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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0184p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARLEY BLANTON, *Plaintiff*, DEREK PIERSING, on Behalf of Himself and All Others Similarly Situated, *Plaintiff-Appellant*, v. DOMINO'S PIZZA FRANCHISING LLC; DOMINO'S PIZZA MASTER ISSUER LLC; DOMINO'S PIZZA LLC; DOMINO'S PIZZA, INC., *Defendants-Appellees*.	No. 19-2388

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit,
No. 2:18-cv-13207—Victoria A. Roberts, District Judge.

Argued: June 10, 2020

Decided and Filed: June 17, 2020

Before: GRIFFIN, THAPAR, and READLER,
Circuit Judges.

COUNSEL

ARGUED: Anne B. Shaver, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, San Francisco, California, for Appellant. Norman M. Leon, DLA PIPER LLP (US), Chicago, Illinois, for Appellees. **ON BRIEF:** Anne B. Shaver, Dean M. Harvey, Lin Y. Chan, Yaman Salahi, Jeremy J. Pilaar, LIEFF CABRASER HEIMANN & BERNSTEIN, LLP, San Francisco, California, Derek Y. Brandt, Leigh M. Perica, McCUNE WRIGHT AREVALO, LLP, Edwardsville, Illinois, Sharon S. Almonrode, Emily E. Hughes, Dennis A. Lienhardt, THE MILLER LAW FIRM, P.C., Rochester, Michigan, for Appellant. Norman M. Leon, J. Robert Robertson, John J. Hamill, Michael S. Pullos, Mary M. Shepro, DLA PIPER LLP (US), Chicago, Illinois, David H. Bamberger, DLA PIPER LLP (US), Washington, D.C., Edward J. Hood, CLARK HILL PLC, Detroit, Michigan, for Appellees.

OPINION

THAPAR, Circuit Judge. Derek Piersing and Domino's Pizza disagree about whether he should have to arbitrate his claims against the company. As in many arbitration cases, the question here is who should resolve their dispute: an arbitrator or a court. The district court held that an arbitrator should do so. We agree and affirm.

I.

Domino's has thousands of pizza restaurants across the country. Like other large chains, Domino's operates many of these restaurants through a franchise model. Each franchise is an independently owned and managed business with a separate legal identity. But Domino's still controls certain aspects of each franchise. Relevant here, Domino's allegedly required its franchises to agree not to solicit or hire employees from other franchises without the prior consent of their employer.

Piersing began working at a Domino's franchise in Washington state in the fall of 2014. Four years later, Piersing sought a second job from a different Domino's franchise in the area. When he was hired by the second franchise, Piersing signed an arbitration agreement, which requires him to arbitrate a wide array of issues related to his employment. The agreement also specifies that the arbitration will be conducted according to the American Arbitration Association National Rules for the Resolution of Employment Disputes ("AAA Rules").

Around the same time, Piersing learned that he had been fired from the first franchise. According to Piersing, the store fired him because it thought that its franchise agreement with Domino's required it to do so in order to allow him to work at the second franchise. Piersing worked at the second franchise for a few months until he left his job because of a medical condition.

Piersing and another plaintiff then filed a class action against Domino's, alleging that the company's franchise agreement violated federal antitrust law as well as state law. Domino's soon moved to compel arbitration under the Federal Arbitration Act. *See* 9 U.S.C. § 1 *et seq.* The plaintiffs opposed the motion, arguing that Domino's couldn't enforce the arbitration agreements because the company hadn't signed the agreements (only their franchises had). But the district court ordered the plaintiffs to go to arbitration anyway, finding that both Piersing and his co-plaintiff had agreed to arbitrate not only the merits of certain claims but also threshold questions about the agreements themselves. This appeal followed.

II.

To understand this case, you first need a little background about federal arbitration law. The Federal Arbitration Act reflects the basic principles that "arbitration is a matter of contract" and that contracts must be enforced "according to their terms." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). As a corollary, the Supreme Court has recognized that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (cleaned up). After all, such an agreement is "simply an additional, antecedent agreement" about *who* should

decide these questions. *Rent-A-Center*, 561 U.S. at 69. And when parties have agreed to arbitrate "arbitrability," a court may not disregard their agreement—even if a particular argument for arbitration seems to be "wholly groundless." *Henry Schein*, 139 S. Ct. at 528–31.

That leaves the question of *how* to determine whether the parties have agreed to arbitrate "arbitrability." Usually, courts look to state law to interpret arbitration agreements. *See*, *e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414–15 (2019). (Here, all agree that Washington contract law applies.) But for questions of "arbitrability," the Supreme Court has adopted an additional interpretive rule: there must be "clear and unmistakable" evidence that the parties agreed to have an arbitrator decide such issues. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up); *see also Rent-A-Center*, 561 U.S. at 69 n.1 (describing this "heightened standard"). In effect, this rule reverses the usual presumption in favor of arbitration when it comes to questions of "arbitrability." *See First Options*, 514 U.S. at 944–45.

That brings us to the question in this case. In his arbitration agreement, Piersing agreed that "[t]he American Arbitration Association ('AAA') will administer the arbitration and the arbitration will be conducted in accordance with then-current [AAA Rules]." R. 61-4, Pg. ID 982. And those Rules provide that "[t]he 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." R. 61-6, Pg. ID 989. The question for us is whether that's "clear and unmistakable" evidence that Piersing agreed to arbitrate "arbitrability."[1]

There are good reasons to think it is. To start, the AAA Rules clearly empower an arbitrator to decide questions of "arbitrability"—for instance, questions about the "scope" of the agreement. And it's long been settled that parties can incorporate outside documents into a contract if their agreement says as much. *See*, *e.g.*, *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861, 865 (Wash. Ct. App. 2000); 11 *Williston on Contracts* § 30:25 (4th ed. 2012). Piersing's agreement says as much: it expressly incorporates the AAA Rules into the agreement and even helpfully includes a link to the AAA's website, from which one can easily access the Rules. On its own

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[1] On that point, we should clarify one question not before us. The underlying dispute in this case is whether Domino's (as a non-signatory) has any right to enforce the arbitration agreement as a whole. And both parties have litigated this case on the view that the first question we must answer is whether Piersing agreed to arbitrate that question of "arbitrability." But there might be another, antecedent question here—namely, whether Domino's has any right to enforce the *specific* provision of the agreement in which Piersing purportedly agreed to arbitrate "arbitrability." *Cf. Rent-A-Center*, 561 U.S. at 69–71 (treating the broader arbitration agreement as separate from the specific agreement to arbitrate "arbitrability" and distinguishing between challenges to the former and challenges to the latter). Because that is a distinct question that is not before us, we express no views on it. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (reiterating the "principle of party presentation" under which courts "rely on the parties to frame the issues for decision" and decide only the "matters the parties present" (citation omitted)).

terms, that's pretty compelling evidence that Piersing agreed to arbitrate "arbitrability."

What the text suggests the case law confirms. The Supreme Court has itself said that the AAA Rules "provide that arbitrators have the power to resolve arbitrability questions." *Henry Schein*, 139 S. Ct. at 528. And the Court has itself relied on the incorporation of the AAA Rules to determine what the parties agreed to. *See Preston v. Ferrer*, 552 U.S. 346, 361–63 (2008); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418–20 (2001). It's true that the Court has yet to put these pieces together so as to resolve the question in this case. *See Henry Schein*, 139 S. Ct. at 531. But there's no reason for our court to wait to finish the puzzle. There's little doubt about the final picture.

Our own circuit's precedent counsels—and perhaps compels—the same outcome. In a recent decision, our court relied on the incorporation of the AAA Rules to find that the parties had "clearly and unmistakably" agreed to arbitrate "arbitrability." *McGee v. Armstrong*, 941 F.3d 859, 866 (6th Cir. 2019) (citation omitted). To be sure, our decision also pointed to another provision in the agreement during the course of its analysis. But that provision simply described the *procedures* by which the parties had to raise questions of "arbitrability" before the arbitrator; it didn't purport to expand the arbitrator's *authority* to decide such questions. *See id.* So it's unclear what (if anything) the provision added to the court's analysis. *See In re: Auto. Parts Antitrust Litig.*, 951 F.3d 377, 382 (6th Cir. 2020) (reading

McGee as holding that the incorporation of the AAA Rules "shows that the parties 'clearly and unmistakably' agreed that the arbitrator would decide questions of arbitrability" (citation omitted)).

What's more, district courts in our circuit have long found that the incorporation of the AAA Rules provides "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." *See*, *e.g.*, *Cornett v. Cmco Mortg., LLC*, Civ. No. 12-169-ART, 2012 WL 12925599, at *2 (E.D. Ky. Nov. 9, 2012); *see also Willacy v. Marotta*, 683 F. App'x 468, 477 (6th Cir. 2017) (White, J., concurring). Just another persuasive reason for us to do the same.

Finally, consider that every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." *See Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11–12 (1st Cir. 2009); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208–09 (2d Cir. 2005); *Richardson v. Coverall N. Am., Inc.*, ___ F. App'x ___, 2020 WL 2028523, at *2–3 (3d Cir. 2020); *Simply Wireless, Inc v. T-Mobile US, Inc.*, 877 F.3d 522, 527–28 (4th Cir. 2017) (same for the "substantively identical" JAMS Rules), *abrogated on other grounds by Henry Schein*, 139 S. Ct. 524; *Petrofac, Inc. v. Dyn-McDermott Petrol. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015); *Dish Network L.L.C. v.*

Ray, 900 F.3d 1240, 1246 (10th Cir. 2018); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006), *abrogated on other grounds by Henry Schein*, 139 S. Ct. 524; *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015) (same for the United Nations Commission on International Trade Law Rules). And the one remaining circuit has precedent suggesting that it would join this consensus. *See Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1272–73 (7th Cir. 1976) (relying on the incorporation of the AAA Rules to find that the parties had agreed to binding arbitration). Indeed, it's possible that our circuit has *already* joined too. *See McGee*, 941 F.3d at 866. But to the extent that there's any ambiguity in our prior decisions, we officially do so today.

III.

All that's straightforward enough. But both parties raise some arguments in response. Some of these arguments require a bit of explanation. None change our final decision.

A.

Domino's argues about the correct choice of law. The company says that the question here—whether there's "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability"—presents a question of state law, not federal law. It's true that

some courts have described the question in this way. *See*, *e.g.*, *Dish Network*, 900 F.3d at 1246; *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 396–99 (2d Cir. 2018). But these decisions seem to conflate the questions of contract formation and interpretation (which generally involve state law) with the question whether a particular agreement satisfies the "clear and unmistakable" standard (which seems to be one of federal law). *See*, *e.g.*, *Arnold v. Homeaway*, *Inc.*, 890 F.3d 546, 552 & n.4 (5th Cir. 2018); *Brennan*, 796 F.3d at 1128–30; *see also Dish Network*, 900 F.3d at 1252 n.1 (Tymkovich, C.J., concurring).

To see why, consider the Supreme Court's leading case on the "clear and unmistakable" standard. *See First Options*, 514 U.S. 938. That decision explained that courts should generally "apply ordinary state-law principles that govern the formation of contracts" in arbitration cases but then added a "qualification." *Id.* at 944. The "qualification" was that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* (cleaned up). The Supreme Court then analyzed *for itself* whether there was "clear and unmistakable" evidence that the parties had agreed to arbitrate "arbitrability." *See id.* at 946. Nothing in this analysis suggests that this new standard should be governed by state law. Nor have later decisions suggested anything different. *See*, *e.g.*, *Rent-A-Center*, 561 U.S. at 69 n.1 (describing the standard as an "interpretive rule" created by the Supreme Court (citation omitted)).

In any event, Washington courts have also found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provide "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." *See In re Estate of Anches*, No. 78732-2-I, 2019 WL 3417100, at *2 (Wash. Ct. App. July 29, 2019); *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 400 P.3d 347, 349–50 (Wash. Ct. App. 2017) (same for similarly worded Maritime Arbitration Association Rules). And Piersing hasn't give us any reason to think that the Washington Supreme Court would ultimately adopt the minority view in this debate. So in the end, the choice of law makes no difference here.

B.

For his part, Piersing offers several arguments why we should be the first circuit court in the country to find that the incorporation of the AAA Rules doesn't provide "clear and unmistakable" evidence that he agreed to arbitrate "arbitrability." None prove persuasive.

The Arbitration Agreement. Piersing argues that his arbitration agreement incorporates the AAA Rules only as to claims that fall within the scope of the agreement. In other words, he thinks that a court must first determine whether the agreement covers a particular claim before the arbitrator has any authority to address its jurisdiction. But nothing in the relevant provision limits the incorporation in this way. Instead, it simply provides that "the arbitration will be conducted

in accordance with then-current. [AAA Rules]." R. 61-4, Pg. ID 982. Other courts have read similar references to "arbitration" or "the arbitration" as generally authorizing an arbitrator to decide questions of "arbitrability." *See*, *e.g.*, *Dish Network*, 900 F.3d at 1244–46; *Simply Wireless*, 877 F.3d at 525, 527–28; *Awuah*, 554 F.3d at 9, 11; *Terminix Int'l Co.*, 432 F.3d at 1332. And on its own terms, Piersing's reading of the agreement doesn't make much sense. He reads the agreement to say that the arbitrator shall have the power to determine the scope of the agreement *only* as to claims that fall within the scope of the agreement. Yet that reading would render the AAA's jurisdictional rule superfluous.

It's true that some courts have read similar provisions more narrowly when an arbitration agreement carves out certain claims from the very provision that incorporates the AAA Rules. *See*, *e.g.*, *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 280–82 (5th Cir. 2019), *cert. granted* ___ S. Ct. ___, 2020 WL 3146679 (June 15, 2020). Imagine that Piersing's arbitration agreement said that "the arbitration *(except as to antitrust claims against non-signatories)* will be conducted in accordance with then-current [AAA Rules]." In that scenario, one might think that the agreement "incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out." *Id.* at 281. But to the extent that Piersing's arbitration agreement carves out certain claims from arbitration, it does so from the agreement in general, not from the provision that incorporates the AAA Rules. So the carveout goes to the

scope of the agreement—a question that the agreement otherwise delegates to the arbitrator—not the *scope of the arbitrator's authority* to decide questions of "arbitrability." *See id.* (describing the "placement of the carve-out" as "dispositive"); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1076 (9th Cir. 2013) (warning parties not to "conflate[] the *scope* of the arbitration clause . . . with the question of *who* decides arbitrability"); *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 757–58 (Ky. 2019) (same). And that's probably why Piersing doesn't raise any argument about the carveout in his agreement.

The AAA Rules. Piersing next offers two reasons why, in his view, the AAA Rules don't require him to arbitrate the question of "arbitrability" at issue in this case. Neither has merit.

Piersing first argues that the relevant AAA rule addresses only the "existence, scope or validity" of his arbitration agreement, not whether a non-signatory may enforce the agreement under state contract law. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009) (explaining that state contract law sometimes allows non-signatories to enforce arbitration agreements under the Federal Arbitration Act). But Piersing overlooks key language in the rule. In full, the rule provides that "[t]he 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." R. 61-6, Pg. ID 989 (emphasis added). The term "including" shows that the latter issues—"existence, scope or validity"—

are meant to illustrate rather than exhaust the concept of "jurisdiction." *See*, *e.g.*, *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008). So the real issue is whether the question here goes to the arbitrator's "jurisdiction."

Piersing doesn't dispute that the question here goes to the arbitrator's jurisdiction. In fact, he himself says that whether Domino's can enforce the arbitration agreement against him under state contract law involves a "question of arbitrability." Piersing Br. at 9. Hence the AAA Rules cover the question. *See*, *e.g.*, *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014); *Anderton v. Practice-Monroeville, P.C.*, 164 So. 3d 1094, 1101–02 (Ala. 2014); *cf. Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017) (holding the same for similarly worded arbitral rules); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (same).

This court has treated the non-signatory question differently when the non-signatory *opposes* arbitration. Imagine, for instance, that Piersing had never signed the arbitration agreement. In that context, our court has said, the question goes to the very "existence of [a valid arbitration] agreement" and thus the court must itself resolve the question even if the agreement incorporates the AAA Rules. *In re: Auto. Parts Antitrust Litig.*, 951 F.3d at 385; *see also DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011) (same); *cf.* 7 Bruner & O'Connor on Construction Law § 21:93 (noting that "arbitrators and judges often draw

distinctions between what might be called 'consenting non-signatories' (which seek to arbitrate) and 'non-consenting non-signatories' (which resist arbitration)" (cleaned up)). But Piersing doesn't challenge the "existence" of the arbitration agreement here. Probably because he signed it.

Piersing also argues that even if the relevant AAA rule gives arbitrators the power to decide questions of "arbitrability," it doesn't give them the *exclusive* power to do so. Piersing is right that the rule doesn't include the word "exclusive." But in law the expression of one thing often implies the exclusion of other things. *See*, *e.g.*, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232–33 (2011). And the same insight holds true in life. Imagine that during dinner one of your children asks whether she can use the car that evening, and you reply, "Sure, you can have the car tonight." Your other children will understand that this child is the *only* person who should use the car that evening even if you don't expressly say as much.

Arbitration agreements may be less fun than a night out with friends. But the same rules of English apply. Most people who read the sentence, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction," wouldn't then think "but a court may also rule on this issue." And things would get pretty chaotic if the rule were read this way. It would lead to a race to the courthouse (or arbitrator's forum) to have each party's preferred decisionmaker be the first to rule on the issue. For if a court ruled on the issue first, then that ruling could bind the arbitrator under the

doctrine of res judicata. *See*, *e.g.*, *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto. Workers*, 97 F.3d 155, 159 (6th Cir. 1996). But if the arbitrator ruled on the issue first, then that ruling would be subject to an exceedingly narrow form of judicial review. *See*, *e.g.*, *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005); *see also First Options*, 514 U.S. at 942 (explaining that a court will set aside an arbitration decision involving an issue on which the parties agreed to arbitrate "only in very unusual circumstances"). All this would suggest that the AAA Rules are best read to give arbitrators the exclusive authority to decide questions of "arbitrability."

Still, there may be a kernel of truth to Piersing's argument. The relevant AAA rule looks like what's known in the world of international arbitration as a "competence-competence" clause. *See generally* Restatement (Third) of the U.S. Law of Int'l Commercial and Inv'r-State Arbitration § 2.8 (2019). And there's reason to think that these clauses—when first added to the rules of arbitral institutions almost a century ago—were not meant to give arbitrators the exclusive authority to decide their jurisdiction. They simply confirmed that arbitrators *could* address their jurisdiction. *See* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable,"* 17 Am. Rev. Int'l Arb. 545, 551–63 (2006).

Yet the problem for Piersing is that the AAA seems to have adopted its jurisdictional rule for a different reason: namely, to provide "clear and unmistakable"

evidence that the parties agreed to arbitrate "arbitrability." That's at least how the AAA and other sources described the rule at the time of its adoption. *See*, *e.g.*, Alan Scott Rau, *Arbitrating "Arbitrability,"* 7 World Arb. & Mediation Rev. 487, 542–43 (2013) (collecting evidence); *AAA Revises Commercial Arbitration Rules*, 53 Disp. Resol. J. 4, 96 (1998) (describing the new rule as a response to the Supreme Court's decision in *First Options*). *But see* Hulbert, *supra*, at 563 (reading the evidence differently). And that understanding would seem to undercut any comparison between the AAA's jurisdictional rule and traditional "competence-competence" clauses.

Whatever you think of all this history, in the end we need not rely on it to resolve this case. The real issue here isn't how an arbitrator would have understood the jurisdictional rule in 1918, but how the parties would have understood it in 2018 (when Piersing signed his agreement). *See Rent-A-Center*, 561 U.S. at 69 n.1 (describing the "clear and unmistakable" standard as about "the parties' *manifestation of intent*"). At that time, almost every circuit court in the country—including Piersing's local regional circuit—had held that this rule or similar ones gave arbitrators the exclusive authority to arbitrate "arbitrability." *See*, *e.g.*, *Brennan*, 796 F.3d at 1130–31. Washington law pointed to the same conclusion. *See Raven Offshore Yacht*, 400 P.3d at 349–50. As did the plain text of the rule itself. It's often said that parties bargain in the shadow of the law. To adopt a different understanding

of the rule now would deprive countless parties of the benefit of their bargain.

Circuit Precedent. Piersing next claims that our circuit has already held that the incorporation of the AAA Rules doesn't provide "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." But the cases he cites address two distinct sets of issues.

One line of cases addresses whether the incorporation of arbitral rules from the National Association of Securities Dealers provides "clear and unmistakable" evidence that the parties agreed to arbitrate a specific question of "arbitrability." *See*, *e.g.*, *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 96–97 (6th Cir. 1997), *abrogated on other grounds by Vaden v. Discover Bank*, 556 U.S. 49 (2009). But nothing in those rules—at least those discussed in the opinion—spoke to the arbitrator's power to address "jurisdiction." And nothing in our decision said that the incorporation of arbitral rules can *never* amount to "clear and unmistakable" evidence. Instead, our decision turned on the specific arbitral rules and the specific question of "arbitrability." *See Smith Barney*, 108 F.3d at 96–97. As it turns out, the question in that case did not even involve one of "arbitrability." *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–86 (2002).

What's more, two of our sister circuits have concluded that the arbitral rules at issue in that case did not provide "clear and unmistakable" evidence, while the arbitral rules at issue in this case do. *Compare*

Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474, 480–81 (10th Cir. 1996), *and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995), *with Dish Network*, 900 F.3d at 1246, *and Terminix Int'l Co.*, 432 F.3d at 1332. Piersing hasn't given us any reason not to draw the same distinction.

The second line of cases addresses whether the incorporation of the AAA Rules provides "clear and unmistakable" evidence that the parties agreed to arbitrate whether to allow classwide arbitration. *See*, *e.g.*, *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 553 (6th Cir. 2016); *Huffman v. Hilltop Cos., LLC*, 747 F.3d 391, 393–94, 398–99 (6th Cir. 2014); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013). But again, these cases turned on the reasoning that nothing in the AAA Rules expressly empowers arbitrators to decide this issue. *See*, *e.g.*, *Reed Elsevier*, 734 F.3d at 600. And again, two of our sister circuits have distinguished between the question in those cases and the question in this case based on the different structure of the rules and the unique concerns raised by classwide arbitration. *See Richardson*, 2020 WL 2028523, at *2 n.2; *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 973 & n.4 (8th Cir. 2017); *see also JPay, Inc. v. Kobel*, 904 F.3d 923, 945–47 (11th Cir. 2018) (Graham, J., concurring in part and dissenting in part).

It's true that a few circuits have reasoned that all questions of "arbitrability"—whether related to bilateral or classwide arbitration—should be treated the

same way. *See JPay*, 904 F.3d at 942–44; *Dish Network*, 900 F.3d at 1247–48; *Wells Fargo Advisors*, 884 F.3d at 398–99. But they did so in holding that the incorporation of the AAA Rules provides "clear and unmistakable" evidence as to *all* questions of "arbitrability." That hardly provides us a basis to hold that the Rules provide such evidence as to *none* of them. Whatever side has the better of this debate, all circuits agree that the incorporation of the AAA provides "clear and unmistakable" evidence here.

"Clear and Unmistakable." Piersing also insists that, even if the incorporation of the AAA Rules provides evidence that the parties agreed to arbitrate "arbitrability," it's not "clear and unmistakable" evidence. But his assertion to this effect runs into a solid wall of contrary authority. *See*, *e.g.*, *Awuah*, 554 F.3d at 11 (describing the AAA Rule as "about as 'clear and unmistakable' as language can get"). Indeed, at the time Piersing signed his arbitration agreement, he not only had the benefit of the text of the agreement but also judicial precedent from both his regional circuit and a local state court telling him that the incorporation of arbitral rules can provide "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." *See Brennan*, 796 F.3d at 1130–31; *Raven Offshore Yacht*, 400 P.3d at 349–50. And even if we don't expect Piersing to read judicial decisions, he certified in his arbitration agreement that he had time to obtain advice from an attorney (who we do expect to read such decisions). *Cf. First Options*, 514 U.S. at 946 (referring to local circuit precedent in evaluating whether the

parties had "clearly" agreed to arbitrate "arbitrability"). Given all this, Piersing had ample notice about the meaning and effect of the AAA Rules.

Piersing says that we should distinguish his case because he's not a sophisticated party. But nothing in the Federal Arbitration Act purports to distinguish between "sophisticated" and "unsophisticated" parties. *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 n.5 (2011). And as judges, we have no authority to redline Congress's work. That's probably why other circuit courts have declined to adopt Piersing's proposed distinction. *See*, *e.g.*, *Richardson*, 811 F. App'x at 104; *Arnold*, 890 F.3d at 552 & n.5 (collecting cases). We see no reason to be the first.

Policy. Piersing finally invokes a policy concern: that a ruling for Domino's would mean that *anyone* could force him to arbitrate "arbitrability" no matter how frivolous the argument for arbitration. But just last year, the Supreme Court rejected a nearly identical argument about "frivolous motions to compel arbitration." *Henry Schein*, 139 S. Ct. at 531. The Court explained that—whatever the merits of this policy concern—it couldn't "rewrite" the text of the Federal Arbitration Act "simply to accommodate [this] concern." *Id.* And it also noted that the concern was "overstate[d]" because arbitrators can quickly resolve frivolous motions and in some cases even impose sanctions for such motions. *Id.*

Keep in mind that the question here is quite narrow. It's not about the *merits* of the case. It's not even

about *whether* the parties have to arbitrate the merits. Instead, it's about *who should decide* whether the parties have to arbitrate the merits. And as the Supreme Court has often said, parties don't give up any of their substantive rights when they choose to arbitrate an issue; they simply select a different forum to resolve their dispute. *See*, *e.g.*, *Preston*, 552 U.S. at 359. That's all that happened here.

C.

Aside from the merits, Piersing raises two other arguments. Neither persuades.

Leave to Amend. Piersing argues that the district court erred when it refused him leave to amend his complaint. Yet the record makes clear that the court never ruled on this issue. Why? Because Piersing never filed a *motion* for leave to amend—as contemplated by the Federal Rules of Civil Procedure as well as the local rules. *See D.E.&J. Ltd. P'ship v. Conaway*, 133 F. App'x 994, 1001 (6th Cir. 2005) (citing E.D. Mich. L.R. 15.1); *PR Diamonds, Inc. v. Chandler*, 91 F. App'x 418, 444 (6th Cir. 2004) (citing Fed. R. Civ. P. 7(b)). Instead, Piersing simply included a three-sentence request to "narrow" his claims at the end of his brief in opposition to the motion to compel arbitration. In doing so, Piersing didn't cite any legal authority for his request or list it in his brief's statement of issues. The district court's failure to address such a cursory request hardly amounts to an abuse of discretion. *See*, *e.g.*, *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627–28 (6th Cir. 2019); *Pulte*

Homes, Inc. v. Laborers' Int'l Union of N. Am., 648 F.3d 295, 305 (6th Cir. 2011).

Vacatur of the Opinion. Piersing also asks us to vacate the portions of the district court's opinion that purport to decide whether Domino's can enforce the arbitration agreement under state contract law (specifically, equitable estoppel). He rightly points out that this question should be decided by an arbitrator, not a court. But even so, his request misunderstands our role: "[o]ur job is 'to correct wrong judgments, not to revise opinions.'" *Flight Options, LLC v. Int'l Bhd. of Teamsters, Local 1108*, 873 F.3d 540, 546 (6th Cir. 2017) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed. 789 (1945)); *see also ASARCO, Inc. v. Sec'y of Labor*, 206 F.3d 720, 722 (6th Cir. 2000) ("Appellate courts review judgments, not statements in an opinion."). We understand the district court's "judgment" in this case to be its order to proceed to arbitration—nothing more. *See* 28 U.S.C. § 2106 (noting an appellate court's power to "modify . . . any judgment, decree, or order of a court lawfully brought before it for review"). And whatever else the court's opinion says, *our* opinion makes clear that the arbitrator should decide for itself whether Domino's can enforce the arbitration agreement. We'll leave matters at that.

We affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARLEY BLANTON and DEREK PIERSING, on Behalf of Themselves and All Others Similar Situated,

Plaintiffs,

v.

DOMINO'S PIZZA FRANCHISING LLC, *a Delaware Limited Liability Company*; DOMINO'S PIZZA MASTER ISSUER LLC, *a Delaware Limited Liability Company*; DOMINIO'S PIZZA LLC, *a Michigan Limited Liability Corporation*; and DOMINO'S PIZZA, Inc., *a Delaware Corporation.*

Defendants.

Case No. 18-13207
Hon. Victoria A. Roberts

/

ORDER REGARING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY PROCEEDINGS [ECF No. 61]

(Filed Oct. 25, 2019)

I. INTRODUCTION

The issue before the Court is whether Harley Blanton ("Blanton") and Derek Piersing ("Piersing")

("Plaintiffs") may proceed on their claims against Domino's Pizza Franchising LLC, Domino's Pizza Master Issuer LLC, Domino's Pizza LLC, and Domino's Pizza, Inc. ("Domino's") or proceed to arbitration under employment agreements they entered into.

Plaintiffs are former employees of Domino's franchisees. The franchisees are not named as parties to this lawsuit. Plaintiffs sue Domino's on behalf of themselves and all others similarly situated. Plaintiffs allege a conspiracy between Domino's and its franchisees to suppress wages and limit employment opportunities. They sue under the Clayton Act (15 U.S.C. §§ 15 and 26), the Sherman Act (15 U.S.C. § 4), and the Washington Consumer Protection Act (Wash. Rev. Code 19.86.030) (only to the Washington subclass).

As employees of Domino's franchisees, Plaintiffs signed contracts agreeing to submit employment-related claims to arbitration.

Domino's says Plaintiffs' claims against it are subject to the arbitration agreements and moves to dismiss or, in the alternative, stay proceedings and compel arbitration.

For the reasons below, the Court **GRANTS** Defendants' Motion to Dismiss.

II. LEGAL STANDARD

To survive a motion to dismiss, the nonmoving party must allege enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The facts must be construed in the light most favorable to the nonmoving party. *Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 929–30 (6th Cir.2006) (quoting *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001)).

The Federal Arbitration Act ("FAA") requires courts to "rigorously enforce" arbitration agreements. It outlines a "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Questions about the interpretation and construction of arbitration agreements are governed by federal substantive law. *See*, *e.g.*, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The party opposing arbitration has the burden to show that the agreement is not enforceable. *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 91–92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

III. ANALYSIS

1. Plaintiffs say that because Domino's did not sign the arbitration agreements, it cannot compel arbitration, and the delegation clauses are invalid

Plaintiffs' argument is first about contract formation: they say that Domino's did not sign the arbitration agreements, and so it cannot compel arbitration or invoke the delegation clauses.

Delegation clauses are clauses in the arbitration agreements which require "gateway" questions of "arbitrability"—whether the dispute is arbitrable or not, including any issues of scope, validity, or jurisdiction—to go to the arbitrator instead of a court. This argument applies to both Blanton and Piersing's arbitration agreements.

Piersing also argues that his arbitration agreement has no delegation clause at all. Domino's says that there are valid delegation clauses pertaining to both agreements and it may invoke them.

There must be "clear and unmistakable" evidence that the parties intended the arbitrator to decide questions of arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Absent "clear and unmistakable" evidence that the arbitrator decides questions of arbitrability, the Court has jurisdiction.

A. The Arbitration Agreements

Blanton and Piersing's arbitration agreements differ; the Court considers them separately. The Court first addresses whether Domino's can compel arbitration with either party, and then turns to whether there is a valid delegation clause in each arbitration agreement.

Blanton

Blanton signed an arbitration agreement when he began employment at Wilson Pizza Company ("Wilson Pizza"). He says this arbitration agreement is invalid because Domino's did not sign it, and Domino's cannot invoke the delegation clause. Domino's contends that the broad definition of the "Company" as well as the broad language of the delegation clause, includes Domino's.

The Court first examines whether Domino's is a party to the arbitration agreement under the contract language.

a. Contract formation is a question of state law

Blanton's arbitration agreement says "this Arbitration Agreement will be governed by the Federal Arbitration Act. . . . All other legal decisions shall be determined by the federal, state or local law applicable in the state where the Team Member primarily works." [ECF No. 61-3, PageID.974]

Federal courts apply state law to determine whether ordinary contract law invalidates arbitration agreements. *See*, *e.g.*, *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). "[T]raditional principles of state law" determine whether a "contract [may] be enforced by or against nonparties to the contract through . . . third-party beneficiary theories . . . and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (citation and internal quotation marks omitted).

Blanton signed the arbitration agreement and worked in Indiana; Indiana law applies to his contract formation argument.

b. Domino's is included in the plain language of the arbitration agreement

The Blanton arbitration agreement states:

> In this Arbitration Agreement, the term "the Company" refers to Wilson Pizza Company, and includes its parents, franchisors, subsidiaries, affiliates, predecessors, successors, and assigns . . . the duty to arbitrate under the Arbitration Agreement is mutual, and the decision to accept or to continue employment and to execute this Arbitration Agreement means that the Team Member and the Company have agreed to and are bound by this Arbitration Agreement. [ECF No. 61-3, PageID.974]

This language is clear and unmistakable. Domino's, as the franchisor of Wilson Pizza, is included in the definition of "the Company."

Blanton argues the inclusion of "franchisors" in the definition of "Company" does not include Domino's as a signatory. Blanton relies on *Daimler Chrylser Corp. v. Franklin*, 814 N.E.2d 281 (Ind. App. Ct. 2004). But *Daimler* is factually dissimilar to this case.

In *Daimler*, an automobile manufacturer attempted to compel arbitration. It was not a party to the contract. *Id.* The parties to the contract were the car dealership and the purchaser. *Id.* The arbitration agreement included the "[dealership's] employees, agents, successors or assigns" as parties who could compel, and who were required to, arbitrate. *Id.* The automobile manufacturer was not an employee, agent, successor, or assign, and the court denied its motion to compel arbitration. *Id.* at 285. Here, the definition of "Company" includes Domino's. *Daimler* is not instructive, and Blanton points to no other authority.

Domino's is "the Company" under the arbitration agreement and can compel arbitration.

Piersing

Piersing signed an arbitration agreement when he began employment at Carpe Diem Pizza, Inc. ("Carpe Diem"). The parties:

> . . . mutually promise, agree, and consent to resolve any claim covered by this Agreement

> through binding arbitration, rather than through court litigation. Employee and Company further agree that such binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any claims or disputes covered by this Agreement. [ECF No. 61-4, PageID.982]

Piersing argues that if there is a delegation clause in his arbitration agreement, Domino's cannot invoke it because Domino's did not sign the contract. Domino's says that Piersing is equitably estopped from making this argument. Piersing says that even if this is true, there is no delegation clause in his arbitration agreement. Domino's contends that the arbitration agreement incorporates the rules of the American Arbitration Association, which includes delegation of gateway questions to the arbitrator.

The Court considers whether Piersing is equitably estopped from avoiding arbitration with Domino's.

a. Since Piersing alleges a conspiracy between Domino's and its franchisees, he is equitably estopped from avoiding arbitration with Domino's.

Domino's argues that it can compel arbitration as a nonsignatory under ordinary conspiracy and agent principles or equitable estoppel. Domino's says that because Piersing alleges a conspiracy involving Domino's and its franchisees, he is estopped from avoiding arbitration by selectively suing only some of the alleged conspirators. Piersing did not sue his employer, who he

claims was a participant in a civil conspiracy with Domino's; he only sued Domino's, a nonsignatory to the arbitration agreements.

Equitable estoppel is an ordinary contract defense. State law applies. Piersing signed his arbitration agreement in Washington, and a substantial portion of the events at issue took place in Washington. Washington law applies.

As a general principle, Washington law does not allow nonsignatory defendants to apply equitable estoppel to a signatory plaintiff. *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013). However, the Ninth Circuit noted that "where other circuits have granted motions to compel arbitration on behalf of non-signatory defendants against signatory plaintiffs, it was essential in all of these cases that the subject matter of the dispute was intertwined with the contract providing for arbitration." *Id.* at 848 (internal quotation and citation omitted). The court clarified that equitable estoppel prevents a party from claiming benefits under a contract while avoiding the burdens of that same contract and held that equitable estoppel did not apply because the claim in *Rajagopalan* was not intertwined with the subject of the arbitration agreement. *Id.*

The Washington Court of Appeals has also held that "where the claims against a parent and subsidiary are based on the same facts . . . and are inherently inseparable, a court may order arbitration of claims against the parent even though the parent is not a

party to the arbitration agreement." *Wiese v. Cach, LLL*, 358 P.3d 1213, 1222 (Wash. Ct. App. 2015) (internal quotation and citation omitted).

Piersing's claims are intertwined with his arbitration agreement, which covers all employment-related claims. Piersing alleges that Domino's and Carpe Diem are intertwined and conspired to set unfair wages and prevent employment opportunities.

Domino's and Carpe Diem are inseparable. The claims against them are inseparable. Equitable estoppel applies, and Domino's may compel Piersing to arbitration.

b. Piersing's arguments that equitable estoppel does not apply are without merit

Piersing argues: (1) he is not trying to claim any benefit from the arbitration agreement, so equitable estoppel does not apply, and (2) his antitrust claims are not intertwined with the arbitration agreement, and so he cannot be compelled to arbitration.

i. Whether Piersing seeks direct benefits from the arbitration agreement is irrelevant

Piersing argues that because the arbitration agreement was a stand-alone contract and did not confer other employment benefits, equitable estoppel does not apply.

This argument is without merit. Piersing relies on *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 628 (6th Cir. 2003). The central question in *Javitch* was whether the nonsignatory sought to benefit under a contract that contained an arbitration agreement, and therefore was estopped from avoiding arbitration. *Id.* Here, Piersing signed a stand-alone arbitration agreement that compels arbitration in all claims relating to his employment with Domino's franchisees. Whether Piersing directly or indirectly benefitted from the arbitration agreements is not at issue; equitable estoppel rests on whether Piersing's claims are intertwined with the arbitration agreements.

ii. The anti-trust claims are intertwined with the arbitration agreement

Piersing's anti-trust claims allege that Domino's is involved in an illegal civil conspiracy with its franchisees to suppress wages and employment opportunities. Piersing makes these claims pursuant to the Sherman Act (15 U.S.C. § 1, *et seq.*) and Clayton Act (15 U.S.C. § 15, *et seq.*). He further claims that the alleged conspiracy between Domino's and the franchisee signatories is not concerted misconduct. This argument is without merit.

Piersing's arbitration agreement covers all claims "arising out of or relating to Employee's employment with the Company and/or the termination of Employee's employment." [ECF 61-4, PageID.982] Piersing sues over an alleged conspiracy involving hiring,

employee opportunities, and wages. The antitrust claims are clearly intertwined with the subject of the arbitration agreements.

Equitable estoppel applies.

B. Both arbitration agreements have valid delegation clauses

Blanton

Blanton's arbitration agreement has an explicit delegation clause.

Blanton agreed to submit all covered claims to binding arbitration. His claims against Domino's are clearly within the arbitrator's jurisdiction:

> This Arbitration Agreement specifically includes all claims, disputes, and controversies by the Team Member or on the Team Member's behalf against the Company . . . Covered claims include past, current and future disputes or controversies related to a Team Member's job application, hiring, terms and conditions of employment, job assignments, payment of wages, benefits, forms of compensation, or termination from the Company. [ECF No. 61-3 at PageID.974]

The agreement also sets forth "gateway" covered claims that must be delegated to the arbitrator. They include:

> (5) Any claim, dispute, and/or controversy relating to the scope, validity, or

> enforceability of this Arbitration Agreement. [*Id.* at PageID.975]

This gateway clause is valid delegation of arbitrability issues to the arbitrator's jurisdiction.

Piersing

The delegation clause in Piersing's agreement is not as explicit as the one in Blanton's agreement. But Domino's contends that the delegation clause that governs Piersing's claims is in the contract under the heading "Arbitration Rules and Procedures," and that incorporation of this rule is a valid delegation clause. The Court agrees.

The relevant section reads:

> The American Arbitration Association ("AAA") will administer the arbitration and the arbitration will be conducted in accordance with the then-current AAA National Rules for the Resolution of Employment Disputes ("AAA Rule"). [ECF No. 61-4, PageID.982]

The applicable AAA Rule is Rule 6(a) of the Rules for the Resolution of Employment Disputes. It says "the 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." [ECF No. 61-6, PageID. 989]

Circuit courts are virtually united on the question of whether AAA rules are "clear and unmistakable" evidence that questions of arbitrability are for the

arbitrator. They routinely hold that incorporation of AAA rules into arbitration agreements is clear evidence of intent to delegate questions of arbitrability to the arbitrator. *See Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015) (citing additional case law from seven other circuits).

Federal district courts in the Sixth Circuit regularly find that incorporation of AAA rules is clear and unmistakable evidence that questions of arbitrability are for the arbitrator. *See e.g. Aerpio Phamaceuticals, Inc. v. Quaggin*, Case No. 1:18-cv-794, 2019 WL 4717477 at *10 (S.D. Ohio Sept. 26, 2019); *Jacobs Field Services North America, Inc. v. Wacker Polysilicon North America, LLC*, 375 F.Supp.3d 898, 913 (E.D. Tenn. Mar. 15, 2019).

Although the Sixth Circuit has not definitively made such a ruling, it has delegated gateway questions of arbitrability to the arbitrator based on a contract that incorporated AAA rules. *Milan Exp. Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.*, 590 Fed. Appx. 482, 484 (6th Cir. 2014):

> "It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation . . . Any dispute or controversy that is not resolved informally . . . shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association." *Id.*

The court emphasized that the words "any," "all," and "exclusively," evidenced a clear and unmistakable

agreement to arbitrate according to AAA rules. *Id.* This language is similar to Piersing's arbitration agreement.

Piersing makes an unsupported argument that incorporation of AAA rules does not grant the arbitrator exclusive jurisdiction over gateway questions, and cites to inapplicable case law.

In *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 553 (6th Cir. 2016) the arbitration agreement only discussed delegating individual claims to the arbitrator; the Sixth Circuit found that AAA rules did not delegate classwide claims to the arbitrator because the contract was silent on delegating classwide claims. That is not the issue before the Court. Piersing's arbitration agreement explicitly states that "no covered claims may be asserted as part of a multi-plaintiff, class or collective action. Moreover, no covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis." [ECF No. 61-4, PageID.982] Piersing makes no arguments about classwide, as opposed to individual, arbitration.

In *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 95 (6th Cir. 1987) the court held that the rules of a different arbitration organization—not the AAA—were too vague to be "clear and unmistakable" evidence of intent to delegate. Piersing's agreement concerns AAA rules, and *Smith Barney* addresses a different question of law.

Neither *AlixPartners* nor *Smith Barney* is instructive.

The Court finds that incorporation of AAA rules and procedures is clear and unmistakable evidence that questions of arbitrability are for the arbitrator, and that Piersing's arbitration agreement contains a valid delegation clause.

All gateway questions related to Piersing's claims are for the arbitrator to decide.

2. The Court does not have jurisdiction to consider the Plaintiffs' other arguments

Blanton argues that his arbitration agreement was obtained improperly. This is a question of fact for the arbitrator. Because of the delegation clause, the Court does not have jurisdiction to consider this argument.

All questions regarding arbitrability and the merits of the claims are for the arbitrator to decide.

IV. CONCLUSION

The Court **GRANTS** Defendants' Motion to Compel Arbitration and Dismiss. The Motion to Stay is **MOOT**.

IT IS ORDERED.

s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: 10/25/2019

Sage HRMS HR Actions® **Arbitration Agreement CDP**

Employee Name: Derek Piersing
Employee ID: REDACTED
Action ID: 43413
Submitter Name: Derek Piersing

Effective Date: * 8/15/2018

EMPLOYER: CARPE DIEM PIZZA INC
STORE NUMBER: 7084 – UW
SUPERVISOR: Joey Lark
WAGE TYPE: 6130 – Driver's Wage
BONUS GL: 6131 Employee Bonus

Initiated Date: 8/15/2018 3:23 PM

Submitter Comments: 0 of 5000 max chars.	

*** = Required, + = Not Blankable**

CURRENT VALUE NEW VALUE

Carpe Diem Pizza Inc., DBA Domino's Pizza

Arbitration Agreement

This Mutual Agreement to Arbitrate Claims ("Agreement") is entered into between the Team Member ("Employee") and Carpe Diem Pizza, Inc. ("Company").

1. Binding Arbitration of Disagreements and Claims

Employee and Company mutually promise, agree, and consent to resolve any claim covered by this Agreement through binding arbitration, rather than through court litigation. Employee and Company further agree that such binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any claims or disputes covered by this Agreement.

2. Claims Covered By This Agreement

The claims covered by this Agreement include any and all claims, disputes, or controversies arising out of or relating to Employee's employment with the Company and/or the termination of Employee's employment. Some, but not all, of the types of claims covered by this Agreement include: claims for unpaid wages, commissions, or other compensation, including bonuses or overtime; claims for reimbursed expenses; claims for discrimination or harassment on the basis of race, sex, age, national origin, religion, disability or any other unlawful basis; claims for breach of express or implied contract; claims for unlawful retaliation; claims for wrongful discharge on any basis; clams for defamation or invasion of privacy; employment-related tort claims; claims arising under the Fair Labor Standards Act or the Family and Medical Leave Act; and claims arising under the Employee Retirement Income Security Act.

For all covered claims, Employee and the Company expressly waive any right to a trial by jury. No covered claims may be asserted as part of a multi-plaintiff, class or collective action. Moreover, no covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis. Rather, each alleged aggrieved employee must proceed to arbitration separately and individually, and the Employee's arbitration proceeding shall encompass only covered claims asserted by such individual Employee.

This Agreement does not limit or restrict Employee's opportunity to seek relief from state or federal agencies such as the National Relations Board or the Equal Employment Opportunity Commission.

3. Claims not covered by this Agreement

The only claims between Employee and the Company not covered by this Agreement are:

a) Any claim by Employee for worker's compensation or other related benefit plans, including unemployment compensation benefits; and

b) Any claim by either party for injunctive or declaratory relief arising from alleged inference with business, unfair compensation, unfair business practices, breach of the duty of loyalty, unauthorized disclosure of trade secrets or confidential information, or the breach of covenants between parties.

4. Arbitration Rules and Procedures

- AAA rules

The American Arbitration Association ("AAA") will administer the arbitration and the arbitration will be conducted in accordance with then-current AAA National Rules for the Resolution of Employment Disputes ("AAA Rule"). The AAA Rules are available on AAA's website (www.adr.org). The Arbitrator shall have the authority to consider and rule on dispositive motions to dismiss or motions established by the applicable federal district court in the district where the arbitration proceeding is pending. The Arbitrator may establish appropriate procedures for such motions consistent with the expedited and informal nature of arbitration proceedings.

5. Representation

The Company and the Employee have the right to retain an attorney to represent them in connection with arbitration, but they are not required to do so.

6. Fees and Costs

The party demanding arbitration shall pay the AAA filing fee, subject to any caps applicable under the AAA rules. The remaining fees and expenses of the arbitration, including the cost of the arbitrator's fee, will be allocated in accordance with the AAA Rules. Each party will pay for the fees and expenses of its own attorneys, experts, witnesses, and preparation and

presentation of evidence and any pre or post-hearing briefs. If a party prevails on a claim for which attorney's fees or costs are recoverable by statute or contract, the arbitrator shall have discretion to order non-prevailing party to pay the reasonable fees and costs of the prevailing party.

7. Discovery

The parties shall be permitted to engage in written discovery including interrogatories, request for production of documents and requests for admissions. In conducting discovery before such arbitration, each party shall be limited to taking the deposition of three persons and expert witnesses designated by another party. If a party shows substantial need, the arbitrator may allow that party to take additional depositions.

8. Enforcement of Award

This Agreement shall be governed by the Federal Arbitration Act ("FAA"), and any act on to compel arbitration or to enforce or vacate the arbitrator's award shall also be governed by the FAA and otherwise by applicable state law.

9. Relief Available

The arbitrator shall have the authority to award the same relief to the Employee or the Company as if the dispute had proceeded in litigation rather than arbitration.

5. Miscellaneous Provisions

- Definitions

For purposes of the scope of the obligation to arbitrate disputes, the term "Company" shall include King Beast Pizza, Inc. and al related entities, all officers, directors, agents, owners, shareholders, partners, benefit plans, benefit plan sponsors, fiduciaries, administrators, employees (current or former) or affiliates of any of the above; and all successors and assigns f any of the above.

- Dismissal of Court Action

If either party pursues a covered claim against the other in a court proceeding, the filing party agrees that the responding party shall be entitled to a dismissal, stay and/or injunctive relief regarding such action, and recovery of all costs and attorney's fees related to such court action proceeding.

- Entire Agreement

This is the complete Agreement between the parties on the subject of arbitration of disputes claims. This Agreement supersedes any prior or contemporaneous oral, written, or implied understanding on the subject, shall survive the termination of Employee's employment, and can only be revoked or modified upon 30 days written notice from the Company of intent to revoke or modify the Agreement. If any provision of this Agreement is adjudged to be void and otherwise unenforceable in whole or in part, such unenforceability shall not affect the validity of the remainder of the

Agreement. This Agreement is not, and shall not be constructed to create, any contract of employment, express or implied, nor does this Agreement in any way alter the "at-will" status of Employees employment.

6. Opportunity to Review and Consult

Employee acknowledges that he/she has had the opportunity to review this Agreement with and obtain advice from a private attorney, has had sufficient time to, and in fact has carefully read and fully understands all the provisions of this Agreement, and is knowingly and voluntarily entering this Agreement.

Employee Signature Instructions

Please sign this form by entering your name in to the signature block, todays date and the last 4 of your SSN.

Employee Signature:

Employee Signature:	Derek Piersing
Last 4 digits SSN:	REDACTED
Employee Signature Date:	8/15/2018

Approval Instructions:

ROUTING

Derek Piersing	Timestamp: 8/15/2018 3:23:42 PM Comments: No approval sequence available for this situation.
Piersing, Derek (Admin)	Timestamp: 8/15/2018 3:23:42 PM Comments: Action saved into HRActions database by: HR Actions® System. Saved on: 8/15/2018 3:23:42 PM

Submit Instructions:

Auditor Comments:

If you need assistance, please call Crystal in HR at (360) 830-0354 X 2