SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73
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JAMES RICHARD, ROYAL HUFF,
VERONNICA ALVARADO, NICK SMITH,
AND SAMANTHA HICKS, on behalf of themselves
and all others similarly situated,

Plaintiffs,

-against-

AMBULNZ HEALTH, LLC and AMBULNZ TN, LLC,

Defendants.
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Index No.: 510337/2020
Mot. Date: 11/30/20
Mot. Seq. No. 1-2

DECISION/ORDER

The following papers were read on these motions:

Papers:	**NYSCEF Nos:**
Mot. Seq. No. 1:	
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	2-11
Answering Affirmations/Affidavits/Exhibits/Memo of Law	
Reply Affirmations/Affidavits/Exhibits/Memo of Law	
Other	
Mot. Seq. No. 2:	
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	15-36
Answering Affirmations/Affidavits/Exhibits/Memo of Law	37-48
Reply Affirmations/Affidavits/Exhibits/Memo of Law	49-50
Other	13

Upon the foregoing papers, the motions are decided as follows:

In this hours and wages case, in Mot. Seq. No. 1, Defendants Ambulnz Health, LLC and Ambulnz TN, LLC ("Defendants") move for an Order (1) pursuant to CPLR 7503(a), compelling arbitration of all claims in Plaintiff's Class Action Complaint dated and filed June 17, 2020 (the "Complaint") (NYSCEF Doc 1) and staying this action, including Defendants' obligation to answer to the Complaint, pending arbitration; (2) ordering Plaintiffs to pay the attorneys' fees and costs incurred by Defendants to file and pursue the instant motion.

In Mot. Seq. No. 2, Defendants move for an Order (1) pursuant to CPLR 7503(a), compelling arbitration of all claims in Plaintiffs' First Amended Class Action Complaint dated and filed August 17, 2020 (the "Amended Complaint") (NYSCEF Doc12), and staying this action, including Defendants' obligation to answer Plaintiffs' Amended Complaint pending arbitration; (2) ordering Plaintiffs to pay the attorneys' fees and costs incurred by Defendants to file and pursue two motions to compel arbitration and stay action (NYSCEF Docs 2-11 and the instant motion); (3) in the event that the instant motion to compel arbitration and stay this action is denied, granting Defendants an extension of time of 10 days from the date of such decision to file an answer to the Amended Complaint pursuant to Rule 2004 of the CPLR. The amended complaint filed on August 17, 2020 supersedes the original complaint.

Background

The instant case, styled as a putative class action, seeks to redress alleged violations of New York State's overtime and minimum wage laws, among other things. Plaintiffs bring this action on behalf of themselves and all similarly situated individuals to seek recovery for violations of NYLL Article 6 § 190 et seq. and 12 NYCRR § 142 et seq. Plaintiffs bring additional claims to seek recovery for violations of NYLL Article 6 §§ 191 and 195.

The putative class are emergency medical technicians ("EMTs") and paramedics the defendants deployed to New York City from other states as part of its contract with the Federal Emergency Management Agency ("FEMA") to transport and treat patients and transport medical supplies at the height of New York City's COVID-19 crisis. Plaintiffs argue that the Defendants systematically underpaid the deployed EMTs and paramedics their full wages for all the hours worked while they were deployed in New York City, as well as for all of the hours spent traveling to and from New York. Plaintiffs allege that defendant AMBULNZ directed the EMTs and paramedics to transport ambulances and supplies across the country to New York, including back and forth between New Jersey, Pennsylvania, and New York. They also allege that

Ambulnz required EMTs and paramedics to transport patients to neighboring states when New York City struggled with its hospital capacity.

Defendants contend that all the members of the putative class executed agreements in which they agreed to have the claims they are now asserting resolved through arbitration. Each of the agreements stated that all arbitrations proceedings shall be governed by The Federal Arbitration Act [FAA] (9 U.S.C. Sections 1, et seq.). The agreements provided:

> The Federal Arbitration Act (9 U.S.C. Sections 1, et seq.) shall govern this Agreement. If any provision of this Agreement, or portion thereof, is held to be invalid, void, or unenforceable, it shall be interpreted in a manner or modified to make it enforceable. If that is not possible, it shall be severed and the remaining provisions of this Agreement shall remain in full force and effect.

Counsel for the putative class contends that the claims asserted in this action are except from the FAA because the putative class members fall within 9 U.S.C. § 1 which provides: "Nothing" in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

As recently stated in *Islam v. Lyft, Inc.*, No. 20-CV-3004 (RA), 2021 WL 871417, at *2 (S.D.N.Y. Mar. 9, 2021):

> Section Two of the FAA—the "primary substantive provision of the Act," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)—declares that an arbitration clause in any "contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. This provision embodies a "liberal federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, and it requires federal courts to "place arbitration agreements on an equal footing with other contracts ... and enforce them according to their terms." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citations omitted). Section One of the Act, however, carves out an exemption: "Nothing" in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This exception specifically enumerates two classes of exempt workers who cannot be compelled to arbitrate under the FAA – maritime and railroad employees – while including the "residual category" of classes of workers engaged in foreign or interstate commerce. *See Wallace v. Grubhub Holdings*, Inc., 970

F.3d 798, 800 (7th Cir. 2020).

The Court in *Islam v. Lyft* went on to state:

> The leading Supreme Court case interpreting the residual category is *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The plaintiff in that case—an employee of a consumer electronics retailer—sought to avoid his contract's arbitration clause by arguing that Section One of the FAA precludes arbitration with respect to *all* contracts of employment. **The Court rejected this view, holding that the residual category of Section One is confined to the employment contracts of "transportation workers**." *Circuit City*, 532 U.S. at 109. To reach that conclusion, the Court applied the statutory canon of *ejusdem generis* to hold that the residual category should be construed as "embrac[ing] only objects similar in nature to those objects enumerated by the preceding specific words"—i.e., seamen and railroad workers. *Id.* at 114–115 (citation omitted). The Court further observed that the phrase "*engaged* in" interstate commerce sweeps less broadly than, for example, "*affecting*" commerce or "*involving*" commerce, such that the Section One exemption should be "afforded a narrow construction." *Id.* at 118. **To fall into the residual category, then, a class of workers must be transportation workers who are "active[ly] employ[ed]" in interstate commerce**. *Wallace*, 970 F.3d at 801 (quoting *Circuit City*, 532 U.S. at 116).[1] **Put another way, as the Seventh Circuit did in *Wallace*, the relevant inquiry is whether the "interstate movement of goods [or people] is a central part of the class members' job description**." *Wallace*, 970 F.3d at 801.

(Islam, supra., at *2 [emphasis added]).

The *Islam* Court went onto state:

> As multiple courts have made clear, whether an individual transportation worker is entitled to the Section One exemption depends not on whether she *personally* has engaged in interstate commerce, but "whether the *class* of workers to which the complaining worker belong[s] [is] engaged in interstate commerce." *Bacashihua v. U.S. Postal Service*, 859 F.2d 402, 405 (6th Cir. 1988) (emphasis added); *see also Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 929 (N.D. Cal. 2020). What this means is that "a member of the class qualifies for the exemption even if she does not personally engage in interstate commerce," and, at the same time, "someone whose occupation is

> not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work." *Wallace*, 970 F.3d at 800 (citing *Bacashihua*, 859 F.2d at 405). For example, a furniture sales account manager who sometimes delivers furniture across state lines is not entitled to the exemption, because he does not belong to a class of transportation industry workers actively engaged in the interstate movement of goods. *See, e.g., Hill v. Rent-a-Center*, 398 F.3d 1286, 1289–90 (11th Cir. 2005). But a truck driver for a company that regularly makes interstate trips falls within the exemption even if she herself only occasionally crosses state lines. *See, e.g., Int'l Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 958 (7th Cir. 2012); *Smith v. Allstate Power Vac, Inc.*, No. 17-CV-7475 (NGS), 2020 WL 5086584, at *4 (E.D.N.Y. Aug. 26, 2020) (plaintiff truck driver qualified for the exemption even though her job for a company that transported waste across state lines was principally to extract the waste, whereas other colleagues were "typically responsible for driving the waste to the out-of-state disposal facility"). Because the analysis necessarily focuses on the activity of a *class* of workers, a "plaintiff['s] personal exploits are relevant only to the extent they indicate the activities performed by the overall class." *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020).

(Islam, supra., at *3).

The pivotal issue presented on this motion is whether whether the putative class members fall within the exemption set forth in 9 U.S.C. § 1. Based on the papers before the Court, it is the Court's view that resolution of this issue requires an evidentiary hearing.

Accordingly, it is hereby

ORDERED that the motion will be held in abeyance pending an evidentiay hearing on the issue of whether the putative class fall within the exception to the FAA set forth in 9 U.S.C. § 1. The Court hereby directs that the counsel for the parties appear for a virtual conference on May 3, 2021, at 11 am, for the purpose of scheduling the hearing and to discuss what what discovery is necessary before the hearing takes place.

This constitutes the decision and order of the Court.

Dated: April 12, 2021

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020