APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 22-1268

MARGARITO V. CANALES; BENJAMIN J. BARDZIK,

Plaintiffs, Appellees,

v.

CK SALES CO., LLC; LEPAGE BAKERIES; FLOWERS FOODS, INC.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison D. Burroughs, U.S. District Judge]

Before

Kayatta, Lynch, and Thompson, Circuit Judges.

Amanda K. Rice, with whom Traci L. Lovitt, Matthew W. Lampe, Jack L. Millman, Jones Day, Peter Bennett, Frederick B. Finberg, Pawel Z.

Binczyk, and The Bennett Law Firm, P.A., were on brief, for appellants.

Archis A. Parasharami, Mayer Brown LLP, Jennifer B. Dickey, Jonathan D. Urick, and U.S. Chamber Litigation Center, Inc., on brief for Chamber of Commerce of the United States of America, amicus curiae.

Benjamin C. Rudolf, with whom Sarah H. Varney and Murphy & Rudolf, LLP, were on brief, for appellees.

May 5, 2023

KAYATTA, **Circuit Judge**. This is the latest in a line of cases calling for interpretation of section 1 of the Federal Arbitration Act ("FAA"). Section 1 exempts from the FAA's purview "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Considering the arguments and evidence before it, the district court denied defendants' motion to dismiss or, in the alternative, to compel arbitration under the FAA. In so doing, the district court found that plaintiffs, who distribute baked goods along routes in Massachusetts, fit within the section 1 exemption. Defendants, whose baked goods plaintiffs distribute, request reversal on several grounds, some of which they presented to the district court and others of which they did not. Addressing only those arguments raised below, we affirm. Our reasoning follows.

I.

Defendant Flowers Foods, Inc. ("Flowers"), is a Georgia-based holding company of various subsidiary bakeries, including defendant Lepage Bakeries Park Street, LLC ("Lepage"), which operates out of Auburn, Maine. Lepage uses a "direct-store-delivery" system to get its products on the shelves of grocery stores and other businesses that sell baked goods to consumers. Through its wholly owned subsidiary, defendant CK Sales Co., LLC ("CK Sales"), Lepage sells distribution rights to so-called "independent distributors." These distributors purchase rights to distribute Lepage's baked goods along particular routes. They buy the baked goods from defendants and then resell and deliver the goods to stores along their routes. Defendants classify these distributors as independent contractors.

Prior to April 2018, plaintiffs Margarito Canales and Benjamin Bardzik worked as employees delivering defendants' baked goods through a temporary staffing agency. In late 2017, defendants told plaintiffs that their delivery route would be purchased soon, which plaintiffs took to mean that they would be terminated unless they purchased the route themselves. Plaintiffs created a distribution company, T & B Dough Boys Inc. ("T&B"), of which Canales owns fifty-one percent and Bardzik owns forty-nine percent. Through T&B, plaintiffs purchased distribution rights for three Massachusetts routes in June 2018. They purchased a fourth route in July 2019, which they later sold back to buy a different route in October 2020. Each time T&B purchased a route, it entered a "Distributor Agreement" with CK Sales.

Each of plaintiffs' routes is entirely within Massachusetts. To get the baked goods to Massachusetts, defendants ship them across state lines to a warehouse in North Reading, Massachusetts. Pursuant to the Distributor Agreements, title and risk of loss of the goods pass to T&B upon delivery. At some later point, plaintiffs pick up the baked goods from the warehouse and deliver them in trucks to stores along their routes. Plaintiffs' sworn affidavits state that they each spend a minimum of fifty hours per week driving delivery routes, and another twenty to thirty hours per week supervising other drivers. Other than these facts, the record reveals little about how the goods are ordered to the warehouse or exactly how they are distributed from there.

The parties dispute how much control defendants exercise over plaintiffs' business under the Distributor Agreements and in practice. Defendants describe the distribution relationship as one in which plaintiffs, through T&B, purchase baked goods from defendants and resell them to stores for a profit, using their business judgment to increase the value of their routes by, e.g., soliciting new customers, growing sales, and merchandising effectively. Defendants point to business plans submitted by plaintiffs as evidence of plaintiffs' use of discretion and business judgment to grow their company. Plaintiffs see things differently and contend that, "[b]oth by the terms of the written contracts and in practice, [plaintiffs] lack any meaningful control or authority over the quantity or price of the baked goods being distributed to Flowers' customers; the schedules for the deliveries; and the customer stores included on the routes."

The Distributor Agreements state that T&B is an "independent business" and that CK Sales does not control "the specific details or manner and means" of T&B's business. That being said, many of the other terms in the agreement exert a significant amount of control over the details, manner, and means of T&B's business. The agreements obligate T&B to "use [T&B]'s commercially reasonable best efforts to develop and maximize the sale of Products to Outlets within the Territory." And T&B must do so according to "Good Industry Practice," which involves "actively soliciting all Outlets in the Territory not being serviced"; "maintaining proper service and delivery to all Outlets in the Territory requesting service in accordance with Outlet's requirements"; and adhering to a number of requirements relating to, e.g., sanitation, safety, product freshness, and regulatory compliance. The agreements also require T&B to: "cooperate with [CK Sales] on its marketing and sales efforts and ensure its employee(s) maintain a clean and neat personal appearance consistent with the professional image customers and the public associate with [CK Sales], and customer requirements"; obtain T&B's own delivery vehicles and "maintain [T&B's] delivery vehicle(s) in such condition as to provide safe, prompt, and regular service to all customers"; and use CK Sales' "proprietary administrative services" for certain purposes such as collecting sales data and communicating with CK Sales. If T&B believes that a certain account has become unprofitable, it must meet with CK Sales and implement CK Sales' recommendations to attempt to remedy the unprofitability. If CK Sales agrees that the unprofitability cannot be remedied, "[T&B] shall be

relieved of its contractual obligation to service such account(s) for a period of time determined by [CK Sales]."

The Distributor Agreements "do[] not require that [T&B's] obligations hereunder be conducted personally by Owner or by any specific individual in [T&B's] organization." T&B is "free to engage such persons as [T&B] deems appropriate to assist in discharging [T&B's] responsibilities." T&B hired at least one part-time employee.

The Distributor Agreements also contain an arbitration clause stating:

> The parties agree that any claim, dispute, and/or controversy except as specifically excluded herein, that either [T&B] (including its owner or owners) may have against [CK Sales] (and/or its affiliated companies and its and/or their directors, officers, managers, employees, and agents and their successors and assigns) or that [CK Sales] may have against [T&B] (or its owners, directors, officers, managers, employees, and agents), arising from, related to, or having any relationship or connection whatsoever with the Distributor Agreement between [T&B] and [CK Sales] ("Agreement"), including the termination of the Agreement, services provided to [CK Sales] by [T&B], or any other association that [T&B] may have with [CK Sales] ("Covered Claims") shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) ("FAA") in conformity with the Commercial Arbitration Rules of the American Arbitration

> Association ("AAA" or "AAA Rules"), or any successor rules, except as otherwise agreed to by the parties and/or specified herein.

"Covered Claims" expressly include "any claims challenging the independent contractor status of [T&B], claims alleging that [T&B] was misclassified as an independent contractor, any other claims premised on [T&B's] alleged status as anything other than an independent contractor, . . . and claims for alleged unpaid compensation, civil penalties, or statutory penalties under either federal or state law."

Although the Distributor Agreements were signed on behalf of T&B, plaintiffs each signed a "Personal Guaranty" acknowledging that they are subject to the arbitration clause. These documents also state that if T&B fails to comply with any term in the agreement, plaintiffs "will, upon [CK Sales'] demand, immediately ensure the timely and complete performance of [T&B] of each and every obligation and duty imposed on it by the Distributor Agreement, and/or pay any amounts due and owing due to [T&B's] breach."

Plaintiffs filed suit in June 2021, alleging that defendants misclassified them as independent contractors. Plaintiffs sought unpaid wages, overtime compensation, and other damages. Defendants filed a motion to dismiss or, in the alternative, to compel arbitration under the FAA. Anticipating that plaintiffs would invoke the FAA's section 1 exemption for transportation workers engaged in interstate commerce, defendants advanced two arguments for finding the section 1 exemption inapplicable: first, that plaintiffs' responsibilities under the Distributor Agreements extend significantly beyond the mere

transportation of goods; and, second, that plaintiffs do not work in the transportation industry because the business for which they work is not in the transportation industry.

Sure enough, plaintiffs opposed defendants' motion and argued, among other things, that they fell within the section 1 exemption. They asserted that "[t]he work which Plaintiffs engage in daily consists of transporting goods in the stream of interstate commerce." Defendants filed a response to plaintiffs' opposition in which they again argued that plaintiffs are more than just delivery drivers.

The district court, considering the arguments presented to it, denied defendants' motion to dismiss, concluding that plaintiffs fell within the FAA's section 1 exemption. Having found the FAA inapplicable, the district court allowed defendants to file a renewed motion addressing only the issue of arbitration under state law. Defendants opted to file this timely appeal instead. We have jurisdiction under 9 U.S.C. § 16(a).

II.

In reviewing the district court's resolution of a motion to compel arbitration, we review legal issues de novo and factual determinations for clear error. Fraga v. Premium Retail Servs., Inc., 61 F.4th 228, 233 (1st Cir. 2023); Cullinane v. Uber Techs., Inc., 893 F.3d 53, 60 (1st Cir. 2018).

Resolving this case requires interpreting section 1 of the FAA, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's general command that arbitration agreements be enforced. 9 U.S.C. § 1. This exemption

is "afforded a narrow construction" under which it applies only to "contracts of employment of transportation workers." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118–19 (2001). In addition, "[t]o be 'engaged in' interstate commerce, a class of workers 'must at least play a direct and "necessary role in the free flow of goods" across borders.' That is, the class of workers 'must be actively "engaged in transportation" of those goods across borders via the channels of foreign or interstate commerce.'" Fraga, 61 F.4th at 237 (citations omitted) (quoting Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1790 (2022)).

On appeal, defendants make four arguments why the section 1 exemption does not apply to plaintiffs. First, that plaintiffs are not "engaged in" interstate commerce because their deliveries occur entirely within the borders of Massachusetts, and the baked goods' prior interstate journey to Massachusetts is insufficient to bring plaintiffs' intrastate transportation within the channels of interstate commerce. Second, that plaintiffs' primary responsibilities are those of business owners, not transportation workers. Third, that plaintiffs do not themselves have "contracts of employment" with defendants, as that term is used in section 1, because the Distributor Agreements were signed on behalf of T&B and not plaintiffs personally. And fourth, that plaintiffs necessarily cannot qualify for the section 1 exemption because they do not work in the transportation industry.

A.

Defendants did not present their first argument to the district court. See McCoy v. MIT, 950 F.2d 13, 22

(1st Cir. 1991) ("[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal."). In none of defendants' filings in the district court did they argue that plaintiffs' transportation of goods is not interstate in nature because it occurs entirely within Massachusetts. Nor did defendants contest plaintiffs' assertion that they transport "goods in the stream of interstate commerce," or that such transportation is sufficient to satisfy the interstate commerce element of section 1.

In recounting the facts for the district court, defendants did point out in a footnote that "neither Plaintiffs nor those they hire were required to cross state lines in operating T&B as all of their territories were entirely in Massachusetts." But this observation never factored into defendants' argument that the section 1 exemption did not apply. See, e.g., United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992) ("Passing allusions are not adequate to preserve an argument in either a trial or an appellate venue."); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 1, 6 & n.5 (1st Cir. 2008) (finding argument waived where party noted a fact before the district court but "did not argue that [the fact] had any legal significance"). In any event, such a statement does nothing to counter plaintiffs' argument that they qualify for the exemption because the goods they transport are in the stream of interstate commerce. Nor does this case present "the most extraordinary circumstances" under which we will consider on appeal an argument not made to the district court. Teamsters Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992). Defendants neither developed the argument below nor argued that

plaintiffs were obligated to submit further evidence bearing on the issue in the absence of any challenge by defendants. As a result, the record is scant on information pertaining to whether plaintiffs' intrastate transportation of the baked goods is a continuation of the same interstate journey that brings the goods to the Massachusetts warehouse or a separate, purely intrastate journey.[1] The argument is therefore waived.

Defendants also failed to present to the district court their third argument (that plaintiffs are ineligible for the section 1 exemption because they personally do not have "contracts of employment" as that term is used in the statute). Defendants argue that they preserved this argument because they "consistently pointed out . . . that 'the Distributor Agreement is signed on behalf of T&B,'" and because they "consistently argued that Plaintiffs' status and relationship to Flowers as business owners, not

---

[1] Such information would include, for example, whether the goods are ordered to the warehouse pursuant to a prior contract or understanding with the ultimate recipients or whether the shipments to the warehouse populate a general inventory from which subsequent in-state orders are filled. See, e.g., Fraga, 61 F.4th at 241 (distinguishing materials that "began their interstate journeys intended for specific retail stores" from parts shipped interstate to a "general inventory" and then delivered later when it is "determine[d] the part is required"); cf. Walling v. Jacksonville Paper Co., 317 U.S. 564, 569–70 (1943) (holding that goods ordered by a wholesaler based on anticipation of need, as opposed to "pursuant to a prior order, contract, or understanding," may no longer be traveling in interstate commerce when delivered to the wholesaler's in-state customers for purposes of the Fair Labor Standards Act).

transportation workers, controls the [section] 1 analysis." But, as we just said, merely pointing out a fact is not the same as developing an argument about that fact's legal significance. See, e.g., Slade, 980 F.2d at 30; New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d at 6 & n.5. And defendants' argument that plaintiffs are business owners, not transportation workers, which defendants preserved, does not subsume the very different argument that plaintiffs do not have "contracts of employment" with defendants because they are not signatories to the Distributor Agreements in their personal capacities. This latter argument is therefore also waived.

B.

Having found two of defendants' arguments waived, we address the merits of defendants' remaining arguments, beginning with the contention that plaintiffs do not fit within the section 1 exemption because the business for which they do their work is not in the transportation industry. This contention does not survive our recent analysis in Fraga of how to determine whether a worker belongs to a class of transportation workers. Fraga reiterated Saxon's holding, based on the text of section 1, that the inquiry trains "on what [the worker] does at [the company], not what [the company] does generally." Fraga, 61 F.4th at 235 (alterations in original) (quoting Saxon, 142 S. Ct. at 1788). In Saxon, the Supreme Court rejected the plaintiff's "industrywide approach" in arguing that all airline employees are covered by section 1 "because air transportation '[a]s an industry' is engaged in interstate commerce." 142 S. Ct. at 1788 (alteration in original). Fraga construed Saxon's focus on the worker's work rather than the company's

industry to mean that employment within the "transportation industry," however defined, is neither sufficient nor necessary to qualify as a transportation worker for purposes of section 1. Fraga, 61 F.4th at 235. Simply put, "workers who do transportation work are transportation workers." Id. So we held that an employee of a retail services company may qualify as a transportation worker for purposes of section 1, based on the work that she actually performed. Id. at 237. So, too, here. We look to what work plaintiffs do, not what defendants do generally.

C.

That brings us to defendants' remaining preserved challenge to the district court's ruling: that plaintiffs' responsibilities are those of a business owner, rather than those of a transportation worker. This argument runs smack into the facts as found by the district court — each plaintiff spends a minimum of fifty hours per week driving their delivery routes to deliver goods. There is no evidence in the record to suggest that this finding comes anywhere close to clear error.

Nevertheless, defendants maintain that, despite transporting goods for fifty hours or more each week, plaintiffs are not transportation workers because transportation is not their primary responsibility. Defendants contend that plaintiffs are, rather, "independent franchisee business owners" whose business "has a wide variety of sales and customer-service responsibilities." Specifically, defendants point to plaintiffs' responsibilities of "'obtain[ing] . . . delivery vehicle(s) and purchas[ing] adequate insurance thereon'; mak[ing] and us[ing] 'advertising materials'; and hir[ing] any necessary employees"

(citations omitted). Defendants aver that business plans submitted by plaintiffs prove that plaintiffs perform a variety of tasks other than delivery and that they use business acumen to grow the value of their business.

Fraga, though, held that workers do not need to be "primarily" devoted to transportation in order to qualify for the section 1 exemption. Fraga, 61 F.4th at 236–37. Instead, Fraga and Saxon make clear that workers who perform transportation work "frequently" are transportation workers. Id.; Saxon, 142 S. Ct. at 1788–89, 1793. Workers who frequently perform transportation work do not have their transportation-worker status revoked merely because they also have other responsibilities. In Saxon, the Supreme Court held that the plaintiff was a transportation worker based on her frequent filling in to help load cargo on and off airplanes, even though as a "ramp supervisor" she was also responsible for training and supervising rather than loading cargo. 142 S. Ct. at 1787, 1789. And the Court so concluded without suggesting that it need also find that training and supervising transportation workers was itself transportation work. Id. at 1789 n.1. Similarly, in Fraga, we held that merchandisers who transported display materials to stores could qualify as transportation workers even though it was undisputed that they had other duties unrelated to transportation. Fraga, 61 F.4th at 237. Here, plaintiffs frequently deliver goods in trucks to stores. So they are transportation workers, even though they may also be responsible for other tasks associated with running a distribution business.

Defendants contend that we should look past the substance of plaintiffs' actual work because plaintiffs could have structured their distributorships so as to delegate driving to other persons. They argue that the relevant class of workers is the class of workers who own companies that distribute defendants' products. And the only way to determine what that class does, defendants continue, is to look at those workers' "job description[s]" as provided in the Distributor Agreements, which state that owners need not personally engage in any transportation. Relatedly, defendants maintain that even if we do look to plaintiffs' actual work, we must also look to the actual work of other owners of distributor companies, to determine what work "the members of the class, as a whole, typically carry out" (quoting Saxon, 142 S. Ct. at 1788).

Defendants misconstrue the relevant class of workers, which is not strictly limited by the worker's job title or job description. In Saxon, as a "ramp supervisor," the plaintiff's job duties were "[o]stensibly . . . meant to be purely supervisory." Saxon v. Sw. Airlines Co., 993 F.3d 492, 494 (7th Cir. 2021). But the Supreme Court nevertheless held that, "as relevant," she belonged to a class of "airplane cargo loaders"—that is, "a class of workers who physically load and unload cargo on and off airplanes on a frequent basis"—because in practice she frequently stepped in to load cargo alongside the ramp agents that she supervised. Saxon, 142 S. Ct. at 1789. So the plaintiff in Saxon belonged to the relevant class of cargo loaders, even though she also belonged to a class of workers who supervise cargo loading. Id. at 1793 ("Saxon frequently loads and unloads cargo on and off

airplanes that travel in interstate commerce. She therefore belongs to a 'class of workers engaged in foreign or interstate commerce' to which [section] 1's exemption applies."). And that makes sense, because any individual can be said to fall into a variety of different classes of workers depending on the relevant inquiry (e.g., a class of workers who reside in Massachusetts, a class of workers who receive hourly wages, etc.).

Here, plaintiffs deliver goods in trucks to stores for at least fifty hours every week. They therefore belong to a class of workers who frequently deliver goods in trucks to stores. Defendants offer no reason why that class is not a class of transportation workers. And plaintiffs' additional membership in a class of workers who own companies that distribute products for defendants does not remove them from the class of workers who deliver goods—just as the Saxon plaintiff's membership in a class of workers who supervise cargo loading did not remove her from the class of workers who physically load cargo.

In sum, the arguments that defendants preserved fail under recent First Circuit and Supreme Court precedent. We express no view in this opinion as to the merits of defendants' waived arguments, other than to confirm their waiver.[2]

III.

---

[2] The legal arguments in the amicus brief submitted by the Chamber of Commerce largely echo those made by defendants, and fail for the same reasons.

For the foregoing reasons, we affirm the district court's denial of defendants' motion to dismiss this lawsuit or to compel arbitration.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 22-1268

MARGARITO V. CANALES; BENJAMIN J. BARDZIK,

Plaintiffs - Appellees,

v.

CK SALES CO., LLC; LEPAGE BAKERIES; FLOWERS FOODS, INC.,

Defendants - Appellants.

Before

Kayatta, Lynch and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: June 2, 2023

Defendants' petition for panel rehearing is denied. Defendants' papers submitted to the district court never developed any argument that the goods plaintiffs carried were not in the flow of interstate commerce, as plaintiffs argued under Waithaka v.

Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020). To the contrary, defendants suggested that they "'do[] not take issue with' Waithaka or with the general proposition that a delivery driver responsible for transporting goods that have traveled interstate may well be a 'transportation worker' for purposes of the FAA," and instead distinguished Waithaka solely on the basis that "Plaintiffs certainly are not merely delivery drivers." Defendants' Response to Plaintiffs' Motion to Supplement Record and Plaintiffs' Supplemental Affidavits, ECF No. 24 at 1–2, Oct. 5, 2021 (quoting Bissonette v. Lepage Bakeries Park St., LLC, 460 F. Supp. 3d 191, 199 (D. Conn. 2020)).

Defendants' alternative argument that plaintiffs waived waiver overlooks our case law plainly holding that we may affirm by deeming waived arguments that an appellant failed to present below, regardless of whether the appellee requests such a finding of waiver. See Sammartano v. Palmas Del Mar Props.. Inc., 161 F.3d 96, 97 & n.2 (1st Cir. 1998) (applying waiver to affirm despite appellee's failure to assert waiver in its briefing because, "[a]lthough the [appellee] did not raise this argument in its papers, a district court's grant of summary judgment may be affirmed on any ground that appears in the record"); see also, e.g., United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuño, 633 F.3d 37, 42 & n.6 (1st Cir. 2011) (affirming on merits despite appellee's reliance on waiver alone because "[w]e are not . . . bound by the appellee's arguments, as we may affirm a district court's decision on any ground supported by the record"); United States v. Amador-Huggins, 799 F.3d 124, 132 (1st Cir. 2015) (affirming admission of statement under Federal Rule

of Evidence 801(d)(2)(A), despite parties' briefs addressing only Rule 804(b)(3), because "this court can affirm the admission 'on any independent ground made apparent by the record'" (quoting United States v. Cabrera-Polo, 376 F.3d 29, 31 (1st Cir. 2004))); O'Brien v. United States, 56 F.4th 139, 147 n.5 (1st Cir. 2022) ("Waiver doctrine is less readily applied to bar new arguments offered on behalf of an appellee").

By the Court:

Maria R. Hamilton, Clerk

cc:

Traci L. Lovitt
Frederick B. Finberg
Peter Bennett
Jack L. Millman
Pawel Binczyk
Amanda Kelly Rice
Matthew W. Lampe
Benjamin Caldwell Rudolf
Sarah Varney
Archis Ashok Parasharami
Jennifer B. Dickey

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARGARITO V. CANALES and BENJAMIN J. BARDZIK,	*	Civil Action No. 1:21-cv-40065-ADB
Plaintiffs,	*	
v.	*	
LEPAGE BAKERIES PARK STREET LLC, CK SALES CO., LLC, and FLOWERS FOODS, INC.,	*	
Defendants.	*	

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION

Margarito V. Canales ("Canales") and Benjamin J. Bardzik ("Bardzik," collectively, "Plaintiffs") brought this action against Lepage Bakeries Park Street, LLC ("Lepage"), CK Sales Co., LLC ("CK Sales"), and Flowers Foods, Inc. (together with Lepage and CK

Sales, "Defendants"), alleging that Defendants deliberately misclassified them as independent contractors in violation of Massachusetts law and thereby withheld wages and overtime compensation. See [ECF No. 1 ("Compl.")]. Currently before the Court is Defendants' motion to dismiss, or, in the alternative, compel arbitration pursuant to the Federal Arbitration Act ("FAA"). [ECF No. 9]. For the reasons set forth below, the motion is DENIED with leave to file a renewed motion to dismiss.

I. BACKGROUND

A. Factual Background

The Court draws the following facts from the complaint and the materials filed in connection with Defendants' motion to dismiss or compel arbitration. See Cullinane v. Uber Techs., Inc., 893 F.3d 53, 55 (1st Cir. 2018).

Defendants manufacture, sell, and distribute baked goods throughout Massachusetts. [Compl. ¶¶ 8–9; ECF No. 10-1 ¶¶ 2–4]. To carry out their operations, Defendants use a "direct-store-delivery" system in which "independent distributors" purchase distribution rights to deliver products and stock shelves at stores along particular routes. [Compl. ¶¶ 9, 11; ECF No. 10-1 ¶ 3]. Defendants classify these individuals as independent contractors. [Compl. ¶ 11].

Prior to April 2018, Plaintiffs worked as delivery drivers for Defendants. [Compl. ¶ 12]. In late 2017, Defendants' representatives approached Plaintiffs and told them that their delivery route would be purchased soon. [__, through their distribution company, T&B Dough Boys Inc. ("T&B"),

[1] signed a contract with Defendants ("Distributor Agreement"), [ECF No. 10-3 (copy of Distributor Agreement)], to purchase the distribution rights for three routes, [Compl.¶ 21; ECF No. 10-1 ¶ 5]. The Distributor Agreement incorporates a separate exhibit requiring T&B, including its owners, to arbitrate disputes with Defendants arising out of their business relationship (the "Arbitration Agreement"). [ECF No. 10-3 at 27–29]. The Arbitration Agreement states that:

> [t]he parties agree that any claim, dispute, and/or controversy except as specifically excluded herein, that either DISTRIBUTOR (including its owner or owners) may have against COMPANY (and/or its affiliated companies and its and/or their directors, officers, managers, employees, and agents and their successors and assigns) or that COMPANY may have against DISTRIBUTOR (or its owners, directors, officers, managers, employees, and agents), arising from, related to, or having any relationship or connection whatsoever with the Distributor Agreement between DISTRIBUTOR and COMPANY ("Agreement"), including the termination of the Agreement, services provided to COMPANY by DISTRIBUTOR, or any other association that DISTRIBUTOR may have with COMPANY ("Covered Claims") shall be submitted to and determined exclusively by binding arbitration under the Federal

---

[1] Plaintiffs formed T&B in 2018. [ECF No. 10-2 at 7]. Canales owns 51% of T&B, and Bardzik owns 49%. [Id. at 5].

> Arbitration Act (9 U.S.C. §§ 1, et seq.) ("FAA") in conformity with the Commercial Arbitration Rules of the American Arbitration Association ("AAA" or "AAA Rules"), or any successor rules, except as otherwise agreed to by the parties and/or specified herein.

[ECF No. 10-3 at 27]. The Arbitration Agreement also states that "[a]ll Covered Claims against COMPANY must be brought by DISTRIBUTOR on an individual basis only and not as a plaintiff or class member in any purported class, collective, representative, or multi-plaintiff action." [Id.]. The "Covered Claims" that must be submitted to arbitration include "any claims challenging the independent contractor status of DISTRIBUTOR" and "claims alleging that DISTRIBUTOR was misclassified as an independent contractor." [Id. at 28]. Finally, the Arbitration Agreement includes a delegation clause that provides that "[a]ny issues concerning arbitrability of a particular issue or claim under this Arbitration Agreement (except for those concerning the validity or enforceability of the prohibition against class, collective, representative, or multi-plaintiff action arbitration and/or applicability of the FAA) shall be resolved by the arbitrator, not a court." [Id.]. Although the Distributor Agreement is signed on behalf of T&B, Canales and Bardzik each also signed a Personal Guaranty, [ECF No. 10-3 at 25–26], certifying that each of them, as individuals, "agrees and acknowledges he/she is subject to" the Arbitration Agreement in the Distributor Agreement, [ECF No. 10 at 3–4; ECF No. 10-3 at 25–26]. In July 2019, Plaintiffs, through T&B, purchased a fourth

distribution route, T&B signed another Distributor Agreement (with an identical Arbitration Agreement), and Plaintiffs submitted a business plan in connection with that purchase. [ECF No. 10-1 ¶ 7; ECF No. 10-4; ECF No. 10-5]. In October 2020, Plaintiffs arranged for CK Sales to buy back the fourth territory they purchased in July 2019 and then purchased a different territory. [ECF No. 10-1 ¶ 5]. In connection with that purchase, T&B again signed another Distributor Agreement with an Arbitration Agreement and submitted another business plan. [ECF Nos. 10-6, 10-7].

Since signing the Distributor Agreements, Plaintiffs represent that they have worked an average of sixty to eighty hours a week but have not been properly compensated and have been forced to pay various expenses, including delivery driver payments, delivery truck payments, insurance payments, gas and maintenance, "shrink charges" for missing or damaged goods, and "stale charges" for baked goods that have been returned as stale. [Compl. ¶¶ 23–28; ECF No. 19 ¶¶ 4, 6; ECF No. 20 ¶¶ 4, 6]. Plaintiffs also aver that they spend a minimum of fifty hours per week driving on two delivery routes and another twenty to thirty hours supervising other drivers who work their other delivery routes. [ECF No. 19 ¶¶ 4–6; ECF No. 20 ¶¶ 4–6]. Though Plaintiffs state that they spend the vast majority of their time driving or supervising drivers, the Distributor Agreements do not require the Plaintiffs to perform any driving themselves. [ECF No. 10-3 at 16 ("This [Distributor] Agreement does not require that DISTRIBUTOR'S obligations hereunder be conducted personally" by Plaintiffs or any specific individual)]. A declaration from a LePage employee

describes Plaintiffs as having significant other responsibilities beyond driving, including "hiring employees at their discretion to run their four territories; identifying and engaging potential new customers; developing relationships with key customer contacts; ordering products based on customer needs; servicing the customers in their territory, stocking and replenishing product at the customer locations; removing stale product; and other activity necessary to promote sales, customer service and otherwise operate their independent business." [ECF No. 10-1 ¶ 10].

B. Procedural Background

Plaintiffs filed their eight-count complaint on June 17, 2021, alleging violations of the Massachusetts Wage Act, Mass. Gen. Laws ch. 149 §§ 148, 148B; the Massachusetts Minimum Fair Wage Law, Mass. Gen. Laws ch. 151 §§ 1, 1A; unjust enrichment; fraud/misrepresentation; breach of contract; and breach of the implied covenant of good faith and fair dealing. [Compl. ¶¶ 40–59]. On August 13, 2021, Defendants filed a motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, [ECF No. 9], which Plaintiffs opposed on September 10, 2021, [ECF No. 16]. Plaintiffs moved to supplement the record on September 29, 2021 and then filed supplemental affidavits regarding the nature of their work for Defendants. [ECF Nos. 17, 19, 20]. Defendants replied to Plaintiffs' supplemental materials on October 5, 2021. [ECF No. 24].

II. LEGAL STANDARD

The FAA "'embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.'" Soto-

Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). According to the FAA, "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . 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 party that seeks to compel arbitration is the one that bears the burden of proving "that a valid agreement to arbitrate exists, the movant has a right to enforce it, the other party is bound by it, and that the claim asserted falls within the scope of the arbitration agreement." Oyola v. Midland Funding, LLC, 295 F. Supp. 3d 14, 16–17 (D. Mass. 2018) (citing Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 293 (D. Mass. 2016), aff'd, 918 F.3d 181 (1st Cir. 2019)).

III. DISCUSSION

Plaintiffs argue that they cannot be compelled to arbitrate because they qualify as transportation workers under § 1 of the FAA and are therefore exempt from the statute.[2] [ECF No. 16 at 14–16; ECF No. 17]. Here, the Arbitration Agreement explicitly reserves the question of the FAA's applicability for the courts, not an arbitrator. [ECF No. 10-3 at 27]. Thus, it falls

---

[2] Although Plaintiffs make several other arguments in opposition to the motion to dismiss, [ECF No. 16 at 4–14], because the § 1 issue is dispositive for the purposes of Defendants' pending motion, the Court begins and ends its discussion with an analysis of § 1.

to this Court to decide whether Plaintiffs qualify as transportation workers under § 1.

A. Scope of the § 1 Exemption

Section 1 of the FAA states that the statute does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; see Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020), cert. denied, 141 S. Ct. 2794 (2021), reh'g denied, 141 S. Ct. 2886 (2021). In Circuit City Stores, Inc. v. Adams, the Supreme Court narrowly interpreted the phrase "any other class of workers engaged in foreign or interstate commerce" and limited its coverage to "transportation workers" engaged in foreign or intrastate commerce. 532 U.S. 105, 114, 119 (2001) ("Section 1 exempts from the FAA only contracts of employment of transportation workers."). The Court's analysis was guided by the canon of *ejusdem generis*, which required the Court to read "the residual clause . . . to give effect to the terms 'seamen' and 'railroad employees'. . ." Id. at 115. Notably, other than determining that the exemption applied only to seamen, railroad employees, and transportation workers, the Supreme Court declined to provide further guidance on which type of workers would fall within § 1.

Although the Supreme Court has provided scant guidance on how courts should define "transportation worker," the First Circuit has recently interpreted the term in the context of last-mile delivery drivers for Amazon. Waithaka, 966 F.3d at 26. In Waithaka v. Amazon.com, Inc., the First Circuit held that "last-mile delivery workers who haul goods on the final legs of interstate journeys" while employed by Amazon "are

transportation workers 'engaged in . . . interstate commerce.'" Id. The First Circuit concluded that the § 1 exemption applied to these workers, "regardless of whether the workers themselves physically cross state lines" because the goods they were delivering had moved interstate. Id.; see also Immediato v. Postmates, Inc., No. 20-cv-12308, 2021 WL 828381 (D. Mass. Mar. 4, 2021) ("It is the goods, and not the workers, that define engagement in interstate commerce."). Due to the facts of the case before it, the First Circuit limited its analysis to workers that spent their time physically transporting goods for Amazon. Waithaka, 966 F.3d at 22 n.10. Although the First Circuit declined to explicitly define the boundaries of § 1, it noted that the exemption is not necessarily limited to workers that actually transport goods and opined "that the contracts of workers 'practically a part' of interstate transportation—such as workers sorting goods in warehouses during their interstate journeys or servicing cars or trucks used to make deliveries—[do not] necessarily fall outside the scope of the Section 1 exemption." Id. at 20 n.9. The First Circuit recognized precedent from the Third Circuit that "described Section 1 as covering workers 'who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.'" Id. (quoting Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Loc. 437, 207 F.2d 450, 452 (3d Cir. 1953)); see also Palcko v. Airborne Express, Inc., 372 F.3d 588, 593 (3d Cir. 2004) (finding that a worker who directly supervised package shipments was exempt under § 1 even though the worker did not personally transport packages); Saxon v. Sw. Airlines

Co., 993 F.3d 492, 497 (7th Cir. 2021), cert. granted, 142 S. Ct. 638 (2021) (holding that ramp manager that assisted with loading and unloading passengers and cargo for airline fell within the § 1 exemption).

Although the First Circuit declined to further examine which workers may be "so closely related" to interstate commerce as to practically be a part of it, another court in this district recently considered that precise question. Fraga v. Premium Retail Servs., Inc., No. 21-cv10751, 2022 WL 279847, at *7 (D. Mass. Jan. 31, 2022), appeal docketed No. 22-1130 (1st Cir. Feb. 10, 2022). After undertaking a thorough study of the statutory language and applicable case law from this and other circuits, that court concluded that § 1's residual clause should be read

> to include those "so closely related [to interstate transportation] as to be in practical effect part of it." See Tenney, 207 F.2d at 452 (emphasis added); Saxon, 993 F.3d at 494; Patterson, 113 F.3d at 836. This framework allows workers engaged in interstate commerce to be broken down into three categories: 1) "workers who themselves carried goods across state lines"; 2) "those who transported goods or passengers that were moving interstate"; and 3) those "in positions so closely related to interstate transportation as to be practically a part of it." See Waithaka, 966 F.3d at 20 (internal quotation marks omitted).

Id. Of particular significance in Fraga v. Premium Retail Services, Inc. was the language of the Federal Employer's Liability Act, which includes "nearly identical language to Section 1 of the FAA" and has

been construed by the Supreme Court to include "'employees engaged in interstate transportation or in work so closely related to it as to be practically a part of it.'" Id. at *6 (quoting Shanks v. Del., Lackawanna & W.R.R., 239 U.S. 556, 558–59 (1916) (emphasis omitted)). This Court agrees with the Fraga court's well-reasoned interpretation of § 1, as well as the views of other circuits, and likewise finds that workers engaged in activities so closely related to interstate commerce as to practically be a part of it are also transportation workers under § 1. See Palcko, 372 F.3d at 593; Saxon, 993 F.3d at 497.

After analyzing the scope of the exemption, the Fraga court determined that the plaintiff, who had the official job title of "Merchandiser," was so closely related to interstate commerce as to be a part of it. 2022 WL 279847 at *9. The defendant in that case operated a business that supported various retail customers by providing product displays, "point-of-purchase" displays, pricing, and signage for use in its customers' stores. Id. at *2. Despite her official job title, the court looked to the plaintiff's actual responsibilities, which included receiving "point-of-purchase" display materials that had traveled in interstate commerce, searching through and sorting those materials, and then transporting the displays to different stores. Id. at *8. The court concluded that the plaintiff "served as an integral part of delivering the goods to their end destination. This is the essence of handling goods that travel interstate." Id. In addition to these delivery responsibilities, the plaintiff's other responsibilities included auditing and stocking products, assembling the displays, and updating product pricing and signage. Id. at *2. The

court did not find that the plaintiff's other responsibilities removed her from §1's scope. Id. at *9 ("While her work entails providing a service, she transports the goods used in that service, which were previously travelling interstate.").

B. Applicability to this Case

Having determined the scope of § 1, the Court next applies it to the facts of this case and concludes that Plaintiffs fall under the exemption and cannot be compelled to arbitrate their claims pursuant to the FAA.

Plaintiffs contend that their duties are "entirely consistent with the work performed by the plaintiffs in Waithaka" because the work they "engage in daily consists of transporting goods in the stream of interstate commerce." [ECF No. 16 at 15]. Defendants push back on this interpretation and argue that Plaintiffs are not delivery drivers and are instead "independent distributor franchisees" whose main responsibilities are customer service and growing the business, rather than transporting goods. [ECF No. 10 at 1, 14–15; ECF No. 24 at 3–5].

Plaintiffs' job title alone is not dispositive because "[i]t is not the title of the worker, however, that is the key focus of the analysis but rather the actual activities performed." Fraga, 2022 WL 279847, at *5 (citing Waithaka, 966 F.3d at 22). Plaintiffs have each submitted a supplemental affidavit in which they swear "under the pains and penalties of perjury" that their work for Defendants "has consisted and still consists primarily of driving trucks delivering the Defendants' bread products from their warehouse to their customers along particular delivery routes," they

"spend a minimum of [fifty] hours per week driving," and the remaining twenty to thirty hours of work per week consists of "supervising other individuals who drive trucks." [ECF No. 19 ¶¶ 2, 4–6; ECF No. 20 ¶¶ 2, 4–6]. Defendants argue that these affidavits should be given little, if any, weight since they do not account for, and ultimately contradict, the non-delivery responsibilities outlined in the Distributor Agreements and business plans, which include developing relationships with customers, hiring other drivers, and improving sales. [ECF No. 24 at 3–5]. Defendants also point to the fact that the Distributor Agreements explicitly do not require Plaintiffs to continue making the deliveries themselves. [ECF No. 10 at 14]. Importantly, Defendants do not assert that Plaintiffs never spend any time physically making deliveries but instead argue that they are not "primarily drivers" and the amount of time they spend driving is insufficient to push them into the § 1 exemption. [ECF No. 24 at 3, 5 ("It is clear from [the LePage employee's] Declaration and Plaintiffs' own business plans that less than half of their time is devoted to driving and that driving is **incidental** to all of their other responsibilities. . . .") (emphasis in original)]. Further, Defendants do not challenge Plaintiffs' representation that the baked goods crossed state lines before arriving to Defendants' customers.[3] [ECF No. 19 ¶ 10; ECF No. 20 ¶ 10].

Defendants' argument that the Distributor Agreements and business plans are proof that

---

[3] Plaintiffs do not assert that they ever had to physically cross state lines to carry out their responsibilities.

Plaintiffs did not primarily engage in driving is unavailing. Plaintiffs have put forth sworn affidavits stating that they spend the majority of their time making deliveries. And, although the Distributor Agreements do not require Plaintiffs to personally drive trucks or deliver goods, they also do not prohibit such activities, and there is nothing in the record to suggest that Plaintiffs were carrying out all of the other responsibilities included in the Distributor Agreements and business plans, or that those other responsibilities took up more time than driving. Defendants also have not pointed to any binding case law that requires a worker to be transporting goods at all times in order to be considered a "transportation worker." Cf. Saxon, 993 F.3d at 494 (noting that "[o]stensibly [plainitff's] job is meant to be purely supervisory," but still finding that she was a transportation worker because her declaration stated that she would fill in as a ramp agent when the company was short on workers); Fraga, 2022 WL 279847, at *9 (recognizing that plaintiff had responsibilities other than delivering goods). Thus, taking Plaintiffs' statements that they spend over fifty hours a week delivering goods as true, Plaintiffs' responsibilities are essentially identical to the Waithaka delivery drivers' responsibilities and, under that binding precedent, clearly fall within the § 1 exemption.

Even assuming that Plaintiffs' work primarily involves supervising other drivers and engaging in tasks that only relate to delivery of the interstate goods rather than actually performing the deliveries themselves, those activities are still so closely related to interstate commerce that Plaintiffs are practically a

part of it. Although the First Circuit did not expressly address the "so closely related" question, it noted that "so closely related" workers could include "workers sorting goods in warehouses during their interstate journeys or servicing cars or trucks used to make deliveries." Waithaka at 20 n.9. In Palcko v. Airborne Express, Inc., the Third Circuit held that the plaintiff, who was responsible for monitoring the improvement of drivers and ensuring timely and efficient package delivery, was so closely related to interstate commerce as to be a part of it and declined to limit § 1 to only those "truck drivers who physically move the packages." 372 F.3d at 593. Here, Plaintiffs' other responsibilities include hiring and supervising other drivers, building relationships with potential delivery customers, ordering products based on customer needs, making sure the products are properly stocked and not stale, and otherwise servicing the customers in their territory. These responsibilities, which generally require overseeing deliveries or ensuring that the delivered goods are in proper condition, are sufficiently similar to the hypothetical examples in Waithaka and the supervisor in Palcko to support the conclusion that Plaintiffs are transportation workers.

Defendants urge this Court to adopt the reasoning and holding of Bissonnette v. Lepage Bakeries Park St., LLC, 460 F. Supp. 3d 191 (D. Conn. 2020), which they argue is directly on point. [ECF No. 10 at 13–17; ECF No. 24]. In Bissonnette, another group of Defendants' employees filed suit alleging violations of various employment laws. 460 F. Supp. 3d at 193. Those employees, like Plaintiffs here, were also "franchisees" and had signed distributor agreements. Id. at 194. In that case, the district court dismissed

the case in favor of arbitration because the "Distributor Agreements evidence a much broader scope of responsibility [beyond delivering goods] that belies the claim that they are only or even principally truck drivers." Id. at 199. Bissonnette is distinguishable on two grounds. First, it does not appear that the Bissonnette court had sworn affidavits from the plaintiffs attesting that they spent fifty hours a week driving and making deliveries. Second, the Bissonnette court also did not meaningfully consider whether the non-driving responsibilities would result in the plaintiffs being so closely related to interstate commerce as to practically be a part of it. Id. at 202 (noting only that "[t]he fact that Plaintiffs' contracts expressly contemplate delegation of delivery work and all manner of Plaintiffs' business operations, moreover, undercuts the suggestion that Plaintiffs are personally indispensable to the flow of goods in a manner akin to a traditional truck driver, or that Plaintiffs are so closely related to interstate commerce as to be part of it."). Accordingly, Bissonnette does not require this Court to dismiss or compel arbitration.

Defendants argue, in a final effort to overcome the § 1 exemption, that transportation is only incidental to their business because LePage is a bread baking company, and CK Sales is a company that is in the business of contracting with distributors. [ECF No. 10 at 16]. Therefore, according to Defendants, they are clearly distinct from a railroad operator, airline, or trucking company. [Id.]. Defendants fail to point to any binding case law that requires an employer to be a transportation company for § 1 to apply. To the contrary, the First Circuit, after describing Amazon as an "online retailer," rather than a trucking or

transportation company, still found that its delivery drivers were transportation workers. Waithaka, 966 F.3d at 14, 26. Other courts have reached similar conclusions. See Saxon, 993 F.3d at 497 (noting that "a transportation worker need not work for a transportation company"); Fraga, 2022 WL 279847, at *5 ("It is not required that a class of workers be employed by an interstate transportation business nor a business of a certain geographic scope to fall within Section 1." (internal quotation marks and citations omitted)). Therefore, the nature of Defendants' business alone does not mandate dismissal or compel arbitration.

In sum, Plaintiffs are transportation workers within the meaning of §1 and are exempt from the FAA. Therefore, Defendants' motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, is DENIED.

C. State Arbitration Law

Although the FAA does not require dismissal, the Court must still determine if arbitration can be compelled under state law. Waithaka, 966 F.3d at 26. The text of the Arbitration Agreement indicates, and the parties appear to agree, that Massachusetts arbitration law would apply if the FAA did not. [ECF No. 10-3 at 29 ("This Arbitration Agreement shall be governed by the FAA and []Massachusetts law to the extent Massachusetts law is not inconsistent with the FAA."); ECF No. 10 at 9; ECF No. 16 at 11]. Here, it is undisputed that the Arbitration Agreement waives any rights to proceed in a class action or multi-plaintiff suit and also specifically delegates an analysis of that wavier to the Court, not an arbitrator. [ECF No. 10-3 at 28–29]. After analyzing the relevant

Massachusetts case law, the First Circuit in Waithaka held that "[the Massachusetts Supreme Judicial Court] would conclude that the right to pursue class relief in the employment context represents the fundamental public policy of the Commonwealth, such that this right cannot be contractually waived in an agreement not covered by the FAA." 966 F.3d at 29–33. Thus, "where the FAA does not control, class action waivers are void ab initio as matter of public policy in Massachusetts." Fraga, 2022 WL 279847, at *10. Accordingly, it appears that Massachusetts law would also not compel arbitration in this multi-plaintiff suit. Although this issue must be resolved, other than Plaintiffs' one-paragraph argument that Massachusetts law would prohibit arbitration, neither party has comprehensively briefed this issue. [ECF No. 16 at 11 ("The arbitration provision's waiver of rights to proceed on a 'multi-plaintiff basis' violates Massachusetts law.")]. Because this is an important issue that would benefit from additional briefing, the Court allows Defendants leave to file a renewed motion to dismiss that solely addresses the issue of arbitration under state law.[4]

---

[4] Because the Court's resolution of the § 1 exemption issue is sufficient to resolve Defendants' pending motion, the Court has not analyzed Plaintiff's additional arguments that the Distributor Agreements (and consequently the Arbitration Agreements) are otherwise invalid or that Plaintiffs are not even parties to the Distributor Agreements. Although the Court reserves judgment on these issues at this time, it notes that other than the FAA's applicability and the waiver of class action rights, the Arbitration Agreement expressly delegates "[a]ny issues concerning arbitrability of a particular issue or claim" to an

IV. CONCLUSION

For the reasons set forth above, Plaintiffs are exempt from the FAA and cannot be compelled to arbitrate pursuant to that statute, but as noted above, the issue of state arbitration law remains. Accordingly, Defendants' motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, [ECF No. 9], is DENIED. Within fourteen (14) days of the date of this Order, Defendants should file a renewed motion to dismiss only addressing the specific issue of state arbitration law or a status report indicating that they will not file another motion to dismiss.

SO ORDERED.

---

arbitrator and adopts the American Arbitration Association's rules, which provide that an "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Rules and Mediation Procedures, Rule 7(a) (2013). Although the Supreme Court has cautioned that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so[,]" First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (second and third alterations in original) (internal quotation marks omitted) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)), it has also recently held that courts must respect delegations of arbitrability, Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019); see also Boursiquot v. United Healthcare Servs. of Delaware, Inc., 158 N.E.3d 78, 83 (Mass. App. Ct. 2020) (analyzing delegation clauses under Massachusetts law). Here, Plaintiffs have failed to meaningfully grapple with the Arbitration Agreement's delegation provisions when advancing their other arguments in opposition to dismissal.

March 30, 2022

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE