UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

LEAH CROSS, MARCO GRANGER-RIVERA, RYAN SCHILLING, and CASSIE WHINNIE, and those similarly situated, Plaintiffs, v. AMAZON.COM, INC., and AMAZON LOGISTICS, INC. Defendants.	Case No. 1:23-CV-02099-NYW-SBP

DEFENDANTS AMAZON.COM, INC. AND AMAZON LOGISTICS, INC.'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY CLAIMS PENDING ARBITRATION

Plaintiffs' Opposition ("Opp.") fails to carry their burden to show their claims are exempt from arbitration under either the Federal Arbitration Act ("FAA") or Colorado law.

I. Plaintiffs fail to show they are exempt from the FAA.

A. Plaintiffs fail to explain how the arbitration agreement could be a "contract of employment."

Plaintiffs do not explain how the arbitration agreement could be a contract of employment even though it is binding before, and regardless of whether, an employment relationship forms. Nor do they point to any terms of employment, benefits, or agreement to perform work—prerequisites for a "contract of employment" under 9 U.S.C. § 1. *See, e.g.*, *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 596 (4th Cir. 2023). The authority they cite does not hold otherwise.

Neims v. Neovia Logistics Distribution, LP, No. EDCV23716PASHKX, 2023 WL 6369780, at *4 (C.D. Cal. Aug. 10, 2023), did not consider the argument that where a binding contract is executed even if no employment relationship forms, it cannot be a contract of employment. *See also Fuqua v. Kenan Advantage Group, Inc.*, No. 3:11-CV-01463-ST, 2012 WL 2861613, at *5 (D. Or. Apr. 13, 2012) (same); *In re Oil Spill*, No. MDL 2179, 2010 WL 4365478, at *2 (E.D. La. Oct. 25, 2010) (same). In *Gabay v. Roadway Movers, Inc.*, No. 1:22-CV-06901 (JLR), 2023 WL 3144310, at *6 (S.D.N.Y. Apr. 28, 2023), the arbitration agreement was expressly incorporated into the employee handbook. And in *Shanks v. Swift Transp. Co. Inc.*, No. CIV.A. L-07-55, 2008 WL 2513056, at *3 (S.D. Tex. June 19, 2008), the arbitration provision was in a mandatory employee benefit plan only available to employees and those benefits were expressly tied to continued employment. None of these cases supports Plaintiffs' position here.

B. Plaintiffs fail to show they are within a "class of workers engaged in … interstate commerce."

Plaintiffs misframe the test that the Supreme Court announced in *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022). They frame the central question as: "whether the 'class of workers'

at issue is involved in 'activities within the flow of commerce,' such as 'when they handle goods traveling in interstate and foreign commerce.'" Opp. 4. But *Saxon* holds that exempt workers "must ***at least play a direct and necessary role*** in the free flow of goods ***across borders***" and "be ***actively engaged*** in transportation of those goods ***across borders*** via the channels of foreign or interstate commerce." 596 U.S. at 458 (citations and quotation marks omitted) (emphasis added). *Saxon* requires more than mere involvement in "activities within the flow of commerce" for a worker to be exempt; it requires, at minimum, "a direct and necessary role" being "actively engaged" in the transportation of goods across borders. As purely local delivery drivers who lack any involvement in the movement of the goods across borders, Plaintiffs have not met, and cannot, meet their burden to show they satisfy that requirement.

Plaintiffs try to downplay the courts that have found, when applying *Saxon*'s test, that local delivery drivers are not exempt under Section 1. There is not a "purported circuit split." Courts already recognize that "the Fifth and Ninth Circuit are split on this issue." *Rittmann v. Amazon.com, Inc.*, No. 16-cv-1554, 2023 WL 8544145, at *1 (W.D. Wash. Dec. 11, 2023). Nor was the Fifth Circuit's reasoning "contrived." Opp. 6. The Fifth Circuit looked at the issue with fresh guidance from *Saxon* and accurately applied the Supreme Court's guidance. *Lopez v. Cintas Corp.*, 47 F.4th 428, 431-33 (5th Cir. 2022) (explaining that *Saxon* sets forth the "proper framework" and then applying the two-step test to the facts). This is the very thing the Ninth Circuit refused to do given its pre-*Saxon* jurisprudence even after the Supreme Court remanded *Carmona* for reconsideration in light of *Saxon*. The Ninth Circuit's only analysis was a single assertion that there is "no clear conflict between *Rittmann* and *Saxon*." *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135, 1137 (9th Cir. 2023), *cert. filed*, No. 23-427 (U.S.) (refusing to revisit *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915-19 (9th Cir. 2020)). Given the Ninth Circuit's

failure to look at *Saxon* with fresh eyes, the Fifth Circuit's reasoning is more persuasive. Other courts have recognized *Lopez*'s persuasive application of *Saxon*, too. *See, e.g.*, *Nunes v. LaserShip, Inc.*, No. 22-cv-2953, 2023 WL 6326615, at *2-3 (N.D. Ga. Sept. 28, 2023) (rejecting argument "that last-mile delivery drivers are engaged in interstate commerce because the goods they transport have traveled interstate and remain in the stream of commerce until delivered"); Amazon Mot. 9-10 (discussing Oklahoma and California rulings following *Saxon* and *Lopez* to conclude that local delivery drivers, including ones delivering Amazon packages are not exempt).

Plaintiffs' cases do not support finding the Section 1 exemption applies here. As expected, Plaintiffs cite *Brock v. Flowers Food, Inc.*, No. 22-cv-2413, 2023 WL 3481395 (D. Colo. May 16, 2023), *appeal filed*, No. 23-1182 (10th Cir.). But the language they quote highlights that *Brock* is factually distinguishable. *See* Dkt. No. 38 at 5 (quoting language from *Brock*: a "driver who 'orders … products from bakeries across state borders, signs off on them at his warehouse, loads them onto his trucks, and delivers them' was 'engaged in interstate commerce' within the meaning of Section 1" (alterations in original)). In *Brock*, the driver was the one who caused the goods to come from out-of-state and received them at the warehouse and only then delivered them. Here, Plaintiffs have introduced no evidence[1] that they played any part in causing any goods to move across interstate lines or in facilitating them being unloaded after crossing state lines at a warehouse. Other classes of worker handled those tasks. Plaintiffs only picked up deliveries from an Amazon warehouse. *See* Dkt. No. 25-3, Svanstrom Decl., ¶3; *see also* Dkt. Nos. 25-4, 25-5, 25-6, 25-7, 25-8 (same). And *Ward v. Express Messenger Systems, Inc.*, 413 F. Supp. 3d 1079, 1085-87 (D. Colo. 2019), was decided without the benefit of *Saxon*'s guidance. *Ward* relied on

[1] Plaintiffs submit no evidence in support of their opposition to compel arbitration, but bear the burden to show the exemption does not apply. *See Frazier v. W. Union Co.*, 377 F. Supp. 3d 1248, 1257 (D. Colo. 2019).

cases like *Christie v. Loomis Armored US, Inc.*, No. 10-CV-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011), which adopted the "goods in the flow of commerce" test that *Saxon* rejected, *see* Dkt. 25 at 11, and so its reasoning must now be revisited.

Nor is there merit to Plaintiffs' argument that they are "engaged in commerce" as understood in 1925 when the FAA was passed. Dkt. No. 38 at 6-7. Plaintiffs cite *Bouvier's Law Dictionary and Concise Encyclopedia* 532 (8th ed. 1914). But the quoted portion of the legal reference work merely summarized the holding in *Barrett v. City of New York*, 189 F. 268, 269-70 (C.C.S.D.N.Y. 1911), *rev'd in part on other grounds*, 232 U.S. 14 (1914). And *Barrett* does not support Plaintiffs because it involved true interstate transportation: wagons that constantly crossed state lines between New York and New Jersey. *Barrett*, 232 U.S. at 28. In addition, Plaintiffs cited *Philadelphia & Reading R.R. Co. v. Hancock*, 253 U.S. 284, 285 (1920). In that case, however, there was no real separation between the intrastate and interstate phases of transit as there is here between Amazon's long-haul transportation and the local drivers' transportation in distinct vehicles. In *Hancock*, the transported goods (coal) remained in the same railcars throughout both phases of the journey. *See id.* at 286.

More relevant cases from this pre-FAA era refute Plaintiffs' position. They show that local transportation in distinct vehicles *is* separate from transportation across state lines. *See, e.g.*, *New York ex rel. Pa. R.R. Co. v. Knight*, 192 U.S. 21, 28 (1904) (concluding that a railroad's local cab service, transporting interstate passengers between the train station and their residences or hotels, was "an independent local service, preliminary or subsequent to any interstate transportation"); *ICC v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633, 643 (1897) (concluding that a railroad's local cartage service, for customers whose purchases had arrived by rail from out of state, was "a new and distinct service" rather than a part of the interstate railway transportation).

Plaintiffs have failed to produce any evidence showing they are exempt, and this Court should compel arbitration under the FAA. And even if not, their agreements are enforceable under Colorado law, as explained next.

II. Plaintiffs' arbitration agreements are enforceable under Colorado law.

A. Colorado law requires Plaintiffs to honor their arbitration agreements.

Plaintiffs are incorrect to contend that all their claims are exempt from arbitration under Colorado law. At most, Count 1, Plaintiff's Colorado Wage Claim Act ("CWCA") is not subject to arbitration under *Lambdin v. District Court*, 903 P.2d 1126, 1131 (Colo. 1995). But *Lambdin*'s reasoning does not extend to Counts 2-5, alleging violations of overtime and minimum wage laws and anti-discrimination laws, which must be compelled to arbitration under Colorado law.

Lambdin found that CWCA claims could not be compelled to arbitration because the statute contained a specific prohibition on waiver of statutory rights. *Id.* at 903 P.2d at 1129-30; *see* Colo. Rev. Stat. Ann. § 8-4-121[2] ("Any agreement, written or oral, by any employee purporting to waive or to modify such employee's rights in violation of this article shall be void."). The court concluded that "[t]he plain language of the statute establishes that the General Assembly intended Colorado employees to be able to recover past due wages by filing a civil action in the Colorado courts" and that "Section 8-4-[121] implements this policy by protecting employees against contractual waiver or modification of these substantive and procedural rights." *Id.* at 1130. This "specific nonwaiver provision" in the CWCA "prevail[ed] over the general provisions" in the Colorado Uniform Arbitration Act. *Id.* It was not that the CWCA conferred a right to "fil[e] a civil action in the Colorado courts," that made claims under the Act nonarbitrable—instead, it was the presence of the non-waiver provision in the CWCA.

[2] The statutory provisions have been renumbered since *Lambdin* was issued, when the anti-waiver provision was housed in Section 8-4-125.

Thus, the fact that the Colorado Anti-Discrimination Act and Denver Wage Theft Ordinance include language conferring a right to file a "civil action," does not make those claims non-arbitrable as Plaintiffs argue. Opp. 7-8. Those acts would need to also include a "specific nonwaiver provision." They do not contain such a provision. *See* Colo. Rev. Stat. Ann. § 24-34-401, *et seq.* (Count 4: Colorado Anti-Discrimination Act); D.R.M.C. § 58-1, *et seq.* (Count 5: Denver Minimum Wage and Wage Theft Ordinance).

Nor do the Colorado Minimum Wage Act ("CMWA") and Civil Theft Act ("CTA") contain a nonwaiver provision. *See* Colo. Rev. Stat. Ann. § 8-6-101, *et seq.* (Colorado Minimum Wage Act); Colo. Rev. Stat. Ann. § 18-4-401, *et seq.* (Civil Theft Act). Plaintiffs do not discuss these statutes. But even though these acts involve the question of whether minimum and overtime wages are owed, they are entirely separate statutory schemes in different chapters of the Colorado Revised Statutes than the CWCA. *See* Colo. Rev. Stat. Ann. § 8-4-101 (Colorado Wage Collection Act). The fact that the CWCA contains a nonwaiver provision has no bearing on whether claims for wages under the CMWA and CTA must be arbitrated. And because the CMWA and CTA do not contain nonwaiver provision, *Lambdin* does not prevent the claims under those acts in Counts 2 and 3 from being compelled to arbitration. Thus, Counts 2-5 here must still be compelled to arbitration under Colorado law.

Because the overtime and minimum wage claims in Counts 2 and 3 (and Counts 4 and 5) are subject to arbitration, the CWCA claim in Count 1 should be stayed pending arbitration. *City & Cnty. of Denver v. Dist. Ct.*, 939 P.2d 1353, 1370 (Colo. 1997) (non-arbitrable claims should be stayed pending arbitration where risk of "inconsistent determinations").[3]

[3] Even the CWCA claim must be compelled to arbitration, of course, if the FAA applies. *Grohn v. Sisters of Charity Health Servs. Colorado*, 960 P.2d 722, 727 (Colo. App. 1998).

B. Colorado public policy does not support finding the class waiver unconscionable.

Plaintiffs admit that Colorado law has no prohibition on class action waivers. Opp. 8. Yet they urge this Court to create a prohibition on enforcing arbitration agreements with class action waivers. There are no grounds to do so.

"In Colorado, arbitration is a favored method of dispute resolution. Our constitution, our statutes, and our case law all support agreements to arbitrate disputes." *Lane v. Urgitus*, 145 P.3d 672, 678 (Colo. 2006) (citations omitted); *Tug Hill Marcellus LLC v. BKV Chelsea LLC*, 486 P.3d 461, 463 (Colo. App. 2021) (reaffirming Colorado's strong "policy of favoring arbitration"). In addition to favoring arbitration, Colorado also has a "strong commitment to the freedom of contract." *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1047 (Colo. 2011). The Plaintiffs' contractual agreement to arbitrate implicates both these important Colorado public policies favoring enforcement of the agreements against any other competing policy considerations.

Here, the strong public policy favoring arbitration as a method of dispute resolution and the freedom of contract override any policy favoring classwide resolution of Plaintiffs' claims. *See Bailey*, 255 P.3d at 1046-48 (finding where competing public policy principles, the public policy favoring freedom of contract overrides the "strong public policy in favor of protecting tort victims"); *Arline v. Am. Family Mut. Ins. Co.*, 2018 COA 82, ¶ 11, 431 P.3d 670, 672 (courts "must be cognizant that court invalidation of a contract provision infringes on the 'essential freedoms of … the right to bargain and contract.'" (quoting *Superior Oil Co. v. W. Slope Gas Co.*, 549 F. Supp. 463, 468 (D. Colo. 1982), *aff'd*, 758 F.2d 500 (10th Cir. 1985))). The Colorado Supreme Court has also rejected numerous other challenges to the enforcement of arbitration agreements under the CUAA. *See, e.g.*, *State Farm Mutual Automobile Insurance Co. v. Broadnax*, 827 P.2d 531,

535-37 (Colo. 1992) (rejecting constitutional challenges to a statute requiring binding arbitration in disputes involving personal injury protection benefits). This challenge would fare no better.

Plaintiffs cite no Colorado authority that would authorize overriding the strong public policy in favor of arbitration. Nor, for that matter, do the cited out-of-jurisdiction cases—which obviously give no basis to displace Colorado's strong pro-arbitration policy—adopt per se prohibitions on class waivers. They instead invalidated class waivers only when plaintiffs made certain factual showings.[4] *See, e.g.*, *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1097 (9th Cir. 2009) ("we do not hold [under Oregon law] that all class action waivers are necessarily unconscionable"); *Jones v. DirecTV, Inc.*, 381 F. App'x 895, 896 (11th Cir. 2010) (Georgia looks to the fairness of the provisions, the cost of individual arbitration in comparison to the potential recovery, the likelihood that attorney's fees and expenses could be recovered, the power the waiver gave the company to engage in unchecked market behavior, and related public policy concerns); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59 (1st Cir. 2007) (determining under Massachusetts law the "waiver clause, under these circumstances, is unenforceable under state law. We do not need to reach the question of whether the waiver's purpose and effect is independently objectionable"). Even if this Court were inclined to adopt a similar rule, Plaintiffs have not made any of the evidentiary showings necessary under other states' tests to show that in these circumstances a class action waiver would be unenforceable.

III. Amazon is entitled to enforce the arbitration agreements.

Plaintiffs provide no basis to conclude that Amazon cannot enforce Plaintiffs' arbitration agreements with the DSPs. By Plaintiffs' own allegations and arguments, as well as the terms of

[4] In *Pace v. Hamilton Cove* the issue was that the class waiver was uncoupled from an arbitration agreement, not that a class waiver in an arbitration agreement is unconscionable. 295 A.3d 1251, 1256 (N.J. App. Div. 2023), *leave to appeal granted*, 301 A.3d 388 (2023).

the arbitration agreements, either Amazon is a client of the DSPs or the DSPs are Amazon's agents. There is no need to go on a fishing expedition for discovery to answer these questions.

First, Amazon is clearly a "client" within the meaning of the arbitration agreements. Plaintiffs themselves plead that the "Delivery Service Partners ("DSPs") … contract directly with Amazon" and that "Amazon's contracts with each DSP dictate that the DSP must meet certain delivery quotas for the company." Dkt. 24, ¶¶ 4, 6; *id.*, ¶¶ 4-7; *see also Saghian v. Shemuelian,* 835 F. App'x 351, 353 (10th Cir. 2020) (pleadings are binding admissions on party and any seemingly contrary post-pleading evidence cannot be used to create disputed facts). The declarations from the DSPs (Plaintiffs do not submit any evidence that would create a disputed fact as to these attestations), expressly establish that Amazon is a client of the DSPs. Svanstrom Decl., ¶ 2 ("PODI is a delivery service … that makes local-only deliveries in Colorado for its clients. One of PODI's clients in Amazon Logistics, Inc."); Baugh Decl., ¶ 2 (same); Ferguson Decl., ¶2 (same); Everitt Decl., ¶ 2 (same); Boyd Decl., ¶ 2 (same); Elliott Decl., ¶ 2 (same); *see also* Calloway Decl., ¶ 2 (DSP "provided local delivery services to Amazon Logistics, Inc."); Cantwell-Badyna Decl., ¶ 3 ("Amazon contracts with DSPs [who employed Plaintiffs] to provide local delivery services."). Although the arbitration agreement does not define the term "client," the relationship between the DSPs and Amazon falls squarely within the dictionary definition of client. *See* CLIENT, Black's Law Dictionary (11th ed. 2019) ("A person or entity that employs a professional for advice or help in that professional's line of work[.]"). Unlike in *Fundamental Admin. Servs., LLC v. Patton*, 504 F. App'x 694, 699 (10th Cir. 2012), the evidence—and Plaintiff's own pleadings—establishes that Amazon falls within the contractual term at issue. Amazon contracted with local delivery services providers to provide delivery services. That makes Amazon a "client" and thus an intended third-party beneficiary of the agreement. *See* Mot. 13-14.

Next, Plaintiffs assert—inconsistently—both that Amazon exercises too much control over the DSPs to be a mere client and yet somehow not enough control for the DSPs to be Amazon's agent. It is one or the other. Amazon maintains its relationship with the DSPs is that of a client. But Plaintiffs' own pleadings and allegations characterize the relationship as one of agency and control by Amazon. Plaintiffs plead that "DSPs effectively serve as Amazon's agents to facilitate deliveries." Dkt. No. 24, ¶ 7; *see also id.* (alleging "Amazon's control over nearly every aspect of [the DSPs'] business"). Plaintiffs' brief also argues that "the DSPs entered into 'contracts of employment' with Plaintiffs." Dkt. No. 38 at 2. But if the DSPs have the employment relationship with Plaintiffs, Amazon cannot be a joint employer of Plaintiff—as they allege—without the DSPs being Amazon's agent. *Cf. Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1260 (10th Cir. 2020) (holding "absent an agency relationship" there could not be "liab[ility] as a joint employer"). Plaintiffs also allege that the DSP drivers are hired only after the "applicant's information is received and reviewed by Amazon." Dkt. No. 24, ¶ 32. The terms of Plaintiffs' own allegations and arguments suffice to establish that the DSPs were authorized to or were acting on Amazon's behalf in entering into the arbitration agreements.[5]

Thus, the uncontested evidence and pleadings establish that either Amazon was a client and third-party beneficiary, or the DSPs were acting as Amazon's agent when entering into the arbitration agreements. Either way, Amazon can enforce the agreements.

V. Conclusion

For all these reasons, this Court should compel Plaintiffs' claims to arbitration on an individual basis, dismiss their class claims, and dismiss this action.

[5] Amazon does not concede that the DSPs acted as its agents. But Plaintiffs cannot prevail on this Motion through arguments that are inconsistent with their own pleadings. Nor is discovery appropriate just because Plaintiffs wish to avoid the legal implications of their prior allegations.

Dated: December 22, 2023

Respectfully submitted,

/s/ Jennifer S. Harpole

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CERTIFICATE OF SERVICE

I hereby certify that a copy of **Defendants Amazon.Com, Inc. and Amazon Logistics, Inc.'s Reply in Support of Motion to Compel Arbitration and Dismiss or Stay Claims Pending Arbitration** was electronically filed with the Clerk of the Court using the Court's CM/ECF electronic filing system this 22nd day of December, 2023, which will provide notice of service upon:

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