of ***antitrust law*** foreclose Hurley's claims. Start with his claim against the NBPA. Generally speaking, ***HN2***[↑] the Sherman Act prohibits monopolizing or unreasonably restraining trade and commerce. *15 U.S.C. §§ 1* & *2*. But Congress did not dispatch the Act to cover all actors. One example is labor unions: Congress broadly exempted them from the Act's prohibitions. *Clayton Act § 20, 15 U.S.C. § 17* ("Nothing contained in the antitrust laws **[*4]** shall be construed to forbid the existence and operation of labor . . . organizations . . . , or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."); *see also* *H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 713-16, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981)*. In view of this broad exception, we see no basis for imposing antitrust liability against the NBPA alone. *See also* *Indep. Sports & Ent. v. Fegan, No. CV 17-02397-AB, 2017 U.S. Dist. LEXIS 82341, 2017 WL 2598550, at *6 (C.D. Cal. May 30, 2017)* (recognizing "that the NBPA is exempt from the Sherman Act and thus can monopolize the representation of basketball players"); *Collins v. Nat'l Basketball Players Ass'n, 850 F. Supp. 1468, 1475 (D. Colo. 1991)* ("The NBPA Regulations . . . are exempt from ***antitrust law***."), *aff'd*, *976 F.2d 740, 1992 WL 236919, at *2 (10th Cir. 1992)* (unpublished table decision) ("[T]he statutory labor exemption from the Sherman Act permits the NBPA to establish a certification procedure for player agents.").

Hurley fares no better by alleging conspiratorial conduct between the NBPA and the NBA. The NBPA, says Hurley, "was acting in concert with a non-union member to boycott [Hurley] from taking the NBPA Agent Exam." Blue Br. at *10. Here again, Hurley confronts the statutory exemption for unions, albeit in an extended fashion. ***HN3***[↑] Drawing upon the spirit **[*5]** of the union exemption, the Supreme Court, through "nonstatutory" means, *Connell*

Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 622, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975), has similarly "excluded from antitrust scrutiny" "[a]ny anticompetitive effect of a properly bargained collective bargaining agreement." Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 474 (6th Cir. 2005). It did so in view of "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." Connell Constr., 421 U.S. at 622; *see also* Plymouth Whalers Hockey Club, 419 F.3d at 474.

Applied in this setting, that exception encompasses the NBPA's agreement with the NBA. By all accounts, the parties' collective bargaining was standard fare, done for the purpose of protecting players from unscrupulous agent behavior. Collins, 850 F. Supp. At 1478-79. ***HN4***[] In the absence of plausible allegations that the bargaining was not conducted in self-interested ways, there is little basis to find liability under the Sherman Act. United States v. Hutcheson, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941); Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965) (exempting restrictions obtained "through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups"); Brown v. Pro Football, Inc., 518 U.S. 231, 250, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996) (exempting conduct that "grew out of, and was directly related to, the lawful operation of the bargaining process[,] involved a matter that the parties were required to negotiate collectively[, and] concerned only the **[*6]** parties to the collective-bargaining relationship").

True, as Hurley notes, the exemption has not been extended to situations where unions are "aid[ing] non-labor groups to create business monopolies and to control the marketing of goods and services." Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. Of Elec. Workers, 325 U.S. 797, 808, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945); *cf.* Hutcheson, 312 U.S. at 232 ("So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under [§ 17] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." (footnote omitted)). *See also* Conn. Ironworkers Emps. Ass'n v. New England Reg'l Council of Carpenters, 869 F.3d 92, 102-03 (2d Cir. 2017). Yet Hurley points to nothing that would suggest that is what happened here. All he can muster is the assertion that "a reasonable person would assume that," in view of the NBPA's eleventh-hour reversal and ensuing denial of his application, the NBPA and NBA must have impermissibly conspired to restrain trade. We need not credit this conclusory statement as true. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B., 727 F.3d 502, 504 (6th Cir. 2013). Nor would it make sense to do so, in view of the statutory and case law backdrop we write against. After all, saying that the mere fact that parties entered into a standard collective bargaining agreement **[*7]** constitutes improperly "aid[ing] non-labor groups to . . . control the marketing of goods and services," Allen Bradley Co., 325 U.S. at 808, disregards the longstanding balance struck between competing congressional policies. *See* Connell Constr., 421 U.S. at 622. It would likewise elevate the exception to the point where it swallows the rule.

All told, the bargained agreement between the NBPA and NBA is protected from Hurley's antitrust suit, even if he could identify anticompetitive consequences arising out of it. *See* Plymouth Whalers Hockey Club, 419 F.3d at 474.

* * * *

Some final housekeeping matters are in order. One, because the labor exemptions to antitrust laws preclude Hurley's Sherman Act claims, we need not reach the other challenges to those claims. Two, to the extent Hurley argues that the NBPA violated the Railway Labor Act, 45 U.S.C. §§ 151-188, those arguments are forfeited, as he did not make them before the district court. Sheet Metal Workers' Health & Welfare Fund of N.C. v. Law Off. of Michael A. DeMayo, LLP, 21 F.4th 350, 357 (6th Cir. 2021).

Lastly, there remains the issue of arbitration between Hurley and the NBPA. Before the district court, the two agreed that Hurley was required to bring any challenges to the propriety of the NBPA's denial of his application before an arbitrator. To the extent that issue is still live, we leave Hurley with whatever arbitration rights he previously possessed.

We affirm the judgment of the district **[*8]** court.

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