

No. _____

**In The
Supreme Court of the United States**

◆

CRAZY HORSE SALOON AND RESTAURANT INC.,
d/b/a THEE NEW DOLLHOUSE,

Petitioner,

v.

ALEXIS DEGIDIO, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

◆

**On Petition For Writ Of Certiorari
From The United States Court Of Appeals
For The Fourth Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

JAMES L. HOLT, JR.
Counsel of Record
JACKSON, SHIELDS, YEISER & HOLT
262 German Oak Drive
Memphis, TN 38018
901-754-8001 (telephone)
901-754-8524 (facsimile)
jholt@jsyc.com

May 17, 2018

QUESTION PRESENTED

Did the Court of Appeals err when it found that the District Court could refuse to enforce arbitration agreements entered into between the Petitioner, Crazy Horse Saloon and Restaurant, Inc. (“Crazy Horse”) and Entertainers when the evidence does not show that those agreements were obtained in a misleading or coercive manner?

PARTIES TO THE PROCEEDINGS

Respondent Alexis Degidio, who had no arbitration agreement, instituted the proceedings below by filing a complaint for a putative Fair Labor Standards Act (“FLSA”) collective action and Rule 23 class action based on state wage claims. Petitioner Crazy Horse filed a Motion to Compel Arbitration for nine individuals who filed Consents to Join the collective action but had previously executed arbitration agreements with Petitioner. The District Court denied Petitioner Crazy Horse’s motion to compel arbitration for those nine individuals. Crazy Horse appealed to the United States Court of Appeals for the Fourth Circuit pursuant to the statute allowing appeals regarding compelling arbitration. However, the Fourth Circuit first denied Petitioner’s appeal and then its En Banc Petition on February 22, 2018.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Petitioner Crazy Horse Saloon and Restaurant, Inc. (“Crazy Horse”), hereby states that it is not a publicly held corporation or other publicly-held entity, and it does not have any parent corporations. Additionally, there is no parent corporation, publicly held corporation, or other publicly held entity that owns 10% or more of its stock. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. Crazy Horse is not a

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT – Continued**

trade association, and there is no publicly held member whose stock or equity value could be affected substantially by the outcome of this proceeding or whose claims the trade association is pursuing in a representative capacity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
RULE 29.6 CORPORATE DISCLOSURE STATE- MENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY OR CONSTITUTIONAL PROVI- SIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THE PETITION	8
THE FOURTH CIRCUIT’S DECISION CONFLICTS WITH THOSE OF THE SU- PREME COURT AND ELEVENTH CIR- CUIT ON THE IMPORTANT MATTER OF WHETHER AND HOW A PARTY MAY OBTAIN ARBITRATION AGREEMENTS FROM NON-PARTIES DURING PEND- ING CLASS OR COLLECTIVE LITIGA- TION	8
A. The Fourth Circuit’s Definition of “Misleading” or “Coercive” Communi- cation Significantly Differs From the Eleventh Circuit’s, Under Which the Agreements Were Not Misleading or Coercive	10

TABLE OF CONTENTS – Continued

	Page
1. The Differing Definitions of “Misleading”	11
2. The Differing Definitions of “Coercive”	15
B. The Restrictions on Enforcing Arbitration Agreements Were Not Narrowly Tailored After Weighing the Harm To Both Parties As Required By the Supreme Court’s <i>Gulf Oil</i> Opinion	21
CONCLUSION.....	25

APPENDIX

Opinion/Judgment, United States Court of Appeals for the Fourth Circuit, filed January 18, 2018	App. 1
Order (Doc. No. 166), United States District Court South Carolina, filed January 26, 2017	App. 21
Order Denying Petition for Rehearing En Banc, filed February 13, 2018	App. 65

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arrants v. Buck</i> , 130 F.3d 636 (4th Cir. 1997).....	20
<i>Billingsley v. Citi Trends</i> , 560 Fed. Appx. 914 (11th Cir. 2014).....	10-11, 14-16, 18-19, 21, 24
<i>Forrester v. Penn Lyon Homes, Inc.</i> , 553 F.3d 340 (4th Cir. 2009).....	20
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89 (1981)	19-23
<i>Jones v. Waffle House</i> , 866 F.3d 1257 (11th Cir. 2017)	24
<i>Hart v. Rick’s Cabaret Int’l, Inc.</i> , 967 F. Supp. 2d 901 (S.D.N.Y. 2013)	13
<i>Hilborn v. Prime Time Club, Inc.</i> , No. 4:11cv197, 2012 WL 9187581 (E.D. Ark. July 12, 2012)	14
<i>Hoffmann–La Roche, Inc. v. Sperling</i> , 493 U.S. 165 (1989).....	10
<i>Kleiner v. First National Bank of Atlanta</i> , 751 F.2d 1193 (11th Cir. 1985).....	10, 24
<i>Longcrier v. HL-A Co., Inc.</i> , 595 F. Supp. 2d 1218 (S.D. Ala. 2008).....	11
<i>McFeeley v. Jackson St. Entm’t, LLC</i> , 47 F. Supp. 3d 260 (D. Md. 2014).....	13
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	21

TABLE OF AUTHORITIES – Continued

	Page
<i>Milbourne v. JRK Residential Am., LLC</i> , 2016 U.S. Dist. LEXIS 33603 (E.D. Va. Mar. 15, 2016)	20
<i>Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.</i> , 380 F.3d 200 (4th Cir. 2004).....	20
 STATUTORY AND CONSTITUTIONAL PROVISIONS	
9 U.S.C. § 1	21
9 U.S.C. § 2	2, 9
9 U.S.C. § 16(a)(1)(B)	7
28 U.S.C. § 1254(1)	1
U.S. Const. amend. I	2, 21
 RULES	
Supreme Court Rule 10(a), (c).....	8-9, 10, 25

OPINIONS BELOW

The Fourth Circuit Court of Appeals’ affirmance of the United States District Court of South Carolina’s denial of the Petitioner’s Motion to Compel Arbitration is published at 880 F.3d 135 (4th Cir. 2018). The United States District Court in Florence, South Carolina’s denial of the Petitioner’s Motion to Compel Arbitration (Pet. App. at 21-64) is unpublished. The denial of the En Banc Petition from the Fourth Circuit Court of Appeal (Pet. App. at 65) is also unpublished.



JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). On January 18, 2018, the Fourth Circuit affirmed the District Court’s denial of Crazy Horse’s Motion to Compel Arbitration. Then Petitioner filed a Petition for Rehearing En Banc with the Fourth Circuit Court of Appeals on January 30, 2018, which was denied on February 13, 2018.¹ Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction because “[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil . . . after rendition of judgment or decree[.]” *Id.*



¹ Order Denying En Banc Petition (Pet. App. at 65).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Federal Arbitration Act (“FAA”) and the Constitution’s First Amendment right to freedom of speech.

The FAA provision at issue states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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 Petitioner’s First Amendment freedom of speech rights are also at issue. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.



STATEMENT OF THE CASE

Petitioner Crazy Horse Saloon and Restaurant Inc. (“Appellant” or “Crazy Horse”) provides entertainment and restaurant services. Respondent Alexis Degidio (“Respondent” or “Degidio”), who was an independent contractor that performed at other clubs from 2004 to 2013 and only occasionally at Crazy Horse from about July 2012 to April 2013, sued Crazy Horse claiming she was treated as an “employee” but was denied certain wages under the Fair Labor Standards Act (“FLSA”) and South Carolina Payment of Wages Act (“SCPWA”).² Crazy Horse denied liability and claimed it had not “employed” Degidio as an Entertainer and admitted she was not paid wages. Crazy Horse claims that it did not exercise the level of control over her that would qualify her as an employee under the FLSA or SCPWA. Instead, Degidio determined her own schedule, style of performance, dress, and fees, and she was not restricted from performing at other businesses.³

Since Degidio had not signed an arbitration agreement, no motion to compel arbitration was filed when

² (1st Am. Compl., C.A. App. at 12-17; Am. Answer, C.A. App. at 20-30; Def.’s Refiled Memo. in Supp. of Mt. for Summ., C.A. App. at 105-09, 112, 114; Def.’s Resp. to Pl.’s Mt. to Certify Class, C.A. App. at 514).

³ (Def.’s Refiled Summ. Judg. Memo., C.A. App. at 109; Def.’s Stat. of Undisp. Facts, C.A. App. at 136-38; Def.’s Resp. to Pl.’s Mt. to Certify Class, C.A. App. at 514). Although the District Court denied Crazy Horse’s summary judgment motion on that issue, Degidio did not move for summary judgment; thus, whether she was an “employee” under the FLSA or the SCPWA remains a disputed issue to be tried before a jury.

her Complaint was filed. However, on October 31, 2016, after nine Entertainers (“opt-ins”) who had signed arbitration agreements filed consent forms to join in Degidio’s putative FLSA collective action, Crazy Horse timely filed a Motion to Dismiss Claims and Compel Arbitration to enforce arbitration agreements signed by those nine Entertainers.⁴ Crazy Horse met all the requirements to compel arbitration regarding the disputes of those Opt-ins, including that the written arbitration provisions they signed pertained to a dispute between the parties, were related to interstate commerce, and were not misleading or coercive. For example, they advised of Degidio’s lawsuit, contained information about arbitration, had provisions that allowed each one to choose to opt out of the arbitration provision (“opt-out”), and gave Entertainers an opportunity to fully review the agreements outside of Crazy Horse’s presence and consult their own attorney(s) and to opt-out if they so desired.⁵ The Arbitration Provision in the Agreement at issue specifically applies to “***ALL** federal, state, statutory, and common law claims*

⁴ (Def.’s Mt. to Dismiss Claims and to Compel Arbitration Against Those Opt-in Pls. Who Signed Mandatory Arb. Agreements and Brief (C.A. App. at 726-27; hereinafter “Arbitration Brief”).) Each of those nine Entertainers who had performed at Crazy Horse’s Club since mid-November 2014 had each entered into a Licensing Lease and Dispute Resolution Agreement (“Lease Agreement” or “Agreement”) as part of an Entertainers Information Package given to each Entertainer. (Arbitration Brief, C.A. App. at 728-31.)

⁵ (Arbitration Brief, C.A. App. at 728-35; Reply in Support of Mt. to Compel Arbitration (“Reply to Arb. Mt.”), C.A. App. at 888-94.)

*between the Parties, including, but not limited to all claims . . . that arise out of, in connection with, or relating to this Agreement,” including the enforcement of the Licensing Agreement, the “Performer’s classification as an independent contractor, and the arbitrability of any such claim, regardless of when it may have arisen, and regardless of whether a lawsuit has been filed seeking a collective or class action. . . .”*⁶

After Degidio contended that the arbitration agreements should not be enforced because they were allegedly misleading and that the Club delayed in attempting to compel arbitration,⁷ Crazy Horse filed a Reply explaining that it had not delayed in bringing its motion to compel arbitration but filed it as soon as practicable after the first party who had signed an arbitration agreement joined this suit and had sought to confirm with Plaintiff’s counsel the identities of the individual Entertainers who appeared to have signed the agreements while determining whether a motion to compel would be necessary.⁸ Crazy Horse also argued

⁶ Licensing, Lease, and Dispute Resolution Agreements (“Agreements”) § 15(d)(i), C.A. App. at 741, 753, 765, 777, 789, 801, 814, 826, 839) (emphasis added).

⁷ (Pl.’s Resp. to Def.’s Mt. to Dismiss Claims of Opt-ins to Conditionally Certified FLSA Action and to Compel Arb. (“Pl.’s Resp.”) C.A. App. at 853-62.)

⁸ (Reply to Arb. Mt., C.A. App. at 883-86.) In its Reply, Crazy Horse explained that it filed its Motion to compel arbitration on October 31, 2016, after the first putative party to the lawsuit who had signed an arbitration agreement filed a Consent to Join (and after attempting to confirm the identity of such Opt-ins who signed arbitration agreements through discovery). *See id.* Crazy Horse indicated that it previously put this Court and the parties

that Degidio had not met her burden to establish that it engaged in any form of abusive, misleading, or coercive communication with Entertainers that would preclude the enforcement of such agreements.⁹

However, on January 26, 2017, the Court denied Crazy Horse’s Motion to Dismiss the Claims of Opt-Ins and Compel Arbitration, not because Crazy Horse had waived such right (or violated the NLRA or failed to construct a valid agreement under state contract law principles) but because the district court “exercise[d] its discretion to correct the effects of [Crazy Horse’s] misleading unilateral communications with potential plaintiffs.”¹⁰ Specifically, the District Court indicated that it based its ruling denying Crazy Horse’s motion to compel arbitration on “the Agreement’s misleading language implying that the entertainers’ legal status ha[d] been decided and that it [wa]s necessarily more beneficial for them to be considered independent contractors.”¹¹ However, the District Court pointed to no

on notice of its potential defense against liability for any future opt-ins by claiming it had arbitration agreements in its Response in Opposition to Motion to Certify Class, filed on January 19, 2015. (Reply to Arb. Mt., C.A. App. at 885-86; *see also* Def.’s Resp. to Pl.’s Mt. to Certify Class (Doc. No. 81) at 2.) The Club also contended that the timing of its Motion did not prejudice Degidio (who never had an arbitration agreement) or Opt-ins who signed Agreements (since they did not file their Consents to Join for almost eleven months after Crazy Horse gave notice of the arbitration agreements). (Reply to Arb. Mt., C.A. App. at 886-87.)

⁹ (Reply to Arb. Mt., C.A. App. at 888-94.)

¹⁰ (Order, Pet. App. at 40.)

¹¹ *Id.*

misleading communications implied or otherwise regarding the dispute resolution agreement itself or the information about arbitration accompanying it.

On February 1, 2017, Defendant timely filed its Notice of Appeal of the Order denying its Motion to Compel Arbitration, pursuant to 9 U.S.C. § 16(a)(1)(B).¹² On January 18, 2018, the Fourth Circuit affirmed the district court. Petitioner filed a Petition for Rehearing En Banc with the Fourth Circuit Court of Appeals on January 30, 2018.

¹² (Notice of Appeal, filed February 1, 2017, C.A. App. at 932-34.) Pursuant to 9 U.S.C. § 16:

- (a) An appeal may be taken from –
 - (1) an order –
 - (A) refusing a stay of any action under section 3 of this title,
 - (B) denying a petition under section 4 of this title to order arbitration to proceed,
 - (C) denying an application under section 206 of this title to compel arbitration,
 - (D) confirming or denying confirmation of an award or partial award, or
 - (E) modifying, correcting, or vacating an award;
 - (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
 - (3) a final decision with respect to an arbitration that is subject to this title. . . .

Id.

However, that Petition was also denied. This Petition followed.



**REASON FOR GRANTING THE
PETITION FOR CERTIORARI**

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF THE SUPREME COURT AND ELEVENTH CIRCUIT ON THE IMPORTANT MATTER OF WHETHER AND HOW A PARTY MAY OBTAIN ARBITRATION AGREEMENTS FROM NON-PARTIES DURING PENDING CLASS OR COLLECTIVE LITIGATION.

Under Supreme Court Rule 10(a) and (c), Crazy Horse has presented compelling reasons for this petition for a writ of certiorari to be granted, including that:

A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power; . . . or . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by

this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

The Fourth Circuit’s Opinion refusing to enforce arbitration provisions directly conflicts with existing law in the Supreme Court and Eleventh Circuit on this important federal question of whether arbitration agreements may be enforced pursuant to the FAA and under what conditions a court may refuse to enforce them, if any. *See* 9 U.S.C. § 2 (FAA requires enforcement of valid arbitration agreements, unless grounds for revoking such contracts “exist at law or in equity”). For instance, the Fourth Circuit fashioned a much different standard than the Eleventh Circuit as to what communications with putative class members may be deemed to be misleading and/or coercive during the pendency of a class and/or collective action.¹³ The Fourth Circuit’s Opinion also contradicts a Supreme Court Opinion requiring that before a court may correct or restrict communications between a party and putative class members it must: (1) analyze and make specific findings about the harm caused to the party which sought to communicate; and (2) narrowly tailor any necessary restrictions to minimize harm to its constitutional rights.¹⁴ Since the Fourth Circuit’s Opinion conflicts with those of the Eleventh Circuit and

¹³ *See infra* at 10-21.

¹⁴ *See infra* at 21-25.

Supreme Court, this Petition for Certiorari should be granted.¹⁵

A. The Fourth Circuit’s Definition of “Misleading” or “Coercive” Communication Significantly Differs From the Eleventh Circuit’s, Under Which the Agreements Were Not Misleading or Coercive

The Eleventh Circuit set forth a standard that permitted courts to correct the effects of arbitration agreements obtained from putative class members that were “confusing, misleading, coercive, and clearly designed to thwart unfairly the right of its [employees] to make an informed choice as to whether to participate in th[e] FLSA collective action.” *Billingsley v. Citi Trends*, 560 Fed. Appx. 914, 918-19, 922-23 (11th Cir. 2014) (citing *Hoffmann–La Roche, Inc. v. Sperling*, 493 U.S. 165, 171 (1989); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir. 1985) (class action)). However, the *Billingsley* Court seemed to define what was “misleading” and “coercive” differently than the Fourth Circuit.

In *Billingsley*, an employer’s communication with its employees who were putative class members was misleading and coercive in a manner that justified the court’s refusal to enforce those arbitration agreements because the defendant/employer: (1) misled them about the purpose of signing the arbitration agreement and purposefully did not tell them about the pending

¹⁵ See Supreme Court Rule 10(a) and (c).

suit that precipitated the agreement; (2) forced them to sign the agreement immediately while with human resources by themselves in a room; and (3) never gave them an opportunity to retain a copy of the agreement, review it at length, or obtain counsel (or presumably to opt-out). *See Billingsley*, 560 Fed. Appx. at 918-19, 922-24.

However, as explained below, the Fourth Circuit fashioned a much different standard than the Eleventh Circuit as to what communications with putative class members may be deemed to be misleading and/or coercive.

1. The Differing Definitions of “Misleading”

In *Billingsley*, the Eleventh Circuit found arbitration agreements misleading where the defendant failed to mention a pending lawsuit concerning potential opt-ins’ employment.¹⁶ *See Billingsley*, 560 Fed. Appx. at 918-19, 922-24. *Billingsley* also cited *Longcrier*, a case that confirmed that not telling potential opt-ins about a pending lawsuit is misleading. *See id.* at 923; *Longcrier v. HLA Co., Inc.*, 595 F. Supp. 2d 1218, 1227-28 (S.D. Ala. 2008). However, Crazy Horse revealed to Entertainers in the arbitration packet that Degidio had filed a lawsuit against it claiming Entertainers should have been classified as employees and not as independent contractors. Crazy Horse was not attempting to hide the lawsuit from Entertainers.

¹⁶ *See supra* at 10-11.

The Fourth Circuit found Crazy Horse’s arbitration agreement misleading solely because it assumed that portions of the agreement dealing with the independent contractor relationship “painted a false picture of the entertainers’ legal posture” by leading Entertainers to believe it was better to be independent contractors because as employees they would not be able to control “the conditions of their employment,” including that they would not be permitted to keep tips or set their own schedules.¹⁷

First, the agreement did not present any “legal posture.” Nothing in the agreement or corresponding package attempted to state what the law was or what the district court had ruled. It simply stated that Crazy Horse’s offer was to treat Entertainers as independent contractors and that Degidio had filed a lawsuit claiming she and Entertainers like her should have been paid as employees under the law.

Second, the language the Circuit referred to (i.e., if Entertainers were employees they would not be permitted to keep tips or set their own schedules)¹⁸ was not misleading. The Opinion relied on no legal authority indicating that the law prohibited Crazy Horse (if it were the Entertainers’ employer) from setting schedules and refusing to pay tips so long as the appropriate minimum wage and overtime was paid. While the Court believed that most “businesses, employees, or independent contractors – [] g[o]t[] together to settle

¹⁷ (Op., Pet. App. at 14-16.)

¹⁸ *Id.* at 16.

most . . . scheduling to their mutual satisfaction. . . .” that did not prove that an employer cannot legally set its own employees’ schedules as well as other terms of employment.¹⁹ Further, while the Court stated that “[t]he FLSA requires that employers pay a minimum wage and overtime rates to their employees,” the FLSA does not indicate that employers must pay tips to employees so long as the minimum wage and overtime conditions are met.²⁰ The Court’s disagreement with Crazy Horse’s opinion on what afforded Entertainers the best opportunities does not translate to its agreement being misleading.

Far from misleading, particularly with its statement about Degidio’s lawsuit differing from its stance on Entertainer’s employment relationship (or lack thereof), Crazy Horse’s statement in its agreement of its intention to exercise no control over Entertainers’ schedules, performances, or amounts charged to the Club’s patrons only reflected its desire to craft its relationship with Entertainers to entail independent contractor status only. That was permissible under the current economic realities test, which requires an individualized assessment of six factors (e.g., amount of control) to determine if there is an employee or independent contractor relationship.²¹

¹⁹ *Id.*

²⁰ *Id.*

²¹ *McFeeley v. Jackson St. Entm’t, LLC*, 47 F. Supp. 3d 260, 266 (D. Md. 2014); *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 912-13 (S.D.N.Y. 2013) (“application of economic realities test

Moreover, in a manner directly the opposite of misleading, the agreement told Entertainers about Degidio's lawsuit, including that she claimed Entertainers should have been characterized and paid as employees. Furthermore, Crazy Horse's assertion that it desired Entertainers to be independent contractors did not contradict any binding or enforceable ruling by any court. Rather, the issue of whether Degidio was an independent contractor or "employee" is a matter to be decided at a trial before a jury. It should be noted that Crazy Horse was the only party who ever filed a summary judgment motion as to Degidio's independent contractor status, and since its motion was denied the issue will be decided at trial.²²

The Fourth Circuit's denouncement of Crazy Horse's allegedly "misleading" conduct (despite the fact that it made Entertainers aware of Degidio's position in her lawsuit on the independent contractor issue) is in sharp contrast to the conduct of the defendant/employer in *Billingsley*, which failed to even reveal that a lawsuit had already been filed concerning the subject matter in the arbitration agreements. The Eleventh Circuit interpreted the "misleading" component of this test to correlate to the court's ability to

is inherently case-specific"); *Hilborn v. Prime Time Club, Inc.*, No. 4:11cv197, 2012 WL 9187581, at *1 (E.D. Ark. July 12, 2012).

²² The issue of whether Entertainers are independent contractors was only, according to the arbitration agreement, supposed to be made by an arbitrator, not a court. (See, e.g., Jordan Smith's Arbitration Agreement, C.A. App. at 741-42; see also Arbitration Agreements, C.A. App. at 753-54, 765-66, 777-78, 790-91, 802-03, 814-15, 826-27, 839-40.)

regulate communications that are “*clearly designed to thwart unfairly the right of its [employees] to make an informed choice as to whether to participate in th[e] FLSA collective action.*” *Billingsley*, 560 Fed. Appx. at 918-19, 922-23 (emphasis added). However, it would be very difficult indeed to find that an employer was “misleading” in that context when it revealed the very lawsuit at issue in the acknowledgement receipt of the arbitration package containing the arbitration provision, which it had each Entertainer sign.²³

2. The Differing Definitions of “Coercive”

As for the “coercive” requirement, the *Billingsley* Court analyzed whether any pending lawsuit had been revealed during an employer’s attempt to obtain arbitration agreements, whether employees felt forced to sign such agreement, and whether they had an opportunity to consult with their own legal counsel in a manner that afforded them a meaningful choice in deciding to sign such agreement. *See Billingsley v. Citi Trends*, 560 Fed. Appx. 914, 918-24 (11th Cir. 2014). After weighing those factors, the *Billingsley* Court determined that the employer in that case had obtained its arbitration agreements in a “coercive” manner because it:

²³ (*See, e.g.*, Jordan Smith’s Arbitration Package, C.A. App. at 746-48; *see also* Arbitration Packages, C.A. App. at 758-60, 770-72, 782-84, 795-97, 807-09, 819-21, 831-33, 844-46.)

- (1) failed to reveal that there was a pending lawsuit about the subject matter of the agreement, which had precipitated the agreement itself;
- (2) forced employees (who were alone with human resources) to sign the agreement immediately while causing them to believe they would be terminated if they did not sign, which essentially denied them a “meaningful choice in whether to sign the arbitration agreements;” and
- (3) never gave them an opportunity to review the agreement or obtain counsel prior to deciding whether to arbitrate.

Id. at 922-24.

Here, in direct contradiction of the Eleventh Circuit’s measuring standard for “coercion” – whether they were essentially denied a meaningful choice of whether to sign – the Fourth Circuit implied that Crazy Horse’s arbitration agreements were coercive because they were furtively obtained since Crazy Horse did not show them to the district court before disseminating them and the “setting was ripe for duress” due to their execution “in the context of an employment relationship in which the employer alone could profess the requisite legal expertise.”²⁴

However, Crazy Horse’s manner of seeking an arbitration agreement with Entertainers was not coercive here because, unlike the defendant in *Billingsley*,

²⁴ (Op., Pet. App. at 16-18.)

it did not deny the Entertainers a meaningful choice in whether to sign as its agreement and the information accompanying it specifically:

- (1) told Entertainers about Degidio's pending class/collective action lawsuit challenging Crazy Horse's classification of Entertainers as independent contractors (and not employees) while clearly explaining the arbitration process and important rights that would be forfeited by signing (including the right to later sue in court or participate in a class/collective action);
- (2) gave Entertainers twenty-one (21) days to decide whether to arbitrate without the pressure of having to decide immediately in front of a Club representative, while the Club assured them in writing that it would not tolerate retaliation against those who chose to opt-out of arbitration; and
- (3) provided each Entertainer with an opportunity to consult her own attorney about whether to sign the arbitration provision or to opt-out of (or refuse to participate in) the arbitration agreement within twenty-one days.²⁵

Despite the Fourth Circuit's concern that Crazy Horse was the only one in the relationship with the

²⁵ (See, e.g., Entertainer's Inform. Package About Arb., J.A. at 744-48, 756-60, 768-72, 780-84, 793-97, 805-09, 817-21, 829-35, 842-46; Brief (A.R. 13) at 16-17, 31-32; Reply (A.R. 24) at 16.)

ability to consult legal counsel, which was a misconception as clarified above, this situation was far different from the one in *Billingsley* where the employer misled potential opt-ins by implying the agreement did not pertain to a pending lawsuit and forced them to sign immediately while believing they would be fired if they refused, without permitting them time to decide whether to arbitrate or to consult an attorney about it.²⁶ However, the uncontested facts in this case indicate that Crazy Horse’s arbitration agreement gave Entertainers information about Degidio’s suit along with the opportunity to consult their own legal counsel for twenty-one days to decide whether to arbitrate or opt-out of (or refuse to participate in) it without fear of retaliation. Those facts are the opposite of the coercive behavior described by the Eleventh Circuit in *Billingsley* (upon which the district court and Fourth Circuit both relied).²⁷

While the Fourth Circuit also implied that Crazy Horse’s arbitration agreements were potentially coercive because they were obtained in a “furtive” manner “without knowledge of the court,”²⁸ that deviates from the Eleventh Circuit’s *Billingsley* requirements, which did not indicate that an arbitration agreement may automatically be found to be “coercive” solely because a party fails to show those agreements to the court before dissemination; rather, *Billingsley* was evaluating

²⁶ *Billingsley v. Citi Trends*, 560 Fed. Appx. 914, 918-19, 922-24 (11th Cir. 2014).

²⁷ (Op., Pet. App. at 6, 14-16, 18, 30, 32-33, 39-40, 42.)

²⁸ (Op., Pet. App. at 16-17.)

unilateral communications to determine if they were *misleading or coercive* in a manner to justify refusal to enforce the resulting agreements.²⁹ Moreover, such a new Fourth Circuit standard of requiring a defendant to produce every communication to a district court before disseminating it (even if it is not misleading or disseminated in a coercive manner) also conflicts with the Supreme Court case of *Gulf Oil Co. v. Bernard*, which indicated that parties could not be compelled to automatically hand over every communication to be monitored by the court but only if there is a “clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” 452 U.S. 89, 95, 101-03 (1981). However, the district court made no such findings or evaluation regarding Crazy Horse; therefore, there is no proof in the record that it was required to have every communication monitored when it obtained the agreements. Furthermore, Crazy Horse did not keep the agreements secret but rather told the district court in response to Degidio’s class and conditional certification motions about them within at least two months of first attempting to obtain them (albeit the court never requested to see them) and never instructed Entertainers to keep them secret; thus, its dissemination of the agreements was not furtive.³⁰ While the Opinion

²⁹ *Billingsley*, 560 Fed. Appx. at 916, 918-19, 923-24.

³⁰ While the Fourth Circuit criticized Crazy Horse for delay in asserting its arbitration rights, the Court did not specifically find that Crazy Horse waived its arbitration rights. In fact, there was no legal support for such a finding because, at the time the Circuit believed Crazy Horse should have filed an arbitration

implies that Crazy Horse should have informed the district court about those agreements,³¹ such an overbroad, “sweeping restraint” on Crazy Horse’s First Amendment free speech rights would greatly interfere with its ability to effectively operate its business, in which communication is necessary with those in current and potential business relationships (including putative class members). *See, e.g., Gulf Oil Co.*, 452 U.S. at 103 (court abused discretion by issuing overbroad

motion, no one with an arbitration agreement had attempted to join the suit; thus, it had no obligation to compel arbitration until opt-ins with arbitration agreements sought to join. *Milbourne v. JRK Residential Am., LLC*, 2016 U.S. Dist. LEXIS 33603, at *10, 27-28 (E.D. Va. Mar. 15, 2016) (since no party had arbitration agreements, defendant could not compel arbitration); *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997).

In fact, Crazy Horse had no arbitration agreement with Named Plaintiff, had no arbitration agreements with any Entertainers when it filed its Answer, only engaged in motion practice against Named Plaintiff to defend against her claims while at the same time putting the court on notice in its January 2015 responses to Plaintiff’s class and conditional certification motions that it had begun obtaining agreements in mid-November 2014 (which notice was only about six to eight weeks after those agreements began being signed and was about nine months before any party with an arbitration agreement joined the action), and filed an arbitration motion shortly after Opt-in Plaintiffs with arbitration agreements opted into the suit. (Brief (C.A. 13) at 16-17; Reply (C.A. 24) at 6-11; Reply to Arb. Mt., C.A. App. at 883-88; Def.’s Resp. to Pl.’s Mt. to Certify Class (Doc. No. 81) at 2.) Since Crazy Horse did not engage in motion practice addressing the merits of the claims of any Opt-ins who had arbitration agreements, there was no prejudice to them. *See Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200 at 206, 209 (4th Cir. 2004).

³¹ (Op., Pet. App. at 4-5, 12, 17.)

order requiring “prior judicial approval of all communications” and retroactive submission of all other communications while failing to identify “factual findings []or legal arguments supporting the need for th[at] sweeping restraint order”); *see also* U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech. . .”).

Since Crazy Horse established that the agreements to arbitrate were not misleading or coercive under the Eleventh Circuit *Billingsley* standard, the Court must enforce those arbitration agreements, resolving any doubt in favor of arbitration. *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); 9 U.S.C. § 1 *et seq.* To do otherwise would also contravene the Opinion of this Court. *See id.*

B. The Restrictions on Enforcing Arbitration Agreements Were Not Narrowly Tailored After Weighing the Harm To Both Parties As Required By the Supreme Court’s *Gulf Oil* Opinion

Even if Crazy Horse’s agreements had met the standard of being misleading and coercive under the *Billingsley* Eleventh Circuit law, the Fourth Circuit deviated from this Court’s finding in *Gulf Oil* that mandates that a court cannot restrict communications between parties and potential class members unless it has made:

specific findings that reflect a weighing of the need for a limitation and the potential

interference with the rights of the parties. . . . [where the] weighing – identifying the potential abuses being addressed – should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Gulf Oil Co. v. Bernard, 452 U.S. 89, 95, 101-03 (1981). As *Gulf Oil* indicated, although courts may use Rule 23 to “impose conditions on the [parties],” they cannot just ban parties from engaging in any communications with the putative class without prior judicial approval just because there was some possibility of abuse because that would “involve[] serious restraints on expression.” *Id.* at 104-05. Instead, courts must only limit communications between parties and potential class members if there is a “specific record showing by the moving party [as detailed above] of the particular abuses by which it is threatened and that the relief sought would [provide] the narrowest possible relief which would protect the respective parties.” *Id.* at 101-03. The “mere possibility of abuses does not justify routine adoption of a communications ban[,]” and “in the absence of a clear record and specific findings of need [o]ther less burdensome remedies may be appropriate.” *Id.* at 104.

As alluded to previously, the district court’s and Fourth Circuit’s Opinions neglected to make such findings that weighed the need to deny enforcement of the arbitration agreements with the harm to Crazy Horse, while narrowly tailoring any necessary restrictions to minimize harm to its constitutional rights. *Gulf Oil Co.*

v. Bernard, 452 U.S. 89, 95, 101-03 (1981). In fact, in this case, as in *Gulf Oil*, “one looks in vain for any indication of a careful weighing of competing factors.” *Id.* at 102.

First, the Opinions failed to evaluate or weigh the harm Crazy Horse would suffer if it was denied enforcement of the arbitration agreements with the need to do so. Since, as argued above, there was no need to deny enforcement of the agreements because they were not “misleading” or “coercive” under the appropriate standards, the harm to Crazy Horse’s business (including trampling on its freedom of speech rights by preventing it from communicating with its independent contractors and entering into business relationships with them in the ordinary course of business) would far outweigh the need for such denial of enforcement. In fact, the Opinion’s failure to address Crazy Horse’s harm of being prevented from obtaining usual, customary, and necessary business agreements with its business associates, including independent contractors, raises an important question of whether this Court will continue to permit lower courts such as the Fourth Circuit to prevent businesses from obtaining arbitration agreements with putative class members in the normal course of business when those agreements are not misleading or coercive.

Further, instead of narrowly tailoring any restraints (which have now been shown to be unnecessary because the agreement was not misleading or coercive), the Opinion appears to refuse to enforce *all* arbitration agreements Crazy Horse had obtained,

even those from new Entertainers. That directly conflicts with the Eleventh Circuit Opinion in *Jones v. Waffle House*, which indicates that it is permissible for a defendant to obtain an arbitration agreement during a pending lawsuit if the employee seeks employment with that defendant and thereby signs an arbitration agreement. 866 F.3d 1257, 1271-72 (11th Cir. 2017). In fact, that court noted that Jones “initiated the communication with [Waffle House] by seeking employment” and signed an arbitration agreement when being hired. Thus, the Eleventh Circuit held that his arbitration agreement was enforceable and did not interfere with the court’s authority to manage class actions despite the employer obtaining it during litigation because, unlike in *Billingsley* or *Kleiner*, “*there was not the slimmest shred of evidence that the arbitration agreement was part of a purposeful attempt to communicate with class members*” and there was *no evidence the defendant “contacted any putative class members and tried to get them to sign arbitration agreements.”* *Id.* (emphasis added) (citing *Billingsley*, 560 Fed. Appx. at 914; *Kleiner*, 751 F.2d at 1193). In the instant case, the Fourth Circuit did not narrowly tailor its refusal to enforce the arbitration agreements to only certain Entertainers who had already been entertaining at Crazy Horse, while allowing arbitration agreements to be enforced that were obtained from new Entertainers seeking to entertain at Crazy Horse, as the Eleventh Circuit permitted in *Waffle House*.

Since it did not properly weigh the harm to Crazy Horse of failing to implement the arbitration

agreements or narrowly tailor its refusal to enforce such agreements, the Fourth Circuit's ruling denouncing Crazy Horse's procurement of arbitration agreements with Entertainers regarding the manner in which they desired to conduct their business (i.e., with Entertainers as independent contractors and not employees) "has far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."³²

◆

CONCLUSION

Since the Opinion conflicts with law in the Eleventh Circuit and the Supreme Court on an issue of exceptional importance, the Opinion did not weigh the harm to Crazy Horse of refusing to enforce its arbitration agreements, and the Opinion failed to narrowly tailor its refusal to enforce those agreements, this Petition for Certiorari should be granted.

Respectfully submitted,

JAMES L. HOLT, JR.

Counsel of Record

JACKSON, SHIELDS, YEISER & HOLT

262 German Oak Drive

Memphis, TN 38018

901-754-8001 (telephone)

901-754-8524 (facsimile)

jholt@jsyc.com

³² Supreme Court Rule 10(a).