IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

HARRY SWALES, COREY LILLY, KYLE SHETTLES, and JOHN MCGEE on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **KLLM TRANSPORT SERVICES, LLC, and DOES 1-25** **Defendants.**	**Civil Action No.: 3:17-cv-490 CWR-LRA** **PLAINTIFF COREY LILLY'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Corey Lilly ("Lilly"), by and through his undersigned counsel, hereby submits this memorandum in response and opposition to Defendant KLLM Transport Services, LLC's ("Defendant") Motion for Partial Summary Judgment on Claim of Plaintiff Corey Lilly for Collective and Class Certification.

I. INTRODUCTION

Plaintiffs bring this action to recover minimum wages that they, and other persons misclassified as independent contractors by Defendant, are entitled to under the Fair Labor Standards Act ("FLSA").

By its motion for partial summary judgment, Defendant attempts to have this Court prevent Lilly—only one of the four Plaintiffs making identical collective allegations in this case—from asserting a collective action claim. Defendant further requests this Court stay the matter, effectively prohibiting the other three Plaintiffs from moving forward on their individual and collective claims, which are presently unchallenged.

Defendant presents a pure question of law for this Court's consideration: whether the language of the contract presented by Defendant unambiguously precludes Lilly from bringing a *collective action* under Section 16(b) of the FLSA. The exact language Defendant relies on as the basis for its motion reads: "You agree that you may not bring a *class action* suit on behalf of others under this Agreement in any court or in Arbitration." *See* Exh. to Def.'s Mtn. for Partl. Summ. J. at 15 (emphasis added). Nonetheless, throughout its brief, Defendant contends Lilly has filed both a "class action" and a "collective action." In an attempt to render its own contract language applicable to the present case, it wholly invents a Rule 23 claim where none exists. The plain meaning of the clause precludes Lilly from bringing a class action. ***It does not preclude him from bringing a collective***.[1]

This Court should deny Defendant's motion for one simple reason: a collective suit filed under the Fair Labor Standards Act is distinct from a class action filed under Rule 23. Plaintiffs here have filed a *collective suit*. The language of the "Independent Contractor Agreement" presented by Defendant purports to prohibit only a *class action*. As such, Lilly is not precluded from bringing suit as a collective.

Defendant's motion for summary judgment should be denied because it cannot demonstrate, as a matter of law, that Lilly's employment contract precludes him from bringing a collective action under the FLSA. If the Court finds the contract language ambiguous, then there is—at the very least—a genuine issue of material fact that can only be addressed after additional discovery.

[1] Defendant notes it is not moving to compel arbitration under the FAA, a motion that regularly evokes a class action waiver as it would here. Defendant wisely declined to go down this path. Numerous courts have found terms of truck drivers' employment contracts—including those found in independent contractor agreements like Lilly's—are exempt from the FAA. 9 U.S.C. § 1; *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017); *Doe v. Swift Transportation Co., Inc.*, 2017 U.S. Dist. LEXIS 2410 (D. Ariz. 2017).

For all of the above reasons, and for all other reasons detailed below, Plaintiff respectfully requests the Court deny Defendant's motion in its entirety.

II. LEGAL STANDARD

Summary judgment is not appropriate where there exists a genuine issue as to any material fact. *Walker v. Wal-Mart Stores*, 27 F. Supp. 2d 699 (S.D. Miss. 1998), *citing Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir. 1980). It is only where a Court determines that a contract is unambiguous that it should find no issue of material fact and grant a motion for summary judgment. *See United States v. 4500 Audek Model No. 5601 AM/FM Clock Radios*, 220 F.3d 539, 542 (7th Cir. 2000); *Duse v. IBM*, 252 F.3d 151, 158 (2d Cir. 2001). The burden is on the party seeking summary judgment to show that there is no genuine issue of material fact, and the party opposing the motion must be given the benefit of all reasonable doubt when determining whether a genuine factual issue exists. *Alabama Farm Bureau Mut. Casualty Co. v. American Fidelity Life Ins. Co.*, 606 F.2d 602, 609 (5th Cir. 1979). In considering a summary judgment motion, the inferences most favorable to the party opposing the motion will be drawn, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id.*; *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210, 216 (5th Cir. 1976). Further, Rule of Civil Procedure 56 mandates the entry of summary judgment only after adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use." *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967).

III. ARGUMENT

A. A Class Action is Inherently Different From a Collective Suit.

Throughout its brief, including in the title, Defendant repeatedly asserts that Lilly seeks certification of a Rule 23 class action *and* certification of a collective. *See generally*, Def.'s Mtn. Part'l Summ. J. For example, Defendant claims outright on the second page of its brief that Plaintiff "asserts a claim for Collective and Class Certification" and cites to specific paragraphs of Plaintiff's complaint as support. Def.'s Mtn. Part'l Summ. J. at 2. Plaintiff has done no such thing. Lilly only seeks certification of a *collective* action.

Despite their semantic similarities, Rule 23 class actions are "fundamentally different" from collective actions brought under the FLSA. *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013). The Fifth Circuit has long held there is a fundamental and irreconcilable difference between class actions prescribed by Rule 23 and the collective actions provided for by the FLSA. *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 (5th Cir. 1975). For example:

- A Rule 23 class action is a "truly representative suit" in which a named plaintiff "represents" the interests of all potential class members upon filing of a lawsuit. A collective action under the FLSA is not a representative action and the named plaintiff has no such representative status. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551 (1974).
- A Rule 23 class action automatically covers all employees found to be similarly situated unless they opt out of the suit. A collective action under the FLSA requires each employee to affirmatively *opt in* to the action, consenting to become a party plaintiff when his or her paperwork is filed with the court. *See Halle v. W. Penn Allegheny Health Sys.*, 842 F.3d 215, 223 (3d Cir. 2016) (explaining collective

actions, unlike class actions, are not automatic as each employee must opt-in affirmatively in order to participate in class actions); *see also Cameron-Grant v. Maxim Healthcare Svcs. Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("[i]t is not surprising that [collective actions are] a fundamentally different creature than the Rule 23 class action").

- The statute of limitations in Rule 23 class actions is automatically tolled for all members of the class as subsequently determined as of the date of the filing of the complaint. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 550 (1974). In FLSA collective actions, because named plaintiffs never actually represent members of a class, any statutes of limitations are not tolled until each individual actually opts in to the lawsuit. 29 U.S.C. § 256.

All plaintiffs in this matter, including Lilly, allege claims under the FLSA. *See* First Amended Complaint ("FAC") at 17. They each make collective allegations, and seek only to provide similarly situated individuals with notice of the suit and an opportunity to join pursuant to Section 16(b) of the FLSA. *See* FAC at 3. They do not seek to certify a class under Rule 23.[2]

B. Plaintiff has Not Waived His Right to Bring a Collective Action.

In construing contracts under Mississippi law, the court must focus, first and foremost, upon the language of the contract. *New Orleans Glass Co. v. Roy Anderson Corp.*, 632 Fed. Appx. 166, 169 (5th Cir. 2015). Mississippi relies on a three-tiered approach to contract interpretation, focusing on the actual words of the contract "to the exclusion of parol or extrinsic evidence." *Id.*

[2] For ease of comprehension, Plaintiffs used the defined term "the Class" in their First Amended Complaint to refer to all persons in the United States who entered into Independent Contractor Agreements and Tractor Lease/Purchase Agreements with KLLM at any time during the period from three years prior to the filing of the complaint to the present. *See* FAC at 1-2. Plaintiffs do not however seek to represent a class under Rule 23. *See* FAC at 17.

> [The Court] must look to the "four corners" of the contract whenever possible to determine how to interpret it. . . [The Court's] concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy. Thus, the courts are not at liberty to infer intent contrary to that emanating from the text at issue.

Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc., 857 So. 2d 748, 752-753 (Miss. 2003).

If the parties' intent is not discernable from the text the court should apply the meaning most favorable to the non-drafting party. *Id.* Although the Court may go beyond the text to consider extrinsic or parol evidence where the parties' intent remains ambiguous, the mere fact that the parties disagree about the meaning of a contract does not in itself make the contract ambiguous as a matter of law. *Id.* Mississippi courts refuse to "rewrite or deem a contract ambiguous where the language is clear and indicative of its contents." *A&F Props., LLC v. Madison County Bd. Of Supervisors*, 933 So. 2d 296, 301 (Miss. 2006). Parol evidence is not admissible to add to, subtract from, vary, or contradict contracts that are otherwise valid and complete. *Taylor v. C. I. T. Corp.*, 187 Miss. 581, 589 (Miss. 1939).

In all 41 pages of the "Independent Contractor Agreement" presented by Defendant, only one sentence implies any intent of the parties to the contract to waive the right to bring a *class* action: "You agree that you may not bring a class action suit on behalf of others under this Agreement in any court or in Arbitration." *See* Exhibit to Def.'s Mtn. for Partl. Summ. J. at 15. Nowhere within the four corners of the contract do the parties demonstrate any intent or agreement for Lilly to waive his right to bring a *collective* action under the FLSA. The plain meaning of the parties is clear, and this Court should not read into the contract an item that was not intended to be agreed upon at the time of formation.

Plaintiff's research has failed to show a case in which the right to bring a collective action was found waived where the language of the contract specified only a waiver of the right to bring

a class action. The cases upon which Defendant relies involve contract clauses by which a Plaintiff waived his or her right to ***both*** a class and either a collective action or an action brought on behalf of a group of persons. *See for example* Def.'s Mtn. Part'l Summ. J. at 5, *citing Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017) (Plaintiff waives his right to "lead, join, or serve as a member of a class or group of persons"); *see also* Def.'s Mtn. Part'l Summ. J. at 6, *citing LogistiCare Sols., Inc. v. NLRB,* 866 F.3d 715 (5th Cir. 2017) (Plaintiff waives his right to "participate as a member of a Class or Collective action lawsuit"). Here, though Lilly appears to have waived his right to bring a class action under Rule 23, he has not waived his right to bring a collective action under the FLSA.[3]

Moreover, even if Lilly waived his right to "bring" a class action, he has not waived his right to "participate" in one. It follows that should this court find Lilly waived his right to "bring" a collective action, he can still participate in this one by filing a consent form with the Court. 29 U.S.C. 216(b).[4] Thus, as a practical matter, Lilly will be able to participate in this action regardless of how the Court decides this motion.

At the very least, standards of contract interpretation give rise to a genuine issue of material fact as to whether Defendant and Lilly actually agreed to a waiver which covered both class and collective actions. Accordingly Defendant's motion for partial summary judgment should be denied.

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[3] The cases are replete with language Defendant could have used if it intended Plaintiff to waive his right to an FLSA collective action. *See, e.g. Venable v. Schlumberger Ltd.*, 2017 U.S. Dist. LEXIS 104510, *6 (W.D. La. June 5, 2017) (a plaintiff was found to waive his right to both class and collective actions where the contract language stated plaintiff "waives participation… *in any class or collective action*, as either a class or collective action representative or participant as to those claims not released, by signing the Agreement prior to the conditional certification of a class or collective action")(emphasis added); *Serrano v. Globe Energy Serv., LLC*, 2016 U.S. Dist. LEXIS 188027, *8-9 (W.D. Tex. Mar. 3, 2016) (plaintiff was found to have waived his right to both class and collective actions where the applicable contract stated "[e]ach employee and [Defendant]… agree to litigate any dispute between them arising out of or in any way related to the employment relationship… individually, and neither party will seek to consolidate or *obtain class, collective,* or representative treatment of any claim, whether consolidated as a *representative action, class action, or collective action*, unless previously agreed to in writing by the parties") (emphasis added).

[4] In fact, Lilly filed his consent form with the Court on August 2, 2017.

C. A Stay of Discovery and Conditional Certification Would Only Cause Unnecessary Delay.

"A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). Even if Defendant prevails on the presently pending motion, neither this case nor any of the claims at issue will be disposed of, since the additional three named plaintiffs' collective allegations remain unchallenged. If Defendant prevails on its motion, all four Plaintiffs will still need to conduct discovery regarding the employment policies that pertained directly to them, and the remaining Plaintiffs will still need to conduct discovery regarding employment policies which pertain to all individuals who opt in to the lawsuit pursuant to Section 16(b). Thus, no irreparable harm can come to Defendant should Plaintiffs be permitted to proceed with discovery while this motion is pending before the Court.

Potential collective members cannot be notified of their rights until Plaintiffs are granted conditional certification. Plaintiffs do not intend to seek conditional certification prior to conducting limited discovery regarding Defendant's policies and practices. While this Court certainly has the authority to stay discovery pending resolution of Defendant's motion, such a stay would have no practical effect on this case except to cause unnecessary delay, allow the statutory period for similarly situated individuals to run, and decrease efficiency in litigation. Accordingly Plaintiff respectfully requests Defendant's application for a stay be denied.

D. CONCLUSION

Defendant cannot demonstrate that by signing his employment contract Lilly unambiguously agreed to waive his right to bring a collective action under the FLSA. In fact, under the plain meaning of the contract, Lilly only agreed to waive his right to bring a class action. Lilly has not plead class allegations in this matter. For the aforementioned reasons, and

because genuine issues of material fact exist as to the interpretation, Plaintiff requests this Court deny Defendant's motion in its entirety.

Respectfully Submitted,

Dated: September 14, 2017

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**pro hac vice* admission anticipated

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2017, I caused an electronic copy of the above and foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served on all interested parties by filing it with the Court's Electronic Case Filing System.

/s/ Danielle L. Perry
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