Case Nos. 18-6270/19-5410

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARVION TAYLOR, ON HER OWN BEHALF
AND OTHERS SIMILARLY SITUATED,

Plaintiffs – Appellees

v.

PILOT CORPORATION, A TENNESSEE CORPORATION; PILOT TRAVEL CENTERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Defendants – Appellants

and

XYZ ENTITIES 1-10, fictitious names of unknown liable entities,

Defendant

On Appeal from the United States District Court
for the Western District of Tennessee (Case No. 14-cv-2294)
The Honorable Sheryl H. Lipman

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-6270/19-5410 Case Name: TAYLOR v. PILOT CORPORATION

Name of counsel: Adam W. Hansen

Pursuant to 6th Cir. R. 26.1, Arvion Taylor and Opt-In Plaintiffs
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 6, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Adam W. Hansen

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. This Court lacks jurisdiction to hear an appeal challenging an interlocutory order denying a motion to reconsider a discovery order. The record below is undisputed, and oral argument is not necessary to conclude that such an order falls outside the Federal Arbitration Act's narrow grant of appellate jurisdiction for orders denying motions to compel arbitration. Similarly, none of the merits issues raised by appellants warrant oral argument. The plain language of the Federal Arbitration Act, Supreme Court precedent, and decisions from numerous courts of appeals all support the district court's authority and broad discretion to compel discovery related to the existence of arbitration agreements.

STATEMENT OF JURISDICTION

As set forth in detail below, this Court lacks jurisdiction over this appeal. The two non-final orders appellants seek to challenge—one denying a motion to reconsider an order compelling discovery, the other denying without prejudice all pending motions while this appeal proceeds—do no fall within the Federal Arbitration Act's narrow grant of jurisdiction to hear appeals from orders denying motions to compel arbitration. *See* 9 U.S.C. § 16.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This appeal represents an employer's second misplaced attempt to manufacture appellate jurisdiction over a district court's nonappealable interlocutory orders.

In the first appeal in this case, *Taylor v. Pilot Corp.*, 697 F. App'x 854 (6th Cir. 2017), appellants Pilot Corporation, Pilot Travel Centers, LLC, and XYZ Entities 1-10 (collectively "Pilot") challenged the district court's decision to certify the case as a collective action under the Fair Labor Standards Act and send notice to similarly situated employees. *Id.* at 859. Pilot claimed that the existence of employees in the notice group whose claims were (allegedly) subject to arbitration agreements rendered the district court's certification order appealable under the Federal

Arbitration Act's narrow grant of interlocutory review, 9 U.S.C. § 16(a)(1). *Id.* This Court dismissed Pilot's appeal, reaffirming that the Federal Arbitration Act does not operate as "a smuggling route [to appeal] otherwise non-appealable issues." *Id.*

Pilot has not heeded this Court's lesson. In this second appeal, Pilot once again attempts to use the Federal Arbitration Act as a smuggling route to review two nonappealable orders.

Following Pilot's first appeal, over 5,000 similarly situated employees joined the action. Pilot filed a motion to compel arbitration. On Plaintiffs' motion, the district court, faced with a dispute over whether Plaintiffs agreed to arbitrate in the first place, ordered Pilot to produce Plaintiffs' dates of employment. As the district court recognized, because Pilot implemented its arbitration program on a handful of specific dates, Plaintiffs' dates of employment are highly relevant to the question of whether Plaintiffs agreed to arbitration. Pilot sought reconsideration, arguing for the first time that the question of contract formation was for an arbitrator—not the court—to decide. The district court denied Pilot's motion to reconsider, and Pilot appealed that decision. The district court then entered orders denying all pending

motions without prejudice—including Pilot's motion to compel arbitration—while Pilot's appeal proceeded before this Court. Pilot appealed that order as well.

Pilot's instant appeal fails, for three fundamental reasons.

First, as in Pilot's first appeal, this Court does not have jurisdiction to confront the issues Pilot seeks to appeal. The district court never "den[ied] a petition under section 4 of [the Federal Arbitration Act] to order arbitration to proceed." 9 U.S.C. § 16(a)(1)(B). The district court simply ordered discovery related to Pilot's motion to compel arbitration—a step explicitly contemplated by the Federal Arbitration Act when "the making of the agreement for arbitration . . . is . . . in issue," 9 U.S.C. § 4—and denied reconsideration of that order. These discovery orders are not appealable. The same is true of the district court's ministerial orders clearing its docket while this appeal proceeds. The district court has not yet ruled on Pilot's motion to compel arbitration; until that happens, any appeal invoking 9 U.S.C. § 16(a)(1)(B) is premature.

Second, even assuming this Court has jurisdiction to review something, the issues Pilot seeks to raise here lie well outside the scope of this Court's appellate jurisdiction. This Court has, at most, jurisdiction

to review what the district court actually decided: whether any abuse of discretion occurred in (1) denying reconsideration of a prior discovery order where the grounds for reconsideration were not raised initially, and (2) denying all pending motions without prejudice while this appeal proceeds. Pilot, however, asks this Court for much more. It principally asks this Court to compel Plaintiffs to arbitration—an extraordinary request in light of the fact that Plaintiffs have yet to respond to Pilot's motion and the district court has not yet ruled on the motion. Pilot also seeks to raise a host of unrelated issues, including standing, venue, and compliance with the Rules Enabling Act. These issues extend far beyond the narrow arbitration-related questions the district court actually resolved. Any appellate jurisdiction that exists in this case cannot operate as a "smuggling route" to review the issues Pilot would have this Court address. *Taylor*, 697 F. App'x at 859.

Third, Pilot's arguments fail on the merits. Pilot forfeited its delegation argument by failing to raise it until its motion for reconsideration. And on the substance, Pilot's central contention—that its arbitration clauses delegate authority to an arbitrator to decide whether an agreement to arbitrate exists—is wrong. While parties may

assign certain threshold questions to an arbitrator, the scope of that assignment "turns upon what the parties agreed about *that* matter." *First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Relying on Sixth Circuit and Supreme Court precedent, the district court properly rejected Pilot's Orwellian position that parties who dispute whether they agreed to arbitrate must be sent to arbitration to determine whether they agreed to arbitrate. Arbitration agreements remain "strictly 'a matter of consent.'" *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (citation omitted). Courts, therefore—not arbitrators—must determine whether parties agreed to arbitrate; and the Federal Arbitration Act contemplates court-supervised discovery and trial on that question. 9 U.S.C. § 4.

This case vividly illustrates the dangers of "repeated interlocutory appeals," which frequently cause "harassment and delay" and undermine "the efficient administration of justice." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Pilot has every right to enforce any valid arbitration agreements it may have. The district court established a fair and orderly process to adjudicate Pilot's motion to compel arbitration. And if the district court eventually denies Pilot's motion to compel

arbitration on the merits, Pilot's right to appeal will be unassailable. But Pilot's repeated attempts to appeal the district court's preliminary certification, notice, discovery, and case management orders only serve to "harass[]," "delay" and frustrate "the efficient administration of justice." *Id.* This case is now over five years old. And because of Pilot's serial appeals, Plaintiffs remain no closer to resolving the merits of their claims for unpaid overtime than they were when this case was filed.

This Court should promptly dismiss this appeal for lack of appellate jurisdiction. To the extent this Court exercises jurisdiction, the district court's discovery and case management orders should be affirmed.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction over any part of this appeal.

2. Whether appellants waived their delegation-clause arguments on appeal by failing to raise them until a motion to reconsider.

3. Whether the district court abused its discretion in denying appellants' motion to reconsider its order granting Plaintiffs' motion to compel production of employment dates.

STATEMENT OF THE CASE

I. EARLY STAGES OF THE CASE AND CONDITIONAL CERTIFICATION OF THE FLSA COLLECTIVE.

A. Plaintiff Taylor Files This Case Alleging a Pattern and Practice of Unpaid Overtime; Eight Additional Plaintiffs Join the Case.

On April 24, 2014, Plaintiff Arvion Taylor filed this action alleging that her employer failed to pay her and other similarly situated employees overtime wages in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). Complaint, R.1. Taylor's complaint maintained that appellants Pilot Corporation, Pilot Travel Centers, LLC, and XYZ Entities 1-10 (collectively "Pilot") engaged in a pattern and practice of requiring nonexempt hourly workers to perform overtime work off the clock—including working before and after scheduled shifts and during scheduled breaks. Complaint, R.1, PageID.4-6. In its answer, Pilot alleged that the claims asserted were covered by an arbitration agreement "in whole or in part." Answer, R.39, PageID.177.

In the first year of the case, eight additional Pilot employees filed written consent forms with the district court, joining the case as opt-in Plaintiffs. Notices of Consent to Join, R.19, 23, 24, 28, 40, 42; *see generally* 29 U.S.C. § 216(b) (unlike in a Rule 23 class action, in FLSA cases an

individual must "file[] in the court" a "consent in writing" in order to be deemed a "party plaintiff").

B. The District Court Grants Plaintiffs' Motion to Certify a Collective Action and Send Notice to Other Similarly Situated Employees.

In March 2015, Taylor filed a motion seeking conditional certification of a collective action covering all similarly situated hourly Pilot employees and asking the court to authorize notice to those employees. Motion for Conditional Certification, R.53. *See generally Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-47 (6th Cir. 2006) (setting forth the standards for granting conditional certification and notice in FLSA cases). The district court, finding that Plaintiffs had alleged a consistent pattern of off-the-clock work, granted the motion and certified a nationwide FLSA collective covering three positions at Pilot: Cashiers, Team Leaders, and Shift Leaders (the "FLSA Collective"). Order Granting Conditional Certification, R.71.

C. The District Court Denies Pilot's Belated Motion to Exclude from the Collective Action Employees Who Pilot Claimed Had Agreed to Arbitration.

Nearly six months later, Pilot sought reconsideration of the district court's order certifying the FLSA Collective. November 25, 2016 Motion,

R.84. For the first time, Pilot asked the district court to eliminate from the FLSA Collective and omit from the notice plan any employees who had, according to Pilot, agreed to arbitrate the FLSA claims raised in this case. November 25, 2016 Memo, R.84-15, PageID.878, 882-83. The motion alternatively asked the district court to stay the action until prospective plaintiffs who were subject to arbitration agreements arbitrated their claims to finality. *Id.*, PageID.883. Pilot made no claim that any of the nine Plaintiffs in the case at that time had agreed to arbitration. *Id.*, PageID.877. Effectively, Pilot was asking the district court to preclude *potential future Plaintiffs* from joining the action based on Pilot's bare representation that those individuals' claims were subject to arbitration.

The district court refused to depart from its earlier order, rejecting Pilot's "argument that [it] could not have known whether potential plaintiffs would be subject to arbitration before conditional certification." Order Denying Reconsideration, R.95, PageID.1525. But the district court also addressed the substantive flaws in Pilot's request, noting that "[a]t this stage, the Court cannot issue a blanket determination, without more facts, that the arbitration agreements are enforceable against all

potential plaintiffs who may have signed them." *Id.*, PageID.1527. The district court correctly observed that "[t]here may be other gateway issues concerning enforceability or applicability of the agreements that some potential plaintiffs, once brought into the lawsuit, may assert as a defense to arbitration." *Id.* The district court refused to "deny them the opportunity to assert those arguments." *Id.*

II. THIS COURT REJECTS PILOT'S ATTEMPT TO BRING AN INTERLOCUTORY APPEAL.

Pilot lodged an appeal from the order denying its motion for reconsideration. *See Taylor v. Pilot Corp.*, No. 16-5326 (6th Cir.).

On June 19, 2017, this Court dismissed the appeal in substantial part and affirmed the district court's order to the extent it denied Pilot's motion to stay the case pending arbitration. *Taylor*, 697 F. App'x at 854.

This Court agreed that it lacked appellate jurisdiction over the majority of Pilot's appeal. *Id.* at 858-62. Pilot principally asked this Court to reverse the district court's decision conditionally certifying the collective action and directing notice to similarly situated employees. *Id.* at 858. Such an order, this Court recognized, is not a final decision within the meaning of 28 U.S.C. § 1291. *Id.* The Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(a)(1)(A), does permit interlocutory appeals from orders

"refusing to stay any action under section 3" of the FAA. But that provision, this Court recognized, could "only take Pilot so far." *Taylor*, 697 F. App'x at 859. While this Court permitted Pilot to "appeal the denial of its stay request," the Court held Pilot "cannot use the denial as a smuggling route for otherwise non-appealable issues"—namely, the district court's order granting conditional certification and notice. *Id.*

The FAA also authorizes interlocutory appeals from orders "denying a petition under section 4 of [the FAA] to order arbitration to proceed." 9 U.S.C. § 16(a)(1)(B). But this provision also did not help Pilot. *Taylor*, 697 F. App'x at 860. As this Court explained,

> Pilot never filed a petition to compel arbitration under section 4. Nor would it have reason to do so. No party to this litigation has agreed to arbitrate with Pilot. And Pilot points to no one else with a written arbitration agreement who has so far failed, neglected, or refused to arbitrate. Hence, Pilot can cite no order denying a petition under section 4 to appeal from.

Id. at 860-61.

On that discrete point over which it had jurisdiction—Pilot's request to stay the case pending arbitration—this Court affirmed the district court, holding that until any individuals covered by an alleged arbitration agreement joined the action, "Pilot lack[ed] any entitlement to a stay under the FAA." *Id.*

III. POST-APPEAL PROCEEDINGS: DISTRIBUTION OF NOTICE, PARTIAL SETTLEMENT, AND PLAINTIFFS' MOTION TO COMPEL DISCOVERY.

A. The District Court Convenes a Status Conference and Identifies Dates of Employment as Evidence Relevant to Pilot's Anticipated Motion To Compel Arbitration.

Following Pilot's unsuccessful appeal, the district court held a status conference, during which Plaintiffs' counsel raised the issue of equitable tolling given the long delay between the order conditionally certifying the class and the issuance of notice—a delay caused by Pilot's unsuccessful appeal and serial motions.[1] Transcript of March 9, 2019 Status Conference, R.144, PageID.2228-29. (Under the FLSA, absent equitable tolling, the statute of limitations for would-be opt-in plaintiffs continues to run until they join the action via written consent. *See* 29 U.S.C. § 256(b); *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988) (standard for equitable tolling).)

The district court, also aware that a motion to compel arbitration was likely forthcoming, anticipated that the parties would engage in "a

[1] After its unsuccessful appeal but before the status conference, Pilot filed yet another motion relating to its objections to conditional certification and notice to the collective. Motion to Sustain Objections, R.123. The Court denied that motion. Order Denying Motion to Sustain Objections, R.134.

little bit of discovery" with respect to "those issues . . . related to equitable tolling and related to arbitration." Transcript of Status Conference, R.144, PageID.2229. The district court identified "plaintiffs [receiving] from the defendants exactly what . . . time a particular employee was employed" as one type of evidence relevant to both issues. *Id.* This information was relevant to the arbitration issue because Pilot's own affidavits indicated it did not integrate arbitration agreements into its new employee on-boarding procedures until March 2012, at the earliest. Phillips Declaration, R.84-4, PageID.819-20; Beuchat Declaration, R.84-5, PageID.827-28.

B. Notice Is Sent to Members of the FLSA Collective.

Following the status conference—and more than two years after the district court had granted conditional certification—notice issued to the members of the FLSA Collective. Notice of Distribution, R.141. About five thousand one hundred forty-five additional current and former Pilot employees joined the action as opt-in Plaintiffs. Notices of Consent to Join, R.142 – R.143, R.145 – R.173.

C. In Accordance with the District Court's Direction, Plaintiffs' Counsel Seeks Dates of Employment from Pilot.

Before the close of the opt-in period, *see* Scheduling Order, R.137, PageID.1956, Plaintiffs' counsel asked Pilot's counsel when Pilot intended to produce the dates of employment for Plaintiffs. April 21, 2018 Email, R.174-2, PageID.7374; May 2018 Emails, R.174-3, PageID.7383. Pilot stated that it would not produce any dates of employment. May 2018 Emails, R.174-3, PageID.7377. So, on June 12, 2018, after the opt-in period had closed, Plaintiffs filed a motion to compel the production of all opt-in Plaintiffs' dates of employment. Motion to Compel Dates of Employment, R.174. Plaintiffs requested this information to "help evidence who may or may not be subject to any arbitration agreement." *Id.*, PageID.7337.

D. The Parties Reach a Partial Settlement.

The week after Plaintiffs filed the motion to compel production of employment dates, the parties mediated and reached a partial settlement. Motion for Settlement Approval, R.184, PageID.7418. The settlement covered a subset of Plaintiffs, included Taylor, that Pilot conceded had not signed any agreement to arbitrate. Settlement

Agreement, R.184-1, PageID.7438, 7449-67. The settlement did not cover the approximately 3,944 Plaintiffs Pilot believed had agreed to arbitration. Settlement Agreement, R.184-1, PageID.7438.

E. Pilot Opposes Plaintiffs' Request for Dates of Employment but Does Not Argue that Such Discovery Matters Are Delegated to an Arbitrator to Decide.

On July 12, 2018, Pilot filed a response to Plaintiffs' motion to compel employment dates. Response to Motion to Compel, R.180. In its response, Pilot made two—and only two—arguments: first, that the partial settlement mooted Plaintiffs' arguments in support of the motion to compel discovery; and second, that the remaining Plaintiffs in the action "are not subject to discovery in this litigation" because the claimed arbitration agreements "deprive[d]" the district court "of subject matter jurisdiction." *Id.*, PageID.7402-05. Pilot never argued that the claimed arbitration agreements delegated responsibility to an arbitrator—rather than the court—to decide Plaintiffs' motion to compel discovery. *Id.*

In a July 13 status conference, the district court asked Plaintiffs' counsel if he needed employment dates in order to brief the anticipated arbitration issues. Transcript of July 13, 2018 Status Conference, R.187, PageID.7566. Plaintiffs' counsel indicated that the answer to that

question "depend[ed] on what the company ultimately files." *Id.*, PageID.7566-67. The district court therefore left open its ruling on the motion to compel employment dates. *Id.*, PageID.7574.

IV. PILOT FILES A MOTION TO COMPEL ARBITRATION; THE DISTRICT COURT ORDERS PILOT TO PRODUCE DATES OF EMPLOYMENT AND DENIES PILOT'S MOTION TO RECONSIDER THAT DISCOVERY ORDER.

A. Pilot Files a Motion to Compel Arbitration.

A month later, on August 13, 2018, Pilot filed a motion to compel all remaining Plaintiffs to arbitration. Arbitration Motion, R.185, PageID.7471. Pilot asserted that the remaining Plaintiffs (those not covered by the partial settlement) had signed one of two arbitration agreements: (1) a Texas Agreement that covered certain Texas employees who were hired on or after August 1, 2014; and (2) a National Agreement that covered all other employees who were hired on or after some date around March 2012. Memo in Support of Arbitration Motion, R.185-2, PageID.7537-38. The National Agreement requires "arbitration of all claims . . . arising out of, relating to or associated with [an] Employee's employment with" Pilot. National Agreement, R.84-2, PageID.807. The Texas Agreement requires employees to resolve "any legally recognized claim" through arbitration. Texas Agreement, R.84-3, PageID.813.

With respect to the National Agreement, Pilot stated that it "used an all-electronic, paperless system for 'on-boarding' new employees" and that new hires were required to "e-sign[]" the agreement, among other documents, before they could begin working. Memo in Support of Arbitration Motion, R.185-2, PageID.7537. With respect to the Texas Agreement, Pilot stated that a small portion of the FLSA Collective who were hired or employed in Texas on or after August 1, 2014 physically signed the agreement. *Id.*, PageID.7538.

In support of its arbitration motion, Pilot filed a spreadsheet listing the names of Plaintiffs Pilot claims signed arbitration agreements, the dates they allegedly signed, and the Bates numbers corresponding to their claimed arbitration agreements. Arbitration Spreadsheet, R.185-1. In its brief to the district court, Pilot stated that "[c]ounsel for the Parties conferred prior to the filing of this Motion and agreed that the Bates-number references establish the existence and production of the arbitration agreements and signature pages." Memo in Support of Arbitration Motion, R.185-2, PageID.7539-40. That statement is slightly misleading. Although Pilot did not make the actual communication memorializing this agreement part of the record, Plaintiffs' counsel

simply agreed that these documents exist, that Pilot produced them in discovery, and that filing the documents with the court was unnecessary. Plaintiffs' counsel never conceded, however, that the documents proved the existence of valid and enforceable agreements to arbitrate.

Both the National and Texas Agreements include a claimed "delegation clause"—a provision that attempts to delegate disputes related to the arbitration agreement itself to the arbitrator. The National Agreement provides that "the Arbitrator has exclusive authority to resolve any dispute relating to the applicability or enforceability of this Agreement." National Agreement, R.84-2, PageID.810. The Texas Agreement states:

> Any issue or dispute concerning the formation, applicability, interpretation, enforceability, validity, revocability, fairness, or extent, including but not limited to fraud, fraud in the inducement, unconscionability, misrepresentation, unfair bargaining power, duress, public policy, or general rules of equity, shall be subject to arbitration as provided herein.

Texas Agreement, R.84-3, PageID.818.

B. The District Court Grants Plaintiffs' Request for an Expedited Ruling on Plaintiffs' Motion to Compel Discovery.

On August 14, 2018—the day after Pilot filed its motion to compel arbitration—Plaintiffs filed a notice with the Court requesting an

expedited order on their pending motion to compel employment dates. Notice of Need for Order, R.186. Plaintiffs explained that "since the July 13, 2018 conference with the Court, Plaintiffs' Counsel has been contacted by several Purported Arbitration Opt-Ins who **deny** that they even were employed by Pilot on the date Pilot maintains they signed an arbitration agreement." *Id.*, PageID.7551-52.

Plaintiffs who were not actually employed at the time Pilot contended they signed an arbitration agreement "could not under any circumstances be compelled to arbitration" because they had not, in fact, agreed to arbitrate their claims. *Id.*, PageID.7552.

On August 20, 2018, the district court granted Plaintiffs' motion to compel employment dates. Order Granting Motion to Compel, R.190.[2] The district court concluded that, in light of the claim that some Plaintiffs were not even employed when Pilot alleges they signed agreements to arbitrate, "access to this information is . . . essential to Plaintiffs' ability to timely respond to Defendants' Motion." *Id.*, PageID.7580. The district

[2] The same day, the district court entered an order approving the parties' partial settlement. Settlement Approval Order, R.189.

court ordered Pilot to produce the dates of employment within two weeks. *Id.*

C. The District Court Denies Pilot's Motion to Reconsider the Court's Discovery Order Requiring Pilot to Turn Over Dates of Employment.

Pilot never produced the dates of employment as ordered by the court. Instead, on September 4, 2018—the deadline to produce the information—Pilot filed a motion for reconsideration of the district court's order granting the motion to compel employment dates. Motion to Reconsider Compel Order, R.193.

Pilot's motion for reconsideration asserted a host of new arguments. Memo on Motion to Reconsider, R.193-1, PageID.7592-7605. Specifically, for the first time, Pilot pointed to the purported delegation clauses in the claimed arbitration agreements and argued that "the issues raised in Plaintiffs' Motion are for an arbitrator to decide." *Id.*, PageID.7600. Pilot also asserted for the first time that the settlement of Taylor's claims meant there was no remaining live case or controversy under Article III. *Id.*, PageID.7598-99. Finally, Pilot asked the Court to certify four questions for interlocutory appeal. *Id.*, PageID.7603.

Plaintiffs opposed the motion for reconsideration. Plaintiffs' Response to Motion to Reconsider, R.196. Principally, Plaintiffs argued that Pilot had not met the rigorous standards governing motions to reconsider. *Id.*, PageID.7618-20. With respect to Pilot's newly-minted Article III arguments, Plaintiffs explained that the pending claims of thousands of opt-in Plaintiffs were sufficient to satisfy Article III's case or controversy requirement, and that Plaintiffs could simply substitute one of the remaining opt-ins as a named Plaintiff, if necessary. *Id.*, PageID.7622-23. Plaintiffs further argued that only a court could decide the question of whether the parties had agreed to arbitrate in the first instance. *Id.*, PageID.7623-24. Plaintiffs also directed a number of unconscionability challenges to the delegation clauses themselves, arguing that these questions must be addressed by a court as well. *Id.*, PageID.7625-26.

On November 19, 2018, the district court denied Pilot's motion to reconsider. Order Denying Motion to Reconsider, R.202. Addressing Pilot's delegation argument, the court held that, "[t]hough there is a strong federal policy in favor of arbitration, the Court determines whether the parties agreed to arbitrate in the first place." *Id.*,

PageID.7689. The Court succinctly explained that "Pilot's assertion that the arbitrator should determine whether Pilot must produce the employment dates is not logical." *Id.* Plaintiffs were seeking to determine "whether certain individuals *have even agreed* to arbitration," and, as the district court concluded, "that is exactly why the production of the dates of employment cannot, at this point, be within the purview of the arbitrator." *Id.*, PageID.7689-90.

The district court's statements, read in context, do not express any hostility to arbitration or unwillingness to cede authority to the arbitrator, if appropriate:

> The Court respects the arbitration agreement entered into by certain Plaintiffs when they began their work with Defendants. However, asking the Court to cede authority to the arbitrator before it has been determined that all of these individuals are subject to the [arbitration] agreement in the first place is asking the Court to presuppose the answer. This the Court will not do.

Id., PageID.7689-90.

The Court also rejected Pilot's Article III mootness arguments, agreeing that the opt-in Plaintiffs "bec[a]me party plaintiffs" when they "join[ed] the action." *Id.*, PageID.7687. "As party plaintiffs, opt-in plaintiffs have equal status upon joining the case." *Id.*, PageID.7687-88.

So long as these Plaintiffs' claims remain pending, the court held, a live case remains between the parties. *Id.*

The district court declined to certify an interlocutory appeal, concluding that "certifying [an] appeal would further delay this action and create additional expenses, for no legitimate reason." *Id.*, PageID.7692.

V. PILOT FILES A NOTICE OF APPEAL CHALLENGING THE DISTRICT COURT'S ORDER DENYING PILOT'S MOTION TO RECONSIDER THE DISCOVERY ORDER.

On November 30, 2018, Pilot filed a notice of appeal challenging the district court's order denying Pilot's motion for reconsideration of the order compelling production of employment dates. Notice of Appeal, R.203, PageID.7695.

Through all the foregoing procedural morass, this Court should bear in mind three things that have not yet occurred. First, Pilot has not produced Plaintiffs' dates of employment as ordered by the district court. Second, Plaintiffs have not responded to Pilot's motion to compel arbitration. And third, the district court has not ruled on the substance of Pilot's motion to compel arbitration.

On March 29, 2019, the district court denied all pending motions without prejudice, including Pilot's motion to compel arbitration. Order Denying Arbitration Motion, R.207, PageID.7707; Order Denying Motion for Equitable Tolling, R.208, PageID.7709. The district court made clear that it denied the arbitration motion without prejudice solely to clear its docket while awaiting the resolution of this appeal. Order Denying Arbitration Motion, R.207, PageID.7707 ("Because of the pending appeal, the Court cannot appropriately address the issues raised by Defendants. Defendants are free to file this Motion again, if necessary, once the Sixth Circuit has reached its conclusion."). On April 18, 2019, Pilot filed an amended notice of appeal from the order denying its arbitration motion without prejudice. Amended Notice of Appeal, R.209, PageID.7711.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER THIS APPEAL.

This Court has no jurisdiction to hear this appeal. An order refusing to reconsider a prior order compelling discovery is not an order "denying a petition . . . to order arbitration to proceed" under the FAA. 9 U.S.C. § 16(a)(1)(B). The same is true for an order denying without prejudice a motion to compel arbitration to await the result of an interlocutory

appeal. And even if this Court has jurisdiction over some issues, it does not have jurisdiction over the issues Pilot seeks to raise here, which go far beyond the narrow questions decided by the district court.

A. Interlocutory Appeals Are Narrow and Limited Exceptions to the Final Judgment Rule.

Congress has vested the courts of appeals with jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. This finality principle embodied by § 1291 "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft*, 137 S. Ct. at 1712 (citation omitted).

In light of the disruptive nature of interlocutory appeals and their potential for abuse, "[i]nterlocutory appeals are generally disfavored, and statutes permitting them must be strictly construed." *Littlejohn v. Myers*, 684 F. App'x 563, 570 (6th Cir. 2017) (quoting *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997)); *Office of Sen. Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) ("[S]tatutes authorizing appeals are to be strictly construed." (citation omitted)); *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta*, 552 U.S. 148, 164 (2008) (applying the "established principle that the jurisdiction of the federal courts is carefully guarded

against expansion by judicial interpretation" (alterations and quotations omitted)).

B. This Court Lacks Jurisdiction to Review the District Court's Orders.

Pilot invokes § 16 of the FAA, but the principal order Pilot seeks to appeal in no way "den[ied] a petition under section 4 of [the FAA] to order arbitration to proceed." 9 U.S.C. § 16(a)(1)(B). The district court simply refused to reconsider its prior ruling ordering Pilot to produce dates of employment. Order Denying Motion to Reconsider, R.202, PageID.7686-90. The district court made clear that such discovery was necessary to decide Pilot's pending motion to compel arbitration. *Id.* PageID.7689-90.

By its plain terms, an order compelling discovery (or refusing to reconsider such an order) does not deny a motion to compel arbitration. Although this Court has never squarely addressed whether an order incidentally delaying a motion to compel arbitration is appealable as an order denying a motion to compel arbitration, other circuits have unanimously concluded that such orders are not appealable.

In *Continental Casualty Co. v. Staffing Concepts, Inc.*, 538 F.3d 577, 579 (7th Cir. 2008), the Seventh Circuit held unappealable a district

court order striking a motion to compel arbitration while the court considered pending motions relating to personal jurisdiction and venue. The Seventh Circuit characterized the district court's order as a "delay incident to an orderly process," and refused to adopt a rule that "equates every postponement with denial." *Id.* at 580 (citation omitted). As the Seventh Circuit recognized in a different case, "district courts must be given the discretion to manage their cases; routine orders that incidentally delay a decision on a motion to order arbitration fall outside the scope of § 16." *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 740 (7th Cir. 2010).

Similarly, in *Van Dusen v. Swift Transportation Co. Inc.*, 830 F.3d 893, 895 (9th Cir. 2016), the Ninth Circuit rejected an attempt to characterize the district court's case management order as an order denying a motion to compel arbitration. In that case, the parties resisting arbitration—two truck drivers—claimed that they were "workers engaged in . . . interstate commerce" exempt from the FAA. *Id.*; *see* 9 U.S.C. § 1. The district court issued a scheduling order for discovery and trial on the exemption issue. The Ninth Circuit held that such an order was not appealable. As the court recognized, "one cannot construe a case

management order designed to lead to a decision on a motion to compel arbitration as a decision to deny the motion. The district court was simply establishing a decision-making mechanism, not deciding the question on the merits." *Id.* at 897.

The same is true in this case. The district court's order compelling discovery (and refusing to reconsider that decision), was part and parcel of the court's "orderly process" for reaching an ultimate determination on Pilot's motion to compel arbitration. *See Cont'l Cas.*, 538 F.3d at 580. As in *Van Dusen*, the district court was merely "establishing a decision-making mechanism, not deciding the question on the merits." 830 F.3d at 897. Such an order is not appealable. *Id.*; *Cont'l Cas.*, 538 F.3d at 580.

The conclusion that this Court lacks jurisdiction is not altered by the district court's recent housecleaning order denying all pending motions while this appeal proceeds. Order Denying Arbitration Motion, R.207, PageID.7707. That order was purely ministerial—denying the motion to compel arbitration without prejudice while waiting for this Court to resolve the instant appeal. *Id.* Such docket-clearing orders are common; especially, as here, right before the March 31 and September 30

deadlines for the court to report pending motions as required by the Civil Justice Reform Act. *See* 28 U.S.C. § 476.

Allowing such ministerial orders to open the doors to an immediate appeal would undermine the careful balance struck by Congress and disregard the rule that grants of appellate jurisdiction "must be strictly construed." *Littlejohn*, 684 F. App'x at 570 (citation omitted). Accepting jurisdiction would also encourage parties to file spurious interlocutory appeals in the hopes that a subsequent order from the district court (say, denying an injunction without prejudice pending the appeal), would cure the initial jurisdictional deficiency. Such ministerial orders do not give rise to appellate jurisdiction.

This Court should dismiss this appeal for lack of jurisdiction.

C. The Issues Pilot Seeks to Raise Lie Outside the Scope of Any Appellate Jurisdiction this Court May Have.

Assuming this Court concludes that it has appellate jurisdiction over the district court's orders, the *scope* of this Court's review extends no further than reviewing the decisions actually made by the district court.

"[I]nterlocutory appeals . . . must be limited in scope." *Parks v. Warren Corr. Inst.*, 51 F. App'x 137, 139 (6th Cir. 2002). Issues that "fall

outside the limited scope of [this Court's] jurisdiction on interlocutory appeal" should not be considered. *Hopper v. Phil Plummer*, 887 F.3d 744, 745 (6th Cir. 2018). *See generally* 16 Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction § 3921.1 (3d ed.) ("[T]he scope of appellate review . . . is confined to the issues necessary to determine the propriety of the interlocutory order itself."). Indeed, this Court reaffirmed these principles in Pilot's first unsuccessful appeal, holding that a party "cannot use [a single appealable issue] as a smuggling route for otherwise non-appealable issues." *Taylor*, 697 F. App'x at 859.

Assuming the district court's November 19, 2018 order is appealable, the *sole question* before this Court would be whether the district court erred in refusing to reconsider its order compelling the discovery of dates of employment when Pilot failed to raise any delegation-based arguments opposing that discovery initially. And assuming the district court's March 29, 2019 order is appealable, this Court's review would be even more circumspect: essentially determining whether the district court erred in delaying the resolution of Pilot's motion to compel arbitration while this appeal was pending.

Pilot seeks a much broader scope of review. It principally asks this court to "dismiss[]" or "compel[] to arbitration" "all Arbitration Opt-Ins"—i.e., send all remaining Plaintiffs in this case directly to arbitration. Pilot Br. 23, 29, 34, 37, 39. Pilot also raises a host of other questions unrelated to its motion to compel arbitration. *Id.* at 18 (standing), 37 n.19 (Rules Enabling Act), 38-39 (venue).

Pilot's creative attempts to find new "smuggling route[s]" must be rejected. *See Taylor*, 697 F. App'x at 859. Assuming this Court has jurisdiction to review anything, that review must hew closely to the issues fully addressed by the parties below and actually decided by the district court.

Take arbitration. Pilot asks this Court to compel all remaining Plaintiffs to arbitration. But that issue is not ripe, as Plaintiffs have not yet responded to, and the district court has yet to rule on, Pilot's motion. Absent exceptional circumstances, this Court "will not address issues on appeal that were not raised and ruled upon below." *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194 (6th Cir. 1992) (citing *Hall v. Knott Cnty. Bd. of Educ.*, 941 F.2d 402, 409 (6th Cir. 1991)). There is no justification—and Pilot offers none—for this Court to take the

extraordinary step of compelling thousands of Plaintiffs to arbitration before that question is fully addressed by the parties and the district court. *See Janvey v. Alguire*, 647 F.3d 585, 603-05 (5th Cir. 2011) (declining to extend interlocutory review to cover a non-appealable issue); *E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 757 (9th Cir. 1991) (same). In fact, this Court held as much in Pilot's first unsuccessful appeal. *Taylor*, 697 F. App'x at 859.

Nor does this Court's jurisdiction, assuming it has any, extend to the additional issues Pilot raises related to standing, the Rules Enabling Act ("REA"), and venue. "Pendent appellate jurisdiction [covers] the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but, may be reviewed on interlocutory appeal if those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction." *Summers v. Leis*, 368 F.3d 881, 889-90 (6th Cir. 2004) (citation omitted). "Inextricably intertwined" means "that the resolution of the appealable issue 'necessarily and unavoidably' decides the nonappealable issue." *Atkins v. CGI Techs. and Solutions, Inc.*, 724 F. App'x 383, 387 (6th Cir. 2018) (quoting *Summers*, 368 F.3d at 889).

Far from being necessarily and unavoidably raised, Pilot's contentions regarding standing, the REA, and venue have nothing to do with the district court's orders compelling dates of employment or deferring a ruling while this appeal is pending. *Id.* (declining to exercise pendant appellate jurisdiction); *Summers*, 368 F.3d at 890 (same).

This Court has, at most, jurisdiction to decide: (1) whether the district court erred in refusing to reconsider its order compelling Pilot to produce dates of employment where Pilot waived any argument that such discovery conflicts with the arbitrator's (claimed) delegated authority; and (2) whether the district court erred in deferring ruling on Pilot's motion to compel arbitration until this appeal is resolved.

This Court has no jurisdiction to resolve the issues Pilot raises, which extend far beyond those two narrow questions.

II. PILOT WAIVED ITS ARGUMENT THAT THE DELEGATION CLAUSES REQUIRE THE ARBITRATOR TO DECIDE THE MOTION TO COMPEL EMPLOYMENT DATES.

Assuming this Court has jurisdiction to address the issue, the Court should not consider Pilot's arguments that the arbitration agreements' delegation clauses require an arbitrator to decide the motion to compel

employment dates. Pilot raised these arguments for the first time in its motion for reconsideration and therefore waived them on appeal.

"Arguments raised for the first time in a motion for reconsideration are untimely and forfeited on appeal." *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 692 (6th Cir. 2012); *see also Am. Meat Inst. v. Pridgeon*, 724 F.2d 45, 47 (6th Cir. 1984). Arguments that an arbitrator should decide an issue are no exception. *See Evanston*, 683 F.3d at 692 (defendant waived right to invoke the FAA when it raised its argument for the first time in a motion for reconsideration); *Valerino v. Hoover*, 643 F. App'x 139, 142 (3d Cir. 2016) (party who waited until reply brief to request arbitration of attorneys'-fee issue "waived the issue by failing to timely raise it"). This rule should be overlooked only "in exceptional cases" or when the rule would produce a "plain miscarriage of justice." *Scottsdale Ins. Co. v. Flowers,* 513 F.3d 546, 552 (6th Cir. 2008) (quotations and citation omitted).

This is not an exceptional case, and refusing to consider Pilot's forfeited arguments would not lead to a miscarriage of justice. Pilot had every opportunity to raise the delegation-clause arguments in its initial response and failed to do so. The opt-in period closed—and opt-ins'

identities were known—on June 4, 2018. Scheduling Order, R.137, PageID.1956. Plaintiffs filed their motion to compel production of *all* opt-ins' dates of employment on June 12, stating the information would "help evidence who may or may not be subject to any arbitration agreement." Motion to Compel Dates of Employment, R.174, PageID.7337. Several weeks later, on July 12, 2018, Pilot filed its initial response to the motion to compel. Response to Motion to Compel, R.180. By that point, Pilot was aware that many opt-ins had purportedly signed arbitration agreements containing delegation clauses. *See* November 25, 2016 Motion, R.84; National Agreement, R.84-2; Texas Agreement R.84-3.

Yet Pilot did not invoke its delegation clauses. Response to Motion to Compel, R.180. In its response to the motion to compel employment dates, its sole arbitration-related argument was that the court lacked subject-matter jurisdiction over the opt-in Plaintiffs who had agreed to arbitration. *Id.*, PageID.7404. Making this unrelated argument was insufficient to preserve Pilot's delegation-clause arguments. *See Thurman v. Yellow Freight Sys., Inc.*, 97 F.3d 833, 835 (6th Cir. 1996).[3]

[3] Plaintiffs' subsequent notice seeking an expedited order on the motion to compel did not newly implicate the delegation clauses and was not a renewed motion. Notice of Need for Order, R.186. Plaintiffs' notice simply

Pilot had a full opportunity to raise its delegation-clause arguments in its response but failed to do so. Accordingly, its delegation-clause arguments are waived. *See Evanston*, 683 F.3d at 692; *Am. Meat*, 724 F.2d at 47.

III. IF THIS COURT REACHES THE MERITS OF PILOT'S APPEAL, THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

Assuming this Court has jurisdiction and reaches the substance of the district court's orders, the appropriate standard of review is abuse of discretion. Pilot has appealed from two orders: (1) the order denying Pilot's motion to reconsider the district court's order compelling production of employment dates, *see* Order Denying Motion to Reconsider, R.202; and (2) the order denying Pilot's motion to compel arbitration without prejudice pending the result of this appeal, *see* Order Denying Arbitration Motion, R.207.

This Court reviews a district court's order denying a motion to reconsider for abuse of discretion. *Evanston*, 683 F.3d at 691 (citing *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)); *Sommer v. Davis*, 317 F.3d

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restated one of Plaintiffs' original rationales for requesting the information: that the dates of employment were relevant to determine which opt-ins had agreed to arbitration. *Id.*, PageID.7551-52.

686, 691 (6th Cir. 2003). Similarly, this Court reviews a district court's decision to compel pre-arbitration discovery for abuse of discretion. *Bell v. Koch Foods of Mississippi, LLC*, 358 F. App'x 498, 500 (5th Cir. 2009); *Pleasants v. Am. Exp. Co.*, 541 F.3d 853, 859 (8th Cir. 2008); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999); *see also Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991) ("The district court has broad discretion in regulating discovery, and its ruling will not be overturned unless there is a clear abuse of discretion."). Finally, the district court's order denying Pilot's motion without prejudice pending appeal—which was nothing more than a docket management decision in response to this appeal—is also reviewed for abuse of discretion. *See Am. Civil Liberties Union of Ky. v. McCreary Cnty., Ky.*, 607 F.3d 439, 451 (6th Cir. 2010) (noting a "district court has broad discretion to manage its docket").

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PILOT'S ARBITRATION MOTION WITHOUT PREJUDICE TO AWAIT RESOLUTION OF THE PENDING APPEAL.

The district court's decision to deny Pilot's arbitration motion without prejudice pending resolution of the pre-existing appeal was well

within its "broad discretion to manage its docket." *McCreary Cnty., Ky.*, 607 F.3d at 451.

This Court considered a nearly identical issue in *In re Life Investors Ins. Co. of Am.*, 589 F.3d 319 (6th Cir. 2009). There, the appellant company filed a petition for writ of mandamus and an appeal. *Id.* at 327 n.9. The district court subsequently denied without prejudice the company's pending motion and "expressly indicated" it was doing so to await the rulings from the Sixth Circuit. *Id.* The appellant, "[a]pparently construing this denial without prejudice as a ruling giving rise to a right to seek immediate interlocutory review under 28 U.S.C. § 1292," appealed from the denial without prejudice. *Id.* This Court held the denial was not an abuse of discretion and did "not prejudice the Company's right to a timely decision on the merits of its motion." *Id.*

The appeal here from the district court's denial without prejudice is similarly straightforward. The denial did not address the merits of Pilot's motion, did not indicate any intention to proceed to litigation of the merits of the Plaintiffs' claims, and did not decide any issues that Pilot has argued an arbitrator must decide. The sole purpose of the denial

was to manage the motions pending on the docket while this Court decides the other appeal from the discovery order.

The district court acted within its discretion by denying Pilot's motion while this appeal was pending.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN COMPELLING DISCOVERY.

The district court did not err in compelling production of Plaintiffs' dates of employment. Courts or juries—not arbitrators—decide disputes concerning an arbitration agreement's formation. And courts possess the attendant authority to manage related, pre-arbitration discovery relevant to formation issues. The district court acted well within its authority, jurisdiction, and discretion when it ordered production of employment dates.

A. Legal and Statutory Background on Arbitrability.

(1) Under the FAA, arbitration is strictly a matter of consent.

Congress enacted the FAA in 1925 to ensure that arbitration agreements are "enforced according to their terms" and to place such agreements "upon the same footing as other contracts." *Volt Info. Scis.,*

Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474, 478 (1989) (quotations and citations omitted).

Section 2 is the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA contains two primary procedural mechanisms for enforcing an arbitration agreement. Section 3 allows a party to seek a stay of an action brought upon "any issue referable to arbitration." *Id.* § 3. The court must grant the stay only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement." *Id.* Section 4 permits a party to petition the court for an order compelling arbitration. *Id.* § 4. Faced with such a petition, "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.*

Section 4 also sets forth specific procedures a court must follow where "the making of the arbitration agreement" is at issue. *Id.* The party opposing arbitration "may . . . demand a jury trial of such issue." *Id.* And, if "the jury find that no agreement in writing for arbitration was made," the proceeding to compel arbitration must be dismissed. *Id.*

The FAA reflects two key principles: a liberal federal policy favoring arbitration, *see Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, and the notion that arbitration is fundamentally a matter of contract, *see First Options*, 514 U.S. at 943. Arbitration agreements remain "strictly 'a matter of consent.'" *Granite Rock*, 561 U.S. at 299 (quoting *Volt*, 489 U.S. at 479). Arbitration "is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Id.* (quoting *First Options*, 514 U.S. at 943).

Thus, under both the statute's text and Supreme Court precedent, the application of the FAA depends, in the first instance, on the existence of a valid contract to arbitrate. *See, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.").

(2) Courts presumptively decide whether an agreement to arbitrate exists and whether the agreement covers a given dispute.

In an ordinary case, a court confronted with a motion to compel arbitration applies a familiar two-part test. The court first determines whether "a valid agreement to arbitrate exists between the parties." *Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003). If the answer to that question is "yes," the court then goes on to determine whether "the specific dispute [at issue] falls within the substantive scope of that agreement." *Id.*

These antecedent questions—whether an arbitration agreement *exists*, whether that agreement is *valid*, and whether that valid agreement *covers a particular dispute*—are generally referred to as "gateway" questions or "questions of 'arbitrability.'" *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

In resolving the first gateway question—whether a valid arbitration agreement exists—courts "apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944. The party seeking to compel arbitration bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of

the evidence." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014).

In resolving the second question—whether a dispute falls within the scope of the agreement—the burden is on the party opposing arbitration to show that the claims at issue are not covered by the agreement. *See Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987). In answering this second question, courts apply a presumption of arbitrability. *See First Options*, 514 U.S. at 945; *Granite Rock*, 561 U.S. at 301; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."). This thumb on the scale in favor of arbitration applies solely to the second part of the operative test. "[T]he presumption of arbitrability does not bear on the threshold issue of whether the parties entered into a binding agreement to arbitrate at all." *Begonja v. Vornado Realty Trust*, 159 F. Supp. 3d 402, 413 (S.D.N.Y. 2016) (citing *Applied Energetics, Inc. v. New Oak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011)).

(3) Parties may elect to delegate gateway arbitrability disputes to an arbitrator, but only courts can resolve disputes about the existence of an arbitration agreement.

Many arbitration clauses purport to do more than simply require arbitration of certain disputes. They also claim to commit some—or all—questions of arbitrability to the arbitrator to decide. These so-called delegation clauses beg the question: can an arbitration clause require an arbitrator—and not a court—to decide whether "a valid agreement to arbitrate exists between the parties" and whether "the specific dispute [at issue] falls within the substantive scope of that agreement"? *Javitch*, 315 F.3d at 624.

The answer to that question depends on the nature of the gateway issue the arbitration clause seeks to delegate. When a party claims that an arbitration clause delegates arbitrability, the question of who (the court or arbitrator) has the power to decide the arbitrability issue "turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. An "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent–A–Center*, 561

U.S. at 70. The only difference: courts analyzing delegation clauses employ a presumption *in favor of courts* deciding questions of arbitrability. *First Options*, 514 U.S. at 944-45. "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)) (alterations in original).

(a) The scope of an arbitration clause may be delegated.

Applying these principles, parties may validly delegate to an arbitrator (through clear and unmistakable language) the question of *coverage*—that is, whether a "specific dispute falls within the substantive scope" of an otherwise valid agreement to arbitrate, *Javitch*, 315 F.3d at 624. *See, e.g.*, *Henry Schein*, 139 S. Ct. at 528, 530.

(b) Severability principles allow delegation of challenges to the validity of the contract as a whole, but courts must decide challenges to the validity of the arbitration clause itself.

Different considerations come into play when a delegation clause purports to grant an arbitrator the power to determine the *validity* of an agreement to arbitrate. Validity challenges, as distinct from formation

ones, include claims of unconscionability, fraud in the inducement, mistake, or impossibility, among others. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. 63 (unconscionability); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (fraud in the inducement).

As the Supreme Court has recognized, "[t]here are two types of validity challenges under § 2." *Rent-A-Ctr.,* 561 U.S. at 70. "'One type challenges specifically the validity of the agreement to arbitrate,' and '[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.'" *Id.* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)).

The Supreme Court has held that challenges directed broadly to the validity of the contract as a whole may be delegated to an arbitrator to decide. *See Prima Paint*, 388 U.S. at 403-04; *Buckeye*, 546 U.S. at 444-46; *Preston v. Ferrer*, 552 U.S. 346, 353 (2008). This is so because "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye,* 546 U.S. at 445; *see also Rent-A-Ctr.,* 561 U.S. at 71. The FAA's text supports this result

as well: "§ 2 states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." *Rent-A-Ctr.*, 561 U.S. at 70.

By contrast, where the party resisting arbitration challenges the validity of "*the arbitration clause itself*," *Prima Paint*, 388 U.S. at 403 (emphasis added), the court (not an arbitrator) must decide the validity question. *Rent-A-Ctr.*, 561 U.S. at 71. And just as arbitration clauses can be severable from the broader contracts that contain them, delegation clauses can be severable from a broader agreement to arbitrate. *See generally id.* at 70-72. Thus, if a party wishes to challenge a delegation clause as invalid, she must direct the basis of her challenge specifically to the delegation provision. *Id.* at 72.

(c) The question of whether the parties agreed to arbitrate in the first place cannot be delegated.

Some arbitration clauses claim to go further yet: delegating to an arbitrator the authority to determine *whether an agreement to arbitrate exists*. Such provisions are almost never enforceable. The court cannot compel parties to arbitrate a dispute—including disputes over questions of arbitrability—without first satisfying *itself* that an agreement to

arbitrate exists between the parties. *See* 9 U.S.C. § 4; *Henry Schein*, 139 S. Ct. at 530.

The Supreme Court has made clear that its opinions on severability do not address threshold formation challenges—for example, where a party argues that it never signed the agreement, that the signor lacked the authority to bind the obligor, or that the signor lacked the mental capacity to assent. *See Buckeye*, 546 U.S. at 444 n.1 ("Our opinion today . . . does not speak to the issue decided in the cases . . . which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." (citations omitted)); *Rent-A-Ctr.*, 561 U.S. at 70 n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as in *Buckeye* . . ., we address only the former.").

In *Granite Rock*, the Supreme Court stated that before a court can determine that the parties agreed to arbitrate a dispute, it must first find that their arbitration agreement "was validly formed and (absent a provision clearly and validly committing such issues to the arbitrator) is

legally enforceable and best construed to encompass the dispute." 561 U.S. at 303. The placement of the parenthetical in *Granite Rock* draws a distinction between the issue of contract formation, which typically cannot be delegated to the arbitrator,[4] and issues of enforceability and interpretation, which can. *Ford v. Midland Funding, LLC*, 264 F. Supp. 3d 849, 853-54 (E.D. Mich. 2017) (citing Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 Ohio St. J. on Disp. Resol. 1, 59-60 (2011)). Thus, courts "must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. . . . [T]hese issues *always* include whether the clause was agreed to, and may include when that agreement was formed." *Granite Rock*, 561 U.S. at 297.

[4] There is a small class of cases where an arbitration clause might validly delegate the question of whether another agreement was validly formed. For example, if two parties entered into a valid agreement to arbitrate all contractual disputes, including whether the parties agreed to arbitrate, and then, *at a later time*, allegedly entered into a second agreement to arbitrate additional disputes. In that unique scenario, the first agreement could encompass the later-arising dispute over whether the second agreement was ever formed. But it is not logically possible for a single (claimed) agreement to require a court to delegate the question of whether *that* agreement exists.

As Justice Gorsuch explained when he sat on the Tenth Circuit, "[e]veryone knows the Federal Arbitration Act favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must *agree* to have their disputes arbitrated." *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977 (10th Cir. 2014). Thus, this Court has repeatedly distinguished cases applying *Prima Paint*'s severability-based validity analysis from situations where parties challenge the very *existence* of an agreement to arbitrate. *See, e.g.*, *Moran v. Svete*, 366 F. App'x 624, 632 (6th Cir. 2010) ("This is not a case in which it is alleged that the signor did not sign the contract, was an agent without authority to bind his principal, or lacked the mental capacity to assent."); *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 630 n.2 (6th Cir. 2004) ("This is not like a case where, for instance, a contract is void for lack of a valid signature. In such cases, courts have indicated that an arbitration clause contained in the contract would not be binding."); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489 (6th Cir. 2001) ("[W]e are inclined to find that *Prima Paint* supports, rather than prohibits, excluding nonexistent contracts from the severability doctrine, because an allegation of a void contract raises exactly the same question

as an allegation of a fraudulently induced arbitration agreement: whether the arbitrator has any power at all.").

Other circuit courts—including the Third, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—have uniformly held that courts, not arbitrators, decide disputes over whether a party assented to an arbitration agreement. *See Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (holding "the analytical formula developed in *Prima Paint*" does not apply to a claim that the signor lacked the mental capacity to assent); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[T]he judiciary rather than an arbitrator decides whether a contract came into being."); *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99, 107 (3d Cir. 2000) (holding courts must determine the threshold issue of the existence of an agreement); *Chastain v. Robinson-Humphrey Co., Inc.,* 957 F.2d 851, 855 (11th Cir. 1992) (holding that, where a "party is challenging the very existence of *any* agreement," the court must determine whether a binding contract was formed before sending any grievance to arbitration); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.,* 925 F.2d 1136, 1140-41 (9th Cir. 1991) (holding, after extensive analysis, that only courts can decide whether any arbitration agreement

exists); *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) ("[I]ssues of formation . . . must always be decided by the courts . . . ."); *I.S. Joseph Co. v. Mich. Sugar Co.,* 803 F.2d 396, 399-400 & n.2 (8th Cir. 1986) ("If there is in fact a dispute as to whether an agreement to arbitrate exists, then that issue must first be determined by the court as a prerequisite to the arbitrator's taking jurisdiction."); *see also Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016) (explaining that the court always performs a contract formation analysis even where a party "points to a purported delegation clause").

These cases, of course, reflect the FAA's textual command, as well as the policy that arbitration is strictly "a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Section 4 of the FAA requires that, before compelling arbitration, the court or jury (if demanded) must make a factual finding about the contract's formation if "the making of the arbitration agreement" is at issue. 9 U.S.C. § 4. Thus, the plain language of the FAA dictates that "a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate." *Three Valleys,* 925 F.2d at 1140-41. And, "as arbitration depends on a valid

contract[,] an argument that the contract does not exist can't logically be resolved by the arbitrator." *Sphere*, 256 F.3d at 591. "A contrary rule would lead to untenable results. Party A could forge party B's name to a contract and compel party B to arbitrate the question of the genuineness of its signature." *Three Valleys*, 925 F.2d at 1140.

B. The District Court Had the Authority to Adjudicate Disputes Over the Arbitration Agreements' Formation.

These legal principles demonstrate that the district court had the authority to adjudicate the dispute over the arbitration agreements' formation. Pilot's arbitration motion asked the court to compel arbitration. But without assent—a threshold prerequisite for any agreement—the district court had no authority to compel arbitration or dismiss any claims under the FAA. *See* 9 U.S.C. § 4; *AT & T Techs.,* 475 U.S. at 648 ("[A] party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit."); *Sphere,* 256 F.3d at 591 ("No contract, no power.").

Here, Plaintiffs dispute whether they assented to arbitration. Notice of Need for Order, R.186, PageID.7551-52. The plain language of the FAA gives Plaintiffs the right to proceed before the court—and demand a jury trial—on that issue. 9 U.S.C. § 4; *Simula*, 175 F.3d at 726;

Avedon Eng'g, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997). Pilot's assertion that the delegation clause requires the arbitrator to decide whether an arbitration agreement exists simply has no merit. *See Spahr*, 330 F.3d at 1273; *Sphere*, 256 F.3d at 591; *Sandvik,* 220 F.3d at 107; *Chastain,* 957 F.2d at 855; *Three Valleys*, 925 F.2d at 1140-41; *Nat'l R.R. Passenger*, 850 F.2d at 761; *I.S. Joseph Co.,* 803 F.2d at 400.

Pilot's most-cited case does not help Pilot. In *Henry Schein*, the Supreme Court overturned the rule within several circuits that allowed courts to resolve arbitrability questions, despite a delegation clause, if the argument for arbitration was "wholly groundless." *See generally* 139 S. Ct. 524. *Henry Schein* involved a dispute over the *scope* of an arbitration agreement. *Id.* at 528. *Henry Schein* does not support Pilot's position that an arbitrator should decide whether an arbitration agreement exists at all. To the contrary, *Henry Schein* states: "To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Id.* at 530. That was all the district court here was doing. Order Denying Motion to Reconsider, R.202, PageID.7689-90.

Citing *Rent-A-Center*, Pilot argues the delegation clauses must be enforced because Plaintiffs haven't directed a challenge to the delegation clauses specifically. Pilot Br. 37-38 n.20. That assertion is both false and irrelevant. Plaintiffs directed several unconscionability challenges to the delegation clauses themselves. Plaintiffs' Response to Motion to Reconsider, R.196, PageID.7625-26. Furthermore, *Rent-A-Center*'s severability principle does not apply to disputes over the existence of *any* agreement to arbitrate. 561 U.S. at 70 n.2; *see also Buckeye*, 546 U.S. at 444 n.1; *Moran*, 366 F. App'x at 632; *Masco*, 382 F.3d at 630 n.2; *Burden*, 267 F.3d at 489.

Pilot contends that the district court should have dismissed the claims of Plaintiffs whom Pilot associated with an agreement to arbitrate within other judicial districts. Presumably, Pilot's argument—made for the first time on appeal—is that § 4's venue provisions, under which "only a district court in [the arbitral] forum has jurisdiction to compel arbitration pursuant to Section 4," *Mgmt. Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 854 (6th Cir. 1997), prevented the district court from determining the existence of an arbitration agreement. But § 4's venue provisions relate solely to a court's ability to *compel* arbitration outside

of its district. *See* 9 U.S.C. § 4. Section 4's venue provisions do not limit a district court's jurisdiction to decide arbitrability disputes. *See First of Mich. Corp. v. Bramlet,* 141 F.3d 260, 264 (6th Cir. 1998) (holding that venue for a suit to enjoin arbitration "is not limited to the forum where the defendants filed a request for arbitration"); *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014) (holding venue for arbitrability disputes can be outside of district for arbitral forum); *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 784-86 (9th Cir. 2001) (same); *Gone To The Beach, LLC v. Choicepoint Servs., Inc.*, 434 F. Supp. 2d 534, 537-38 (W.D. Tenn. 2006) (explaining that the Sixth Circuit "has implicitly held that a district court may determine issues of arbitrability even if it is not located in the district where arbitration is to take place"). This is especially true where the dispute relates to the very existence of the agreement. After all, arbitration is "strictly 'a matter of consent.'" *Granite Rock*, 561 U.S. at 299. "Requiring a party to contest the very existence of an arbitration agreement in a forum dictated by the disputed arbitration clause would run counter to that fundamental principle." *Textile Unlimited*, 240 F.3d at 786.

Pilot's remaining complaint about the court-ordered discovery is that the court lacked subject matter jurisdiction over the dispute and therefore had no authority to order the discovery. In support, Pilot cites dicta from this Circuit referring to arbitration agreements as "jurisdiction[al]" or "quasi jurisdictional," "as a practical matter." Pilot Br. 33. Despite these dicta, arbitration agreements do not technically divest a federal court of subject matter jurisdiction. *City of Benkelman, Neb. v. Baseline Eng'g Corp.*, 867 F.3d 875, 880-81 (8th Cir. 2017); *Auto. Mech. Local 701 v. Vanguard Car Rental*, 502 F.3d 740, 743 (7th Cir. 2007); *see also Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (rejecting argument that arbitration agreement divested the court of subject matter jurisdiction and explaining that a contractual right to arbitration can be waived). Moreover, "a federal court always has jurisdiction to determine its own jurisdiction," *United States v. Ruiz,* 536 U.S. 622, 628 (2002), so the arbitration agreements could not possibly deprive the district court of jurisdiction to adjudicate the very existence of the arbitration agreements.

The district court had the authority to adjudicate the parties' dispute over the arbitration agreements' formation.

C. The Court Did Not Abuse Its Discretion or Otherwise Err in Compelling Production of the Dates of Employment.

Because the district court has the authority to determine whether the parties agreed to arbitrate, it follows that the district court also has the power to allow reasonable discovery of evidence relevant to the question of contract formation.

When the making of an arbitration agreement is in dispute, the FAA entitles the parties to reasonable and proportional discovery. *See Simula*, 175 F.3d at 726 (explaining that "[t]he FAA provides for discovery and a full trial" if "the making of the arbitration agreement" is at issue); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 774 (3d Cir. 2013) (explaining that parties must be given the opportunity to conduct discovery related to an arbitration agreement's validity); *Deputy v. Lehman Bros.*, 345 F.3d 494, 511 (7th Cir. 2003) (parties must be given the opportunity to conduct discovery on "the authenticity of the signature" on an agreement).

The Federal Rules of Civil Procedure apply to proceedings under the FAA unless the FAA specifies different procedures. Fed. R. Civ. P. 81(a)(6)(B). Under Rule 26, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Accordingly, courts routinely order discovery related to the formation of arbitration agreements. *See, e.g.*, *Alvarez v. T-Mobile USA, Inc.*, 822 F. Supp. 2d 1081, 1085 (E.D. Cal. 2011); *Northport Health Servs. of Ark., LLC v. Rutherford*, No. CIV.A. 07-5184, 2008 WL 2273666, at *4 (W.D. Ark. May 30, 2008); *Hicks v. Citigroup, Inc.*, No. C11-1984-JCC, 2012 WL 254254, at *1-2 (W.D. Wash. Jan. 26, 2012). Indeed, denying parties the opportunity for discovery on formation can constitute reversible error. *Guidotti*, 716 F.3d at 780 (reversing where district court ruled on a motion to compel arbitration without allowing for discovery on arbitrability); *Deputy*, 345 F.3d at 511 (district court erred in denying discovery related to "the authenticity of the signature" on an arbitration agreement); *Gordon v. U.S. Dep't of Navy*, 798 F.2d 469 (6th Cir. 1986) ("It can constitute reversible error to grant summary judgment before the

plaintiff has been given a reasonable opportunity to complete the discovery it seeks." (quotations and citation omitted)).

The dates of employment sought by Plaintiffs are relevant and discoverable. In support of its motion to compel arbitration, Pilot submitted a spreadsheet with claimed dates of execution and bates numbers corresponding to a purported agreement for each opt-in Plaintiff. Arbitration Spreadsheet, R.185-1. The agreements themselves, though not filed with the district court, were mostly electronically generated, and the vast majority did not include a physical signature. *See* Phillips Declaration, R.84-4, PageID.820 (noting the National Agreements were "electronically signed"). Several opt-in Plaintiffs disputed the existence of their purported arbitration agreements and denied they were employed on the date Pilot claims they signed the agreements. Notice of Need for Order, R.186, PageID.7551-52.

The dates of employment are clearly relevant and discoverable, as they provide evidence of whether opt-in Plaintiffs were hired on or employed during the timeframe Pilot utilized arbitration agreements. *See* Phillips Declaration, R.84-4; Beuchat Declaration, R.84-5; Bobik Email, R.84-6; Instructions for Managers, R.84-7; Instructions for

Employees, R.84-8. The district court therefore did not abuse its discretion under Rule 26 in ordering Pilot to produce this relevant information.

D. The Delegation Clauses Do Not Clearly and Unmistakably Delegate Disputes Over the Existence of the Agreement.

Pilot's arbitration agreements also do not clearly and unmistakably delegate the question of their own existence to an arbitrator.

The Texas Agreement is missing the material words that would render it a functional delegation clause. *See* Texas Agreement, R.84-3, PageID.818. Perhaps Pilot *meant* for the clause to state as follows:

> Any issue or dispute concerning the formation, applicability, interpretation, enforceability, validity, revocability, fairness, or extent ***[of this arbitration agreement]***, including but not limited to fraud, fraud in the inducement, unconscionability, misrepresentation, unfair bargaining power, duress, public policy, or general rules of equity, shall be subject to arbitration as provided herein.

However, the bolded words are missing. *Id.* The words "of this arbitration agreement" or the like appear nowhere. *Id.* With respect to formation, for example, the clause states that "[a]ny issue or dispute concerning the formation . . . shall be subject to arbitration." This language is nonsensical. The clause could be referring to the "formation" of the

employment relationship, of some other contract, or of an employee kickball team. The Texas Agreement's incomprehensible clause is not "clear and unmistakable" evidence that the parties intended to delegate arbitrability issues to the arbitrator. *See First Option*, 514 U.S. at 944-45.

The National Agreement does not even claim to cover disputes over formation. National Agreement, R.84-2, PageID.810. It states that "the Arbitrator has exclusive authority to resolve any dispute relating to the applicability or enforceability of this Agreement." *Id.* The words "applicability" and "enforceability" do not clearly and unmistakably delegate to the arbitrator questions about the agreement's very existence. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47, 553 (1964) (holding that the existence of a binding arbitration agreement "is a matter to be determined by the Court" despite clause requiring arbitration of all disputes relating to the agreement's "interpretation or application, or enforcement"); *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016) (holding clause delegating disputes over the "enforceability" of an arbitration agreement does not clearly and unmistakably delegate all arbitrability issues, such as waiver); *Lebanon Chem. Corp. v. United*

Farmers Plant Food, Inc., 179 F.3d 1095, 1100 (8th Cir. 1999) (noting that broad or general language "does not satisfy the express delegation required by [*First Options*]"); *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) (arbitration clauses must be clear and specific to delegate arbitrability, and general or vague language will not suffice).

E. The Delegation Clauses Are Unconscionable.

Plaintiffs also raised a number of unconscionability challenges to the delegation clauses. *See* Plaintiffs' Response to Motion to Reconsider, R.196, PageID.7625-26. These challenges must be resolved by a court. *Danley v. Encore Capital Grp., Inc.*, 680 F. App'x 394, 398 (6th Cir. 2017) (citing *Rent-A-Ctr.*, 561 U.S. at 72).

The delegation clauses are unconscionable because they require the parties to bear their own costs or fees and allow the arbitrator to award fees to a prevailing party in her discretion, whereas the FLSA awards fees only to a prevailing *plaintiff*. *Compare* 29 U.S.C. § 216(b), *with* National Agreement, R.84-2, PageID.809-10, *and* Texas Agreement, R.84-3, PageID.815, 817. This already problematic arrangement is further compounded by the agreements' limitations on damages. *See* National Agreement, R.84-2, PageID.809 (limiting damages period to one

year); Texas Agreement, R.84-3, PageID.817 (same, and limiting damages to $25,000). Read within the context of the agreement, the delegation clauses specifically are unconscionable because they render Plaintiffs responsible for prohibitive fees and costs related to gateway arbitrability disputes, for which Plaintiffs would not be responsible were they to prevail under the FLSA.

F. The Claims of the Opt-In Plaintiffs, All of Whom Are Party Plaintiffs, Present a Live Case or Controversy.

Pilot contends, in a footnote, that the federal courts no longer have Article III jurisdiction over this case because Plaintiff Taylor has reached a settlement. Pilot Br. 18 n.10. But thousands of opt-in Plaintiffs remain parties to this action, and their claims are more than sufficient to give rise to a live case under Article III.

"As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). Here, the thousands of opt-in Plaintiffs in the case have a concrete interest in the outcome of this litigation. "These opt-in employees are party plaintiffs, unlike absent class members in a Rule 23 class action." *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 583 (6th Cir. 2009), *abrogated on other grounds*

by Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016). Opt-in Plaintiffs have "the same status in relation to the claims of the lawsuit as do the named plaintiffs." *Prickett v. DeKalb Cnty.*, 349 F.3d 1294, 1297 (11th Cir. 2003). Pilot has no basis for its assertion that their claims do not present a live case or controversy.

Pilot asserts that a "lead plaintiff cannot be similarly situated and represent opt-in plaintiffs without a viable claim." Pilot Br. 18 (citing *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 878 (6th Cir. 2012)). But the question, addressed in *White*, of whether a named plaintiff is similarly situated to other employees is distinct from the question of whether the pending claims of *additional plaintiffs* are sufficient to confer Article III jurisdiction. "[C]onditional certification is unnecessary to obtain party-plaintiff status." *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1277 (11th Cir. 2018). Instead, opt-in plaintiffs become party plaintiffs as soon as they file a consent and remain party plaintiffs until the court dismisses them. *Id.* at 1280-81; *see also* 29 U.S.C. § 216(b) (opt-ins become "party plaintiff[s]" upon filing a "consent in writing").

The pending claims of the opt-in Plaintiffs are sufficient to establish a live controversy in this case.

G. The District Court Did Not Violate the Rules Enabling Act.

Pilot argues in two footnotes that using the FLSA's collective-action mechanism "to bring Arbitration Opt-Ins into these proceedings and allow them to continue to this point" abridges Plaintiffs' and Pilot's "substantive right to contract" and violates the REA. Pilot Br. 37 n.19, 39 n.21. This argument is meritless.

The district court's decisions do not infringe on Pilot's purported substantive right to contract or its substantive right to arbitration. *See* 28 U.S.C. § 2072(b). The district court is simply adjudicating whether an arbitration agreement exists, which the FAA *requires* it to do before the court can act upon Pilot's request to dismiss or compel arbitration. *See* 9 U.S.C. § 4. The district court cannot abridge Pilot's contractual or statutory rights by simply trying to determine whether those contractual or statutory rights exist.

CONCLUSION

This Court should dismiss this appeal for lack of appellate jurisdiction. Alternatively, the Court should affirm the district court's

orders.

Date: May 6, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,987 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and this Court's Rule 32(b)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Date: May 6, 2019

s/Adam W. Hansen
Adam W. Hansen

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Dkt. No.	Description of Document	PageID
1	Complaint	1-10
39	Answer	172-182
53	Motion for Conditional Certification	223-225
71	Order Granting Conditional Certification	730-743
84	November 25, 2016 Motion	802-804
84-2	National Agreement	807-812
84-3	Texas Agreement	813-818
84-4	Phillips Declaration	819-826
84-5	Beuchat Declaration	827-844
84-6	Bobik Email	845

84-7	Instructions for Managers	846
84-8	Instructions for Employees	847
84-15	November 25, 2016 Memo	867-892
95	Order Denying Reconsideration	1518-1530
123	Motion to Sustain Objections	1797-1819
134	Order Denying Motion to Sustain Objections	1930-1941
137	Scheduling Order	1956-1960
141	Notice of Distribution	2000-2002
144	Transcript of March 9, 2018 Status Conference	2214-2243
174	Motion to Compel Dates of Employment	7333-7341
174-2	April 21, 2018 Email	7373-7375
174-3	May 2018 Emails	7376-7386
180	Response to Motion to Compel	7399-7406

184	Motion for Settlement Approval	7414-7436
184-1	Settlement Agreement	7437-7470
185	Arbitration Motion	7471-7473
185-1	Arbitration Spreadsheet	7474-7535
185-2	Memo in Support of Arbitration Motion	7536-7549
186	Notice of Need for Order	7550-7554
187	Transcript of July 13, 2018 Status Conference	7555-7576
189	Settlement Approval Order	7578-7579
190	Order Granting Motion to Compel	7580-7581
193	Motion to Reconsider Compel Order	7588-7590
193-1	Memo on Motion to Reconsider	7591-7607
196	Plaintiffs' Response to Motion to Reconsider	7615-7629
202	Order Denying Motion to Reconsider	7684-7694

203	Notice of Appeal	7695-7696
207	Order Denying Arbitration Motion	7707-7708
208	Order Denying Motion for Equitable Tolling	7709-7710
209	Amended Notice of Appeal	7711-7712

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of May, 2019, I caused the foregoing brief and addendum to be filed electronically with the Court, where they are available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a Notice of Electronic Filing constituting service. I certify that all parties required to be served have been served.

s/Adam W. Hansen
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