No. _____

In the
Supreme Court of the United States

SCHMIDT BAKING DISTRIBUTION, LLC, ET AL.,
Petitioners,

v.

NATHANIEL SILVA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Respondents are the controlling shareholders and presidents of distribution companies whose agreements with Schmidt Baking Distribution, LLC, a company wholly owned by Schmidt Baking Company, Inc. ("Schmidt"), includes a mandatory arbitration provision requiring Respondents to arbitrate all disputes arising from their relationship with Schmidt on an individual basis. Respondents filed a putative class action in court and opposed arbitration based on the § 1 exemption.

The question presented is:

Whether the FAA's § 1 exemption, which on its face applies only to "contracts of employment," is inapplicable to commercial agreements between two business entities, neither of which is a "worker"?

PARTIES TO THE PROCEEDING

Petitioner Schmidt Baking Company, Inc. is a Maryland corporation. Petitioner Schmidt Baking Distribution, LLC is a limited liability company under the laws of Maryland. Petitioners were defendants in the District Court and the appellees in the Second Circuit.

Respondents Nathaniel Silva and Phil Rothkugel were plaintiffs in the District Court and the appellants in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Schmidt Baking Company, Inc. is wholly owned by five revocable private trusts for the benefit of certain members of the Paterakis family. No publicly held corporation owns 10% or more of its stock. Petitioner Schmidt Baking Distribution, LLC's sole member is Schmidt Baking Company, Inc.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

Silva et al v. Schmidt Baking Distribution, LLC et al, No. 3:23-cv-01695-MPS (D. Conn.) (motion to compel arbitration granted on May 2, 2024).

Silva et al v. Schmidt Baking Distribution, LLC et al, No. 24-2103 (2d Cir.) (order granting motion to compel arbitration vacated on December 22, 2025).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Schmidt Baking Company, Inc. and Schmidt Baking Distribution, LLC respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The District Court's order granting Petitioner's motion to compel arbitration is reported at 732 F. Supp. 3d 194 and reproduced at Pet. App. 20a. The Second Circuit's opinion vacating the District Court's order granting Petitioner's motion to compel is reported at 162 F.4th 354 and reproduced at Pet. App. 1a.

JURISDICTION

The Second Circuit issued a decision in this case on December 22, 2025. This petition is timely because it is filed on March 23, 2026, within ninety days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, sets forth certain definitions applicable to the Act, as well as an exception to the Act's coverage, providing: "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any

other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

INTRODUCTION

This case presents a question of utmost importance across industries, impacting a broad array of businesses that contract for transportation services, and over which the federal courts of appeals are undisputedly divided: whether the Federal Arbitration Act excludes business entities from entering into commercial contracts requiring arbitration of disputes. Congress enacted the FAA to reverse the longstanding judicial hostility to arbitration agreements. In doing so, Congress exempted a narrow class of transportation workers from the statute—those subject to "contracts of employment." This Court has repeatedly instructed lower courts to read this exemption, codified in § 1 of the FAA, narrowly. And for good reason: Congress enacted the transportation worker exemption to accommodate established or developing dispute resolution schemes covering workers in the transportation industry. Recognizing that labor disputes in the transportation sector uniquely threaten

to interrupt interstate commerce, Congress opted to regulate labor dispute resolution in that sector separately from the uniform, generally applicable mandates of the FAA. Whereas the FAA allows parties to *choose* the efficiencies and cost savings of arbitration, many statutes governing labor relations in the transportation sector *mandate* arbitration, and impose specific frameworks for such arbitral proceedings. But, in recent years, the hostility to arbitration that Congress intended to stamp out has remained.

In the decision below, the Second Circuit deepened that hostility by refusing to enforce an arbitration agreement between Petitioners and two of their distributors. Respondents are controlling shareholders and presidents of distribution companies that entered agreements for exclusive rights to sell and distribute Petitioner Schmidt Baking Company's products in certain territories. The agreements require arbitration of all disputes arising from their business relationships. The Second Circuit looked past the corporate form to make findings about the "substance" of the parties' relationships and concluded that the agreements are "contracts of employment" within the meaning of § 1 of the FAA. In the Second Circuit's view, the § 1 exemption reaches contracts between business entities based on the size and scale of their operations, even if the contract's plain language is silent on the terms of work performed by workers.

The Fourth, Sixth, and Ninth Circuit disagree, emphasizing that the § 1 exemption only applies to contracts with transportation workers. So do district courts around the country. After all, the text of the § 1 exemption is limited to contracts of employment of "seamen, railroad employees, and any other class of

workers." Applying the *ejusdem generis* canon, the Fourth, Sixth, and Ninth Circuits all concluded "any other class of workers" meant natural persons, *not* business entities.

That circuit conflict warrants this Court's attention. This Court has steadfastly safeguarded arbitration as an option for dispute resolution. Indeed, this Court repeatedly has refused to carve out exceptions to the FAA. Even in interpreting § 1, the Court has limited its applicability to workers who are actively engaged in transportation of goods across channels of foreign or interstate commerce. The Second Circuit's outlier decision tramples on that precedent. Worse yet, the circuit split contravenes the uniform rule of access to arbitration that Congress designed the FAA to secure. The resulting threshold litigation over the applicability of the transportation worker exemption undermines the efficiency and economy that arbitration promotes. Instead, it creates complexity and uncertainty, even the need for extensive discovery and mini-trials, that this Court has interpreted the FAA to avoid. And the Second Circuit's approach—looking past the corporate form to read an employment relationship into contracts between businesses—if let stand, will mean the enforceability of an arbitration agreement between businesses depends on the jurisdiction in which a lawsuit is filed. In the Second Circuit and any other jurisdiction that adopts its approach, almost every arbitration agreement involving businesses in the transportation industry will be unenforceable under the FAA.

At bottom, the exclusion of arbitration agreements in contracts for transportation services between busi-

nesses from the FAA is an issue of exceptional importance. Such business contracts are the mainstay of the nation's supply chain. Hijacking these businesses' access to the efficiencies of arbitration undermines the purpose of the FAA. The significance of the question presented will only grow in light of the increasing prevalence of threshold litigation over the applicability of the transportation worker exemption. Given these stakes, certiorari is warranted.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

1. Congress enacted the Federal Arbitration Act in 1925 to protect arbitration agreements by requiring courts to enforce them as written. For this reason, this Court has repeatedly stressed the "emphatic federal policy in favor of arbitral dispute resolution" in the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017); *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). As a matter of federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Con Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The FAA's primary substantive provision provides that a "contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Consistent with the purposes of the FAA,

§ 2's "text reflects the overarching principle that arbitration is a matter of contract" and that "courts must rigorously enforce arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (internal quotation marks omitted).

2. Section 1 of the FAA exempts a narrow class of contracts concerning transportation workers from the purview of the statute. It provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This Court has never addressed whether the § 1 exemption applies to contracts between business entities. But it has consistently instructed that the transportation worker exemption must be construed narrowly.

Crucially, in *New Prime Inc. v. Oliveira*, the Court clarified the § 1 inquiry by holding that "Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*." 586 U.S. 105, 116 (2019) (emphasis in original). Because all "work by workers" was treated as employment at the time of the FAA's adoption in 1925, the Court reasoned that § 1 excluded "not only agreements between employers and employees but also agreements that require independent contractors to perform work." *Id.* at 114. But the Court limited its inquiry to whether the statutory term "contracts of employment" extends to independent contractors. It did not decide whether contracts between

business entities qualify as "contracts of employment" for purposes of § 1. *Id.*[1]

Beyond *New Prime*, this Court long circumscribed the scope of § 1. In *Circuit City Stores, Inc. v. Adams*, the Court explained that § 1 requires a "precise reading" and "a narrow construction," to ensure the FAA holds to its purpose of "overcom[ing] judicial hostility to arbitration agreements." 532 U.S. 105, 118-19 (2001) (citation omitted). The Court rejected an interpretation of § 1 that would broaden the residual clause—i.e., "any other class of workers engaged in foreign or interstate commerce"—to almost all "contracts of employment." 532 U.S. at 109, 118. The Court instead held that § 1 "exempts from the FAA only contracts of employment of *transportation workers*." *Id.* at 119 (emphasis added). Applying the *ejusdem generis* canon, the Court reasoned that the transportation worker exemption "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 114-15. But the Court did not address whether the § 1 exemption ever could apply to contracts between business entities.

Then, in *Southwest Airlines Co. v. Saxon*, this Court explained that whether a worker falls within the § 1 exemption depends on what that worker does,

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[1] To be sure, this issue presented by this petition is not unfamiliar to the Court, since at oral argument in *New Prime*, Justices Alito, Kagan, and Gorsuch each inquired whether § 1 could apply to a business-to-business contract, but the Court did not need to reach that question in its opinion. *See New Prime, Inc. v. Oliveira*, 2018 WL 4776174, at *32-33, *38-41 (U.S. Oral Arg., Oct. 3, 2018).

and held that only workers who are "actively engaged in transportation of . . . goods across borders via the channels of foreign or interstate commerce" fall within § 1. 596 U.S. 450, 455-58 (2022) (internal quotation marks omitted). In other words, an "exempted worker must at least play a direct and necessary role in the free flow of goods across borders." *Id.* at 451 (internal quotation marks omitted). Applying that framework in *Saxon*, the Court held that the § 1 exempted "*airline employees* who physically load and unload cargo on and off planes traveling in interstate commerce." *Id.* at 457 (emphasis added). Again, the Court did not address whether the transportation worker exemption permits courts to overlook the corporate form and invalidate arbitration agreements between businesses.

Later, in *Bissonnette v. LePage Bakeries Park Street, LLC*, the Court held that a "*transportation worker* need not work in the transportation industry to fall within the exemption" under § 1. 601 U.S. 246, 256 (2024) (emphasis added). The Court reasoned that the language of § 1—"referring to 'workers' who are 'engaged' in commerce"—focuses on workers' "performance of work rather than the industry of the employer." *Id.* at 246-47 (quoting *Saxon*, 596 U.S. at 456). The Court explained, however, it has "never understood § 1 to define the class of exempt workers in . . . limitless terms." *Id.* at 256. But again, the Court did not consider whether § 1 of the FAA could ever reach contracts between businesses.

II. FACTUAL AND PROCEDURAL BACKGROUND.

1. Schmidt Baking Company, Inc. manufactures and sells baked goods. Pet. App. 4a. Through its subsidiary, Schmidt Baking Distribution, LLC, Schmidt divides the market for its products into geographic territories and sells exclusive distribution rights within each territory to independent companies incorporated under the laws of their respective states of operation. *Id*. at 21a.

Silva and Rothkugel were initially employed by another business to deliver products for Schmidt. *Id*. at 21a-22a. Then they each formed companies of their own to distribute Schmidt's products. *Id*. Silva became controlling shareholder and president of a Connecticut corporation—Silva Baked Goods Inc.—that purchased the rights to market, sell, and distribute Schmidt products in an exclusive sales territory. *Id*. Rothkugel became president and controlling shareholder of Trout Slayers Baked Breads Inc., a Connecticut corporation that purchased exclusive distribution rights to another sales territory from Schmidt. *Id*. Both companies distributed Schmidt products to retailers and foodservice outlets in their respective territories. *Id*.

Schmidt's relationship with Silva Baked Goods Inc. and Trout Slayers Baked Breads Inc. is governed by Distribution Agreements containing the same dispute resolution procedures. Specifically, the Distribution Agreements provide that "[a]ny dispute between the parties . . . shall be decided by neutral, binding arbitration conducted in accordance with the Judicial Arbitration and Mediation Services, Inc." *Id.* at 23a-

24a. The covered claims include "any dispute . . . arising out of the relationship created by th[e] Agreement." *Id.* at 23a. These mandatory arbitration provisions cover claims by "affiliates and their respective owners, officers, and directors" arising from the Agreement. *Id.* at 24a. Silva and Rothkugel each signed separate Distribution Agreements as officers on behalf of their respective companies. *Id.* at 39a.

Through these agreements, Silva Baked Goods, Inc. has made hundreds of thousands of dollars in net revenue and eventually sold the distribution rights to many of its customers for approximately double the price it paid. *Id.* at 48a-49a n.6. Similarly, Trout Slayers Baked Breads Inc. made nearly one-hundred thousand dollars in net revenue from one year of sales, and it sold the distribution rights to its entire sales territory at nearly double the price it paid. *Id.*

2. Silva and Rothkugel subsequently filed a putative class action against Schmidt, alleging claims of unpaid wages and overtime under Connecticut law. Schmidt moved to compel arbitration under the FAA. *Id.* at 5a. Silva and Rothkugel responded that they should be permitted to proceed in court on the basis that their contracts with Schmidt are exempt from enforcement under § 1 of the FAA. *Id.* at 6a.

The district court granted Schmidt's motion to compel arbitration. In doing so, it determined the transportation worker exemption did not apply. The district court acknowledged that § 1's reference to "contracts of employment" refers to "work by workers" only, not agreements between businesses for distribution rights. *Id.* at 29a, 32a-33a. The court explained

that its "narrow construction" comports with this Court's decision in *Circuit City* and the "characteristic elements of employment contracts, such as terms regarding salaries and benefits." *Id.* at 32a.

Applying this reasoning, the district court confined its inquiry to the Distribution Agreements. It explained that the Agreements "read like what they are—agreements between businesses." *Id.* The Agreements require Silva Baked Goods, Inc. and Trout Slayers Baked Breads Inc. to "buy baked goods" from Schmidt, with "title passing at the time of delivery." *Id.* As the district court observed, that title came with certain rights and responsibilities typical of business contracts: the "right to operate the business as they choose," the right to "distribute merchandise for other firms" and to "sell their distribution rights," the burden of bearing "all risks and costs of operating their businesses" and the responsibility of "hiring and firing their own employees." *Id.* According to the district court, these are "not terms typically seen in contracts between a business and its workers; they are, instead, terms that suggest a supplier-distributor relationship between two companies." *Id.*

Silva and Rothkugel appealed the district court's order granting the motion to compel arbitration under 28 U.S.C. § 1292(b).

3. The Second Circuit vacated the district court's order. The Second Circuit held that the term "contract of employment" for purposes of § 1 "leaves little room to exclude . . . a contract between businesses." *Id.* at 11a. The court acknowledged that the Fourth, Sixth, and Ninth Circuits had reached the opposite

conclusion on the same question, holding that "'contracts of employment' in the transportation worker exception do not extend to commercial contracts" between businesses. *Id.* at 17a (quoting *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190, 1196 (9th Cir. 2024)); *see also Tillman Transportation, LLC v. MI Business Incorporated*, 95 F.4th 1057, 1058 (6th Cir. 2024); *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 593 (4th Cir. 2023). And the Second Circuit conceded that "not all business-to-business contracts involving transportation work fall within the exception." *Id.* at 17a. Nonetheless, the Second Circuit disagreed with all those other courts, including the district court below, holding that courts may look past the corporate form and remove business-to-business contracts involving transportation services from the ambit of the FAA. *Id.* at 14a-16a.

The Second Circuit explained that it would "look to the substance" of the parties' relationship, not the "formalities" of "corporate forms." *Id.* at 14a-15a & n.7. Discounting the traditional legal shield between corporations and their shareholders, the Second Circuit analogized its inquiry to equitable doctrines from the common law ("piercing the corporate veil") and labor law ("alter ego"). *Id.* at 15a. But the Second Circuit found no "sham" or "alter ego" in Schmidt's relationship to Respondents and their companies. *Id.* at 15a n.7. Rather, the court focused on size. Finding "contracts for transportation work between *sizeable* business entities with *many* employees" do not fall within the § 1 exemption, the Second Circuit attempted to distinguish Respondents' businesses. *Id.* at 17a (emphasis added). The court then held the Dis-

tribution Agreements were exempt from the FAA because Respondents "did no form sizeable logistics companies that employ significant workforces." *Id.* at 18a.

REASONS TO GRANT THE PETITION

The Second Circuit's decision created a split among the federal courts of appeals on an important question of law regarding the scope and applicability of the exemption in § 1 of the FAA. *See* Sup. Ct. R. 10(a). In holding that the transportation worker exemption applies to commercial contracts between businesses, the Second Circuit created a new conflict among the federal courts of appeals and became an outlier jurisdiction. The decision below, moreover, is wrong that the words "contract of employment" demonstrate Congress's intent to exclude enforceable arbitration provisions from contracts between businesses concerning transportation services. The issue goes to the heart of the FAA's purpose of uniform, speedy, and efficient dispute resolution. This Court should grant review.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS AND DISTRICT COURTS.

The Second Circuit held that courts may look past the corporate form of a business-to-business commercial agreement to find a "contract of employment" for purposes of the FAA's § 1 exemption. On this issue, the decision below breaks from the Fourth, Sixth, and Ninth Circuits and conflicts with decisions of district courts around the country. Indeed, prior to the Sec-

ond Circuit's opinion in this case, courts uniformly understood the phrase "contracts of employment" to mean contracts with and concerning "workers" providing transportation services—not an agreement between incorporated businesses.

1. In *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, the district court granted an e-commerce company's motion to compel arbitration of class action claims by three business entities that performed delivery services for the e-commerce company. 97 F.4th 1190, 1196 (9th Cir. 2024). On appeal, the Ninth Circuit considered whether the transportation worker exemption applied. The court recognized that, at the time the FAA was enacted, "all work was treated as employment whether or not the common law criteria for a master-servant relationship happened to be satisfied." *Id.* at 1195. But turning to the text of the statute, the Ninth Circuit concluded that § 1 "was targeted at employment contracts of workers . . . , *not* contracts of business entities." *Id.* at 1196 (emphasis in original).

The Ninth Circuit arrived at that result through the text and interpretative history of the transportation worker exemption. The Ninth Circuit accepted that § 1's listing of certain types of workers followed by a catch-all phrase, "any other class of workers," meant that "a natural person such as an independent contractor may be a transportation worker," but a "business entity that employs or contracts with transportation workers, is not and cannot be a transportation worker." *Id.* Pointing to this Court's precedents, the Ninth Circuit also accepted that the phrase "contracts of employment" was only intended to "capture any contract for the performance of *work* by *workers*,"

and exclude contracts with business entities that have "exclusive responsibility for their Personnel," including exclusive control over working conditions. *Id.* at 1197 (quoting *New Prime*, 586 U.S. at 116).

Based on those premises, the Ninth Circuit reasoned: the FAA's "transportation worker exemption does not extend to business entities," because "[w]hether independent or not," business entities are "not natural persons." *Id.* at 1198.

2. The Fourth Circuit confronted the same issue in *Amos v. Amazon Logistics, Inc.*, involving a delivery company and its owner who brought claims in court against an e-commerce company, notwithstanding an agreement between the two companies to arbitrate claims. 74 F.4th 591, 593 (4th Cir. 2023). Much like *Fli-Lo*, the § 1 exemption question arose when the e-commerce company successfully moved to compel arbitration under the FAA. *Id.* The Fourth Circuit affirmed on the ground that the "transportation worker" exemption did not apply. *Id.* at 595.

In doing so, the Fourth Circuit rejected the same faulty reasoning adopted by the Second Circuit that the delivery company's owner was a "transportation worker" and has a "contract of employment" with the e-commerce company. *Id.* at 597. For the Fourth Circuit, the owner's "status matters not when the claimed FAA exemption applies to contracts entered into *with* transportation workers," and the agreement is between two business entities. *Id.* (emphasis in original). According to the Fourth Circuit, a contract for business services "to be provided by one business to another" does not have "the hallmarks of a traditional employment contract," as "it does not promise

work and compensation to an individual employee" or include "provisions regarding salary, benefits, and leave time." *Id.* at 596.

The Fourth Circuit also observed that the "wording of the exemption calls for the application of the maxim *ejusdem generis*," where general words follow specific words, the general words are construed to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* (quoting *Circuit City*, 532 U.S. at 114-15); *see also* Scalia & Garner, Reading the Law: The Interpretation of Legal Texts 199 (2012) ("The *ejusdem generis* canon applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics . . . ."). As with the Ninth Circuit, the Fourth Circuit concluded that the § 1 exemption's residual clause ("any other class of workers") should be limited by the statute's preceding words—"seamen" and "railroad workers." *Amos*, 74 F.4th at 596. The Fourth Circuit found salient that those preceding words refer to "*individual* workers carrying out work." *Id.* (emphasis in original). The Fourth Circuit held that business entities were not "similar in nature" to the actual human workers enumerated by the text of the transportation worker exemption, and so the arbitration clause was not exempt. *Id.* at 597.

3. In *Tillman Transportation, LLC v. MI Business Incorporated*, the Sixth Circuit joined the Fourth and Ninth in a case involving trucking contracts between single-owner limited liability companies. 95 F.4th at 1058. The contracts included binding arbitration clauses. *Id.* Undertaking the same reasoning as the Fourth Circuit, the court looked to the text of § 1 and, finding "specific categories of workers" enumerated

before the residual clause ("any other class of workers"), framed its inquiry as "whether corporate entities such as limited liability companies are covered under Section 1's exemption." *Id.* at 1062. The Sixth Circuit then held that the transportation worker exemption does not "apply to limited liability companies" because a "business entity is not a transportation worker, and . . . a commercial contract between two business entities is not a contract of employment." *Id.* at 1064 (internal quotation marks omitted).

The Sixth Circuit then used the same logic to criticize the reasoning adopted by the Second Circuit in this case that the trucking company's owner was a "transportation worker." *Id.* at 1063. According to the Sixth Circuit, the agreement was between two corporate entities, not the owner in his individual capacity. *Id.* The Sixth Circuit refused to look past the limited liability company to the owner, regardless of whether he himself was a transportation worker. *Id.* at 1064. The court's refusal was rooted in its agreement with the Fourth Circuit that what matters under § 1 is "the owner's status as a nonparty to the agreement" and that a "binding commercial contract" between two business entities was not a "contract of employment" that promised "work and compensation to an individual employee." *Id.* at 1063.

4. In addition to departing from these appellate decisions, the Second Circuit's ruling in this case conflicts with federal district court decisions from around the country, all of which have held that commercial contracts between business entities are not "contracts of employment" subject to the transportation worker exemption. *See ShaZor Logistics v. Amazon.com,*

LLC, 628 F. Supp. 3d 708, 712 (E.D. Mich. 2022) ("Section 1 is inapplicable to contracts between businesses, because businesses do not sign employment contracts with one another" (citations omitted)); *R&C Oilfield Servs., LLC v. Am. Wind Transp. Grp., LLC*, 447 F. Supp. 3d 339, 347 (W.D. Pa. 2020) ("The Agreement here is a commercial contract between two business entities. It cannot reasonably be construed as a contract of employment governing 'work by workers.'"); *Negrete v. Campbell's Co.*, No. 2:25-cv-00555-AB-AGR, 2025 WL 4358880, at *3 (C.D. Cal. Aug. 8, 2025) (the § 1 exemption does not "extend to commercial contracts like distribution agreements, even where a single-owner LLC was required to form the business entity to enter into the agreement") (internal quotation marks omitted); *Gray v. Schmidt Baking Co.*, No. 22-cv-00463-LKG, 2023 WL 9285466, at *3 (D. Md. Oct. 16, 2023) ("While the Supreme Court has not addressed [it], . . . agreements between two business entities are 'not contracts of employment' within the context of Section 1 of the FAA"); *D.V.C. Trucking, Inc. v. RMX Glob. Logistics, Inc.*, No. Civ. A. 05-cv-00705, 2005 WL 2044848, at *3 (D. Colo. Aug. 24, 2005) (declining to apply the transportation worker exemption because plaintiff was not "an employed 'transportation worker' engaged in interstate commerce, but rather . . . a business corporation").

The Second Circuit is now a lone outlier on the application of the § 1 exemption to business-to-business contracts. This Court's review is warranted to resolve this conflict.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

The Second Circuit's approach to § 1 of the FAA not only created a circuit split; it also cannot be squared with longstanding precedent of this Court regarding both the § 1 exemption and the FAA more broadly. This Court should not countenance the Second Circuit's contra-textual analysis of § 1's "contracts of employment" language to brush aside the statute's narrow application to contracts for "*work* by *workers*." *New Prime*, 586 U.S. at 117 (emphasis original).

1. The text of § 1 extends only to "class[es] of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In particular, "[t]he word 'workers' directs the interpreter's attention to 'the performance of work.'" *Saxon*, 596 U.S. at 456 (quoting *New Prime*, 586 U.S. at 116) (emphasis omitted). And "the word 'engaged' . . . similarly emphasizes the actual work that the members of the class, as a whole, typically carry out." *Id.* Accordingly, the exclusion "is limited to transportation workers," *Circuit City*, 532 U.S. at 130-31, under "an agreement to perform work." *New Prime*, 586 U.S. at 114.

2. *Circuit City*, from which the phrase "transportation worker" exemption is derived, reinforces the point. That case raised the question to interpret § 1 "as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA's coverage." 532 U.S. at 109. The Court explained that the "better interpretation is to construe the statute . . . to confine the exemption to

transportation workers." *Id.* The Court then suggested that the purpose of the exemption was to preserve statutory schemes that already contained alternative dispute resolution mechanisms for transportation workers. "By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers." *Id.* at 121; *see* Shipping Commissioners Act of 1872, 17 Stat. 262. Similarly, "grievance procedures existed for railroad employees under federal law, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 121. Thus, it was "reasonable to assume that Congress excluded 'seamen' and railroad employees' from the FAA for the simple reason that it did not want to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.*

Notably, the alternative dispute resolution mechanisms established in those other statutes applied only to workers who perform work, not business entities in commercial relationships. The Railway Labor Act covers "every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official." Railway Labor Act of 1926, May 20, 1926, c. 347, § 1, 44 Stat. 577, 45 U.S.C. § 151. The Transportation Act regulates interruptions "to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." Transportation Act of 1920, § 301, 41 Stat. 469. The Jones Act provides a recovery procedure to "any seaman who shall suffer personal injury in the course of his employment."

June 5, 1920, c. 250, § 33, 66 Stat. 988, 1007, 46 U.S.C. § 30104. The Shipping Commissioners Act of 1872 provides that "every shipping commissioner shall hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew." June 7, 1872, c. 322, § 25, 17 Stat. 262, 267.

For those reasons, there is no basis for concluding that "contracts of employment" as used in § 1 includes contracts between corporations, limited liability companies, and partnerships, as the Second Circuit concluded. Pet. App. 11a-12a. Even assuming the phrase "contracts of employment" is not limited to contracts with workers, *see id.*, this Court has still construed that term narrowly. In *New Prime*, the Court explained that "contracts of employment" did not just mean any contract, but a "contract for the *performance of work by workers.*" 586 U.S. at 116 (emphasis added). As the Court later explained in *Saxon*, § 1's textual focus is on "the actual work that the members of the class . . . typically carry out," not the business of the entity that employs them. *Saxon*, 596 U.S. at 456. Until the Second Circuit's decision, § 1 has never been interpreted by any federal court of appeals to reach commercial distribution contracts between businesses that may, indirectly, require the employment of workers.

3. More fundamentally, to whatever extent "contracts of employment" reaches more broadly than contracts with transportation workers, the fact that it is an exemption from arbitration means it must be subject to a limiting principle. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson*

Lane Corp., 500 U.S. 20, 24 (1991). This Court in *Circuit City* recognized that statutory purpose in holding § 1 requires "a narrow construction" and rejecting an interpretation of § 1 that would extend its "residual clause"—i.e., the "any other class of workers engaged in foreign or interstate commerce" language—to all "contracts of employment." 532 U.S. at 109, 119.

The Second Circuit's decision reflects precisely the sort of "sweeping, open-ended construction" of § 1 that this Court has warned against since *Circuit City*. 532 U.S. at 118. According to the Second Circuit, it is enough that a distribution contract, at least indirectly, requires "performance of work" to qualify for the transportation worker exemption. Pet. App. 14a. But that approach transforms § 1's textual focus on "the actual work" performed by workers, *Saxon*, 596 U.S. at 456, into a gaping hole that could nullify all arbitration agreements between businesses that only incidentally affect transportation workers.

4. The Second Circuit also lost sight of the principles articulated by this Court preserving the common law corporate form even when federal statutes apply. In *United States v. Bestfoods*, the Court indicated that even in important federal environmental law matters, absent a clear indication from Congress to the contrary, the common law principles about the corporate form should govern. 524 U.S. 51, 62-63 (1998). Citing the common law principle of piercing the corporate veil, the Court recognized that looking past the corporation to its shareholders, officers, and workers has historically required a finding that the corporate form "would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Id.* at 62; *see also* Stephen B.

Presser, Piercing the Corporate Veil § 1:3 (2025) (noting some sort of abuse is required under most veil-piercing doctrines). For that reason, the Court rejected the argument that the "entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Bestfoods*, 524 U.S. at 63. To the contrary, the Court held that "the failure of the statute to speak to a matter as fundamental as . . . corporate ownership demands application of the rule" that the statute "must speak directly to the question addressed by the common law" *before* abrogating a common-law principle. *Id.*

The Second Circuit's decision, departing from its sister circuits, did the opposite: it put at risk the integrity of the corporate form. Put another way, the Second Circuit's rule looking past the contractual language to the "substance" of the parties' relationship to determine the applicability of the transportation worker exemption may enable litigants to end-run the corporate form without satisfying the rigors of veil-piercing, traditionally reserved for states to regulate. Indeed, the Second Circuit likened its rule to piercing the "corporate veil." Pet. App. 15a. Yet, simultaneously, the Second Circuit made clear that it was not suggesting "that the corporate forms adopted by the drivers in the present case are shams, or that they are alter egos subject to veil-piercing." *Id.* at 15a n.7. Consequently, the Second Circuit's approach raises important questions about whether Congress intended to abrogate common-law principles of the corporate form in enacting the FAA.

Several contextual markers provide reason to doubt that Congress intended to abrogate common-

law principles of the corporate form in § 1. Had Congress meant for the transportation worker exemption to turn on the nature of the parties' interactions, rather than the legal relationship described in the contract, it might have used different language in § 1—just as it did in § 2. Section 2 provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The language "evidencing a transaction" authorizes the court to look beyond the contractual text to the realities of the parties' interactions. The same authorization is missing from § 1. But whatever the vitality of common law corporate law under the FAA, it is a question that warrants this Court's review.

III. THE QUESTION PRESENTED IS IMPORTANT AND FREQUENTLY RECURRING

The exceptional importance of the question presented is evident: the efficient resolution of disputes between business entities implicating national and international transportation services. In enacting the FAA, Congress aimed to create a uniform and liberal federal policy favoring arbitration. *Moses H. Con Mem'l Hosp.*, 460 U.S. at 24-5. The circuit split does not promote a uniform federal arbitration policy; it only engenders legal dissonance. Without this Court's review, little to no disputes arising out of any business-to-business contract involving the transportation industry or the provision of transportation services could ever be compelled to arbitration under the FAA within the Second Circuit.

1. To begin, the patchwork of approaches to the transportation worker exemption compels this Court's intervention. At the very least, business entities contracting for transportation services are not uniformly entitled to compel their claims to arbitration in the Second Circuit, while their counterparts in the Fourth, Sixth, and Ninth Circuits may exercise that right created by the FAA. Meanwhile, in other circuits that lack binding precedent on the question presented, business entities (and other entities that are not themselves transportation workers) are left to wonder whether the specter of protracted litigation abrogating their arbitration agreements hangs over their commercial dealings. Such disparities are untenable in an area as critical as arbitration in the transportation industry that has always been the backbone of our nation's supply chain. An admittedly narrow exemption from the FAA should not hamper the speedy resolution of disputes between businesses contracting for transportation services in certain areas of the country, while promoting it in others.

That is even more true, where, as here, that inconsistency derives from the FAA, which is subject to a Congressionally prescribed uniformity requirement. Before the FAA, different jurisdictions treated arbitration agreements differently. *See Southland Corp. v. Keating*, 465 U.S. 1, 13-4 (1984) (noting courts were bound by state laws "inadequately providing" for consistent enforcement of arbitration agreements until enactment of FAA). Since the enactment of the FAA, this Court has refused to attribute to Congress the intent to "create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."

Id. at 15. Rather, the Court has found in the FAA Congressional intent for nationwide uniformity. The split on the question presented means the enforceability of an arbitration agreement depends on the jurisdiction in which a lawsuit is filed. That result is precisely the kind of lack of uniformity the FAA was designed to avoid, and this Court is well-positioned to settle.

2. Moreover, the circuit split will bring about the type of protracted threshold litigation the FAA was designed to avoid. Parties frequently choose arbitration because it results in "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). But those benefits assume courts will enforce arbitration agreements. Congress therefore provided for "an expeditious and summary hearing" to compel arbitration. *Moses H. Con Mem'l Hosp.*, 460 U.S. at 22. Complex threshold findings—of the type of veil-piercing contemplated by the Second Circuit's approach—would simply create a "new unfamiliar test," thereby "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). As this Court cautioned against, such expansive readings of § 1 could lead to extensive discovery "to explore the internal structure and revenue models of a company," and mini-trials "could become a regular, slow, and expensive practice in FAA cases." *Bissonnette*, 601 U.S. at 254.

It is no answer to say that the Second Circuit's approach will "not require extensive discovery or evidentiary hearings by district courts adjudicating motions

to compel arbitration." Pet. App. 15a. Parties regularly spend years in threshold litigation about arbitrability without making progress toward resolving the merits of the case. The availability of interlocutory appeals under the FAA only exacerbates delay. *See* 9 U.S.C. § 16(a)(1)(B). This case proves the point. The district court granted Schmidt's motion to compel arbitration nearly two years ago. On appeal, the Second Circuit decided it needed to undertake a fact-intensive inquiry into the "substance" of the relationship between the Respondents and Schmidt. Pet. App. 14a-15a & n.7, 16a. In all that time, the case has come nowhere close to resolving the underlying claims.

3. For these reasons, this Court regularly intervenes to resolve disagreements among circuit courts over the interpretation of § 1. *See, e.g.*, *Bissonnette*, 601 U.S. 246; *Saxon*, 596 U.S. 450; *New Prime*, 586 U.S. 105; *Circuit City*, 532 U.S. 105. The Court steps in just as regularly to clarify the meaning of other provisions of the FAA. *See, e.g.*, *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019). The Court should do so again here.

4. There is also no reason to believe that further percolation would shed additional light on the binary choice of whether a business-to-business contract is exempt from the FAA under § 1. On the contrary, courts have confronted that recurring question at least since this Court's decision in *New Prime* and have come to conflicting conclusions. All the while, lower courts in other jurisdictions continue to grapple

with the applicability of the transportation worker exemption to contracts between businesses. *See, e.g.*, *Peltier v. Lepage Bakeries Park Street, LLC*, No. 25-1956 (1st Cir.); *Perruzzi v. The Campbell's Co.*, No. 24-1996 (1st Cir.). The lack of uniformity on the question presented only adds confusion and time-consuming appeals. Other circuits that have yet to consider the question present will simply agree or disagree with the Second Circuit's approach.

Hence, no benefit will come from delaying this Court's intervention. Until the Court takes up the question presented, businesses in the Second Circuit and any other courts that adopt its approach have lost the right to choose the efficiencies and cost savings of arbitration. And this case presents the ideal vehicle for resolving the question presented: the panel decision below thoroughly aired the arguments, and this Court's resolution will determine fully whether Schmidt (and other businesses like it) should be deprived of the arbitration procedures it opted to include in its distribution agreements with other businesses.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 23, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2025
No. 24-2103-cv

NATHANIEL SILVA, PHIL ROTHKUGEL,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

SCHMIDT BAKING DISTRIBUTION, LLC,
SCHMIDT BAKING COMPANY, INC,

*Defendants-Appellees.**

ARGUED: SEPTEMBER 16, 2025
DECIDED: DECEMBER 22, 2025

Before: CHIN, NARDINI, and KAHN, *Circuit Judges.*

Two commercial truck drivers worked for a baked goods company as W-2 employees through a staffing agency. As a condition of continued work, the company required them to create corporations and execute distributor agreements

* The Clerk of Court is respectfully directed to amend the caption accordingly.

in their capacities as presidents of the new corporate entities. The agreements contained mandatory arbitration clauses.

The drivers filed a putative class action in Connecticut state court alleging violations of wage and hours laws. The company then removed the action to the District Court for the District of Connecticut (Shea, *C.J.*), which granted the company's motion to compel arbitration under the Federal Arbitration Act (FAA). The drivers filed this interlocutory appeal of the district court's order, arguing that they are exempt from arbitration under § 1 of the statute. The record on appeal unequivocally demonstrates that the companies they were required to create are mere instrumentalities incorporated at the baked goods company's behest through which the parties have contracted "for the performance of *work* by *workers*." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 116 (2019). As such, we hold that the distributor agreements are "contracts of employment" within the meaning of § 1.

We therefore **VACATE** and **REMAND** the judgment of the district court.

MARIA ARAÚJO KAHN, *CIRCUIT JUDGE*:

This case concerns the interpretation of § 1 of the Federal Arbitration Act (FAA), which excepts from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Specifically, the case is about whether contracts between Schmidt

Baking Distribution, LLC ("SBD") and single-employee corporations created by delivery drivers are "contracts of employment" under that section.

Plaintiffs-Appellants Nathaniel Silva and Phil Rothkugel ("Silva and Rothkugel") delivered baked goods on behalf of SBD for some time as W-2 employees of a staffing agency. After some months, SBD informed them that, to continue in this work, they would be required to incorporate and sign "Distribution Agreements" on behalf of their corporate entities, which included mandatory arbitration clauses. Silva and Rothkugel then filed a putative class action in Connecticut state court. Schmidt removed the action to federal court and moved to compel arbitration under the Distribution Agreements.[1] In granting Schmidt's motion to compel arbitration, the district court (Shea, *C.J.*) held that these contracts were not "contracts of employment" under 9 U.S.C. § 1, and therefore were not exempt from the Federal Arbitration Act. *Silva v. Schmidt Baking Distr., LLC*, 732 F. Supp. 3d 194, 201–03 (D. Conn. 2024). We disagree.

BACKGROUND

I. Facts

Silva and Rothkugel are individuals who, throughout the relevant period, resided in Connecticut and worked as

1. The FAA requires that courts enforce arbitration provisions in a wide range of written contracts. *See generally* 9 U.S.C. §§ 1-16.

commercial truck drivers delivering baked goods. Schmidt Baking Company, Inc. ("SBC") is a Maryland corporation that manufactures and markets baked goods; its wholly owned subsidiary, SBD, is also a Maryland company that coordinates the distribution of SBC's products. Silva and Rothkugel allege that SBD and SBC (collectively "Schmidt") have violated Connecticut wage and overtime laws.

In 2020, both Silva and Rothkugel began delivering products for Schmidt. They worked as delivery drivers through a third-party staffing agency and were classified as W-2 employees of the staffing agency. After several months of this arrangement, Schmidt informed both Silva and Rothkugel that, to continue their work, they would need to form corporate entities and execute "Distributor Agreements" with SBD.[2] Neither Silva nor Rothkugel had prior experience forming or operating a corporation. Under instruction and with assistance from Schmidt, Silva formed "Silva's Baked Goods" and Rothkugel formed "Trout Slayers Baked Breads Inc." In their capacities as presidents of their newly formed corporations, both Silva and Rothkugel entered into "Distribution Agreements" with Schmidt (the "Agreements") to continue performing the same delivery work.

The formal parties to the Agreements were SBD and Silva's and Rothkugel's respective corporations, which

2. Throughout the litigation and at oral argument, the parties used the terms "LLC" and "corporation" interchangeably and the motions panel order referred to "LLCs." App'x at 627. Both Silva's and Rothkugel's entities are, in fact, corporations. The distinction is not relevant to our analysis.

were termed "distributor[s]." App'x at 92, 161. Schmidt did not allow Silva or Rothkugel to sign in their personal capacities. The Agreements disavow an employee-employer relationship and state that the parties "intend to create an independent contractor relationship." App'x at 95, 164. They also include mandatory arbitration provisions that bar class-wide proceedings, requiring individual adjudication of any dispute.

Despite the change to the contractual framework of their relationship with Schmidt, Silva and Rothkugel maintain that their roles remained unchanged. By sworn declaration, they aver that their daily responsibilities, both before and after they signed the Agreements, involved driving a commercial truck to Schmidt's warehouse to pick up fresh baked goods, delivering the products to retail outlets within their assigned territories, unloading the goods, and stocking them on retail shelves. They further declare that they have virtually no role in negotiating any pricing, sales, or promotions with retailers, which are functions carried out by Schmidt.

II. Procedural History

Silva and Rothkugel first filed suit in the Connecticut Superior Court, alleging that Schmidt violated Connecticut wage and overtime laws. Schmidt removed the action to the United States District Court for the District of Connecticut, invoking diversity jurisdiction. Schmidt then filed a motion to compel arbitration and to stay the district court proceedings, relying on the arbitration clauses in the Agreements. Silva and Rothkugel opposed

the motion, arguing principally that 1) the Agreements are employment contracts subject to the § 1 exception of the FAA, 2) they, in their individual capacities, are not bound by the arbitration clauses because they are not parties to the Agreements, and 3) the arbitration clauses are unenforceable.

The district court granted Schmidt's motion and rejected Silva's and Rothkugel's arguments that the Agreements are "contracts of employment" under § 1. The district court also found unavailing Silva's and Rothkugel's arguments regarding their non-party status and unenforceability. Silva and Rothkugel subsequently filed a motion to certify this interlocutory appeal pursuant to 28 U.S.C. § 1292(b), which the district court granted.

Silva and Rothkugel then petitioned this Court for leave to appeal. A threejudge panel of this Court granted that petition and directed the parties "to address whether an individual worker falls within the scope of the [exception] in § 1 of the Federal Arbitration Act even if the contract to perform work is signed on behalf of the worker by an LLC incorporated by the worker and not the worker as an individual." App'x at 627.

DISCUSSION

I. Standard of Review

This Court reviews *de novo* district court orders granting motions to compel arbitration. *Local Union 97, Int'l Bhd. of Elec. Workers, AFL-CIO v. Niagara Mohawk*

Power Corp., 67 F.4th 107, 112 (2d Cir. 2023) (per curiam). "In deciding motions to compel, courts apply a 'standard similar to that applicable for a motion for summary judgment.'" *Edmundson v. Klarna, Inc.*, 85 F.4th 695, 702 (2d Cir. 2023) (quoting *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003)). We "consider all relevant, admissible evidence submitted by the parties and . . . draw all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (citation omitted).

II. Interlocutory Appeal

As an initial matter, Schmidt argues that the motions panel should not have granted the petition for interlocutory appeal. Although we are free to review and reverse the motions panel's decision, *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 866–67 (2d Cir. 1996), we see no basis for doing so.

We agree with the motions panel that this appeal satisfies the statutory criteria for interlocutory appeals set forth in 28 U.S.C. § 1292(b). The district court's order involves a "controlling question of law as to which there is substantial ground for difference of opinion," and this appeal will "materially advance the ultimate termination of the litigation" as it will spare the parties the burden of an arbitration that would be obviated by a later decision to the same effect. *Id.* Indeed, the issues presented in this appeal are "difficult and of first impression." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21,

25 (2d Cir. 1990). Moreover, as discussed at oral argument, the scope of the transportation worker exception is a hotly contested issue that courts have recently been called upon to address with increasing frequency.[3] Accordingly, we conclude that acceptance of this interlocutory appeal is an appropriate exercise of our discretion. *Id.* at 24 ("[I]n exercising our discretion under the statute, we may properly consider the systemwide costs and benefits of allowing the appeal.").

For these reasons, we decline to dismiss the interlocutory appeal as improvidently granted.

III. "Contracts of Employment" Under § 1 of the FAA

The question before us is whether the Agreements between Schmidt and the entities formed by Silva and Rothkugel at Schmidt's request are "contracts of employment" under § 1 of the FAA.[4]

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3. *See, e.g., Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), *aff'd*, 586 U.S. 105, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019); *Saxon v. Sw. Airlines Co.*, 993 F.3d 492 (7th Cir. 2021), *aff'd*, 596 U.S. 450, 142 S. Ct. 1783, 213 L. Ed. 2d 27 (2022); *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2d Cir. 2022), *vacated and remanded*, 601 U.S. 246, 144 S. Ct. 905, 218 L. Ed. 2d 204 (2024).

4. Schmidt argues that Silva and Rothkugel have waived many of their arguments. To the contrary, we conclude these arguments were adequately raised in the district court. We should not be surprised to see a more thorough and detailed discussion of the legal claims in an interlocutory appeal on a narrow issue. This is especially true where, as here, the motions panel specifically

The FAA was passed by Congress in 1925 to require that courts enforce valid arbitration agreements, overcome "judicial hostility to arbitration and establish 'a liberal federal policy favoring arbitration agreements.'" *New Prime Inc. v. Oliveira*, 586 U.S. 105, 120, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). At the time of passage, Congress had established alternative employment dispute resolution regimes for some groups of transportation workers and was in the process of enacting others. *See, e.g.*, Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; Railway Labor Act of 1926, 44 Stat. 577. For that reason, Congress enacted an exception for those workers in § 1 of the FAA. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). The statute reads in relevant part: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

In *New Prime Inc. v. Oliveira*, the Supreme Court recently took up the interpretation of "contracts of employment" in § 1. 586 U.S. at 108. In that case, the Court considered a truck driver's wage and hours suit

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directed the parties to brief a question that was but one of the many issues raised below. *See* App'x at 627. Even if Silva's and Rothkugel's arguments were new, we could exercise our discretion to address them because they present "a question of law and there is no need for additional fact-finding." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005).

against a trucking company that had hired him under a contract that labelled him an independent contractor. *See id.* Specifically, the Court examined whether the language in § 1 limits the exception to contracts forming employer-employee relationships or whether it extends to independent contractor relationships. *Id.* at 112–21. The Court began by emphasizing the fundamental principle of statutory construction that words must be understood according to their ordinary meaning at the time of enactment, here 1925. *Id.* at 113. As such, the Court looked to contemporary legal authorities and dictionaries to conclude "that Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*," notwithstanding whether a contract of employment "signaled a formal employer-employee" relationship. *Id.* at 116 (emphasis in original). On that basis, the Court held that contracts creating independent contractor relationships fall within the scope of the exception. *Id.* at 121.

We must now interpret this same phrase to determine whether the contracts before us are "contracts of employment" even though they were signed by Silva and Rothkugel in their capacities as presidents of their respective corporations, rather than in their individual capacities. We take heed of the Supreme Court's admonition in *New Prime* that we should "'respect the limits up to which Congress was prepared' to go when adopting the Arbitration Act" rather than "pave over bumpy statutory texts in the name of more expeditiously advancing" Congress's policy favoring arbitration. *Id.* at 120–21 (quoting *United States v. Sisson*, 399 U.S. 267, 298,

90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970)). We are also mindful that the contract at issue in *New Prime*, like those before us here, was signed by an individual worker on behalf of an entity that he formed at the direction of his employer. *See Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 128 (D. Mass. 2015), *aff'd in part*, 857 F.3d 7 (1st Cir. 2017), *aff'd*, 586 U.S. 105, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019).

New Prime's holding that "contract of employment" was not, in 1925, "a term of art bearing some specialized meaning," but rather a capacious term referring to "nothing more than an agreement to perform work" leaves little room to exclude a contract from the § 1 exception solely because it is between businesses. *New Prime*, 586 U.S. at 114. Indeed, judicial opinions from the time of the FAA's enactment provide numerous and diverse examples of courts using the term "contract of employment" to refer to contracts for work between business entities; these include contracts between corporations, partnerships, and labor unions.[5] As such, we cannot conclude that a contract is not a "contract of employment" merely because it is signed

5. *See, e.g., Miller v. State*, 16 Neb. 179, 20 N.W. 253, 253–54 (Neb. 1884); *Clifton v. Clark, Hood & Co.*, 83 Miss. 446, 36 So. 251, 251–52 (Miss. 1904); *El Paso & S.W.R. Co. v. Harris & Liebman*, 110 S.W. 145, 146 (Tex. Civ. App. 1908); *People ex rel. Lackawanna Transp. Co. v. Knight*, 75 A.D. 164, 77 N.Y.S. 398, 400 (App. Div. 1902); *The De Gama v. Bridges*, 150 F. 323, 324–25 (5th Cir. 1907); *Olmsted v. Edwards*, 19 Ohio N.P. (n.s.) 177, 179, 1913 WL 950, at *1 (Ohio Super. Dec. 22, 1913), *aff'd sub nom. Olmstead v. Albers*, 26 Ohio C.A. 479, 27 Ohio Cir. Dec. 362, 1916 WL 1324 (Ohio Ct. App. Apr. 24, 1916); *Vulcan Detinning Co. v. St. Clair*, 315 Ill. 40, 145 N.E. 657, 657 (Ill. 1924); *Trump v. Bluefield Waterworks & Imp. Co.*, 99 W. Va. 425, 129 S.E. 309, 311 (W. Va. 1925).

by business entities. A careful reading of the statute's text confirms this conclusion. Congress specifically enacted the phrase "contracts of employment *of*" workers, not "contracts of employment *with*" workers.[6] Had Congress intended to omit contracts between business entities from the § 1 exception, it could easily have done so.

Urging the contrary conclusion, Schmidt argues that "it is settled that the '§ 1 exclusion be afforded a narrow construction.'" Appellees' Br. at 40–41 (quoting *Circuit City*, 532 U.S. at 118). Yet that admonition from the Supreme Court came in a very different context.

Circuit City, Inc. v. Adams concerned a retail sales counselor who argued that his contract fell under the § 1 exception. *Circuit City*, 532 U.S. at 110. In that case, the Court rejected the Ninth Circuit's extremely broad holding that § 1 excepted *all* contracts of employment, even for workers who, like Adams, did not engage in transportation, because it encompassed the full extent

6. *Compare* Murray, A New English Dictionary on Historical Principles 66 (1905) ("All the existing uses of *of* are derivative; many . . . so weakened down as to be in themselves the expression of the vaguest and most intangible of relations.") *and* Webster's Collegiate Dictionary 670 (3d ed. 1916) (defining "of" as "[i]ndicating the object after a noun denoting an action or agent; as, the commission *of* a crime") (emphasis in original), *with* Webster's Collegiate Dictionary 1098 (3d ed. 1916) ("In general, *with* denotes a relation of contact or association.") *and* Murray, A New English Dictionary on Historical Principles 210 (1928) (defining "with" when used "after words expressing transaction or dealing between persons" as "[d]enoting *personal* relation, agreement, association, connextion, union, addition." (emphasis added)).

of Congress's commerce power. *Id.* at 114. The Supreme Court reasoned that the enumeration of specific classes of workers in § 1 had to limit the application of the exception in some way; otherwise the statute's residual clause would be superfluous. *Id.* at 114–15 ("Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it . . . .").

We find the First Circuit's distinction of *Circuit City* persuasive. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017). As that court put it, "[t]his context is critical. The [Supreme] Court announced the need for a narrow construction of the § 1 exemption in the course of 'rejecting the contention that the meaning of the phrase "engaged in commerce" in § 1 of the FAA should be given a *broader construction than justified by its evident language*.'" *Id.* at 22–23 (emphasis in original) (quoting *Circuit City*, 532 U.S. at 118). Like Oliveira, Schmidt and Rothkugel perform truck-driving work that directly impacts "the free flow of goods," 532 U.S. at 121, and they are clearly transportation workers who fall within the ambit of § 1 of the FAA. Their work bears little resemblance to that of the sales counselor at issue in *Circuit City*, who was just as evidently *not* a transportation worker. As such, *Circuit City's* narrow construction of which workers are "engaged in foreign or interstate commerce" does not in any way suggest that contracts covering workers who fall within that category are exempt from § 1 simply because they are signed by business entities. Such a limitation "[would be] inconsistent with both the ordinary meaning of the language used in § 1 and 'Congress's demonstrated

concern with transportation workers and their necessary role in the free flow of goods.'" *Oliveira*, 857 F.3d. at 23 (quoting *Circuit City*, 532 U.S. at 121). That congressional concern is not conditioned on whether the contractual party is an individual worker or their corporate personality, but instead on whether the contract is one under which a transportation worker provides services.

Schmidt urges us to view these relationships as akin to "franchisor-franchisee" or "supplier-distributor" relationships and hold that these fall outside the scope of § 1. Specifically, Schmidt relies on provisions in the Agreements that frame the contract as revolving around the purchase of distribution rights that amounted to "the sole right to sell and distribute Products to Outlets in the Sales Area." App'x at 94, 163. The language of § 1 provides no statutory basis for such a distinction. That a contract includes terms *in addition to* the performance of work does not, in and of itself, remove it from § 1's ambit. On this point, we agree with the Third Circuit's analysis in *Adler v. Gruma Corp.*, in which the court found that a franchise agreement was, indeed, a "contract of employment" because the agreement itself "and undisputed facts show[ed] Plaintiffs contracted with Defendant to 'perform work' by distributing Defendant's food products." 135 F.4th 55, 69 (3d Cir. 2025).

Following the clear instruction of the Supreme Court in *New Prime*, we look to the substance of an agreement, not its formalities, to determine whether it is a "contract of employment" for purposes of § 1 of the FAA. This preference for substance over form is not uncommon in

commercial law. In the liability context, for example, courts pierce the corporate veil when business entities are nothing more than alter egos and adherence to the fiction of their separate existence would "sanction a fraud, promote injustice, or promote inequitable consequences."[7] 1 Fletcher Cyc. Corp. § 41.10. So too here. As the district court recognized in certifying this interlocutory appeal, "the actual work performed by workers under business-to-business contracts may be functionally indistinguishable from the work done in employment relationships, and [its] decision creates a potential loophole that could undermine § 1's purpose." *Silva*, 2024 U.S. Dist. LEXIS 133182, 2024 WL 3566168, at *4. Indeed, to hold otherwise would allow employers to render the exception a nullity, which would vitiate the role played by § 1 in ensuring judicial (rather than arbitral) resolution of disputes involving a vital sector of the nation's workforce.

This approach will not require extensive discovery or evidentiary hearings by district courts adjudicating motions to compel arbitration. In many cases, whether a contract falls within the exception will be clear from the face of the document itself. Even where it is not, limited supporting evidence, such as declarations, will generally suffice. This is such a case.

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7. We do not suggest, of course, that the corporate forms adopted by the drivers in the present case are shams, or that they are alter egos subject to veil-piercing. We offer this analogy simply to illustrate how, in various areas of the law, courts may be required to consider the substance rather than the formality of the relationship between parties.

Turning to the substance of the Agreements, we conclude that they are "contracts of employment" within the meaning of § 1. Some of the most telling evidence that these are employment contracts are the "personal guarantee" provisions of the Agreements holding Silva and Rothkugel personally and unconditionally liable for the performance of the work. *See* App'x at 121, 96–97, 190, 165–166. This provision is not limited to financial liabilities; it extends to the performance of the work itself and blurs the line between a supposedly business-to-business contract and an agreement for personal services. It would be incongruous to allow Schmidt to look, by the very terms of the contract, to the individual drivers for the fulfillment of transportation work while demanding that this Court look no further than the name of the company on the signature line.

Moreover, the genesis of the corporations in this case is informative. Silva and Rothkugel did not approach Schmidt as entrepreneurs seeking to establish business entities. Instead, they were existing W-2 employees, albeit through a staffing agency, whom Schmidt directed to create corporations and to use form contracts as conditions for continuing their work as delivery drivers. Furthermore, the work that Silva and Rothkugel did remained largely unchanged after they signed the Agreements with Schmidt. The record on appeal unequivocally demonstrates that Silva's Baked Goods and Trout Slayers Baked Breads Inc. are mere instrumentalities created at Schmidt's behest to dress individual "contracts of employment" in the garb of commercial transactions.

Of course, we recognize that not all business-to-business contracts involving transportation work fall within the exception. As our sister circuits have found, contracts for transportation work between sizeable business entities with many employees do not fall within the scope of the § 1 exception.

In *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, the Ninth Circuit considered the case of three plaintiff corporations that each hired "tens or hundreds of employees" and managed multiple delivery routes for Amazon. 97 F.4th 1190, 1197 (9th Cir. 2024); Amazon's Answering Brief at 22, *Fli-Lo Falcon*, 97 F.4th 1190 (9th Cir. 2024) (No. 22-35818) (noting the number of workers employed by plaintiffs). The Ninth Circuit decided that "'contracts of employment' in the transportation worker exception do not extend to commercial contracts *like the [agreements at issue in that case]*" because "a business entity that employs or contracts with transportation workers" is not "'similar in nature' to a transportation worker." *Fli-Lo Falcon*, 97 F.4th at 1196 (emphasis added).

In a factually similar case, the Fourth Circuit considered claims by a plaintiff who also formed a corporation in order to sign a distribution contract with Amazon that contained an arbitration agreement. *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 593, 596 (4th Cir. 2023). The plaintiff subsequently hired a fleet of approximately 450 drivers to carry out that contract. *Id.* at 593. The Fourth Circuit narrowly held that "*[s]izable* corporate entities are not 'similar in nature' to the

actual human workers enumerated by the text of the 'transportation worker' exemption . . . ." *Id.* at 596–97 (emphasis added) (noting that the plaintiff itself employed 450 drivers); *see also Tillman Transportation, LLC v. MI Business Inc.*, 95 F.4th 1057 (6th Cir. 2024).

The key distinction between *Fli-Lo* and *Amos* and the case before us is that Silva and Rothkugel did not form sizeable logistics companies that employ significant workforces. They are individual transportation workers who were required to incorporate to perform the same transportation services they had been performing as individuals.[8] Silva and Rothkugel were presented with a Hobson's choice of adopting a corporate form or losing their jobs. This distinction is dispositive and aligns our holding with the precedent from our sister circuits.

CONCLUSION

The Agreements here are the contracts under which Silva and Rothkugel perform transportation work and are therefore "contracts of employment" within the meaning of § 1 of the FAA. We decline to allow employers to circumvent Congress's exception of transportation workers from the FAA's reach by requiring those workers to take the corporate form.

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8. Both the *Fli-Lo* and *Amos* courts recognized that there may be "circumstances under which a business entity could qualify for the transportation worker exemption." *Fli-Lo*, 97 F.4th at 1202 (Thomas, J. concurring); *Amos*, 97 F.4th 597.

For the reasons set forth above, we **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT, FILED MAY 2, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:23-cv-01695-MPS

NATHANIEL SILVA AND PHIL ROTHKUGEL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

SCHMIDT BAKING DISTRIBUTION, LLC AND SCHMIDT BAKING COMPANY, INC.,

Defendants.

Filed May 2, 2024

RULING ON MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Plaintiffs Nathaniel Silva and Phil Rothkugel brought this putative class action against Defendants Schmidt Baking Company, Inc. ("SBC") and Schmidt Baking Distribution, LLC ("SBD") alleging that they were

Defendants' employees and that Defendants misclassified them as independent contractors, made unlawful deductions from their wages, and failed to pay them for overtime work in violation of Connecticut wage laws. Defendants filed a motion to compel arbitration, arguing that arbitration agreements contained within the relevant contracts govern the disputes at issue in this case. For the reasons explained below, I grant Defendants' motion to compel arbitration.

II. FACTS

A. Factual Background

The following facts are drawn from the complaint, along with the exhibits attached to the parties' briefs.

1. Parties

SBC "develops, manufactures, and markets bread and bread-like products to retailers and foodservice outlets." ECF No. 11 at 43. To coordinate the distribution of SBC's products, SBD, a subsidiary of SBC, enters into Distribution Agreements with independent operators, "which give those companies exclusive rights to distribute and sell various Schmidt products to outlets within their designated territories." *Id.*; *see also* ECF No. 3 (noting that SBD's sole member is SBC).

Nathaniel Silva worked for SBC as a delivery driver from approximately February 2020 to June 2020. ECF No. 24-1 at ¶ 6. In June 2020, SBC informed Silva that

to continue to work for SBC, he would need to form a corporate entity and sign a Distribution Agreement with SBD. *Id.* at ¶¶ 7–10. Silva formed Silva's Baked Goods, Inc. ("Silva's Baked Goods"), *id.* at ¶ 9, and on June 24, 2020, Silva's Baked Goods entered into a Distribution Agreement with SBD for the right to distribute SBC bread products to a certain sales area in Connecticut, ECF No. 11 at 46. On October 28, 2020, Silva's Baked Goods entered into a second Distribution Agreement with SBD for the right to distribute to another area within Connecticut. *Id.* at 80. Silva signed each of these agreements in his role as President of Silva's Baked Goods. *See id.* at 75, 109. Silva also signed as "controlling shareholder of Silva's Baked Goods," agreeing to "guarantee[] the full and complete performance by Silva's Baked Goods" of its obligations under the Distribution Agreements. *Id.*

Phil Rothkugel worked for SBC as a delivery driver from approximately October 2020 to December 2020. ECF No. 24-2 at ¶ 5. In December 2020, SBC informed Rothkugel that to continue to work for SBC, he would need to form a corporate entity and sign a Distribution Agreement with SBD. *Id.* at ¶¶ 6–8. Rothkugel formed Trout Slayers Baked Breads, Inc. ("Trout Slayers"), and on December 16, 2020, Trout Slayers entered into a Distribution Agreement with SBD for the right to distribute Schmidt brand bread products to a sales area in Connecticut. ECF No. 11 at 115. Rothkugel signed this agreement in his role as President of Trout Slayers. *Id.* at 144. Rothkugel also signed as "controlling shareholder of Trout Slayers," agreeing to "guarantee[] the full and complete performance by Trout Slayers" of its obligations under the Distribution Agreements. *Id.*

Appendix B

2. Distribution Agreements

The relevant provisions of the three Distribution Agreements at issue here are indistinguishable. The agreements provide Silva's Baked Goods and Trout Slayers with "the sole right to sell and distribute [SBC] Products to Outlets in the Sales Area by Direct Store Delivery." *Id.* at 48, 82, 117.

Article 11 of the Distribution Agreements sets forth the dispute resolution procedures to be followed in the event of "[a]ny dispute . . . arising out of the relationship[s] created by [the] Agreement[s]." *Id.* at 68, 102, 137. Section 11.2 of the agreements provides that, "[i]n the event of any dispute[,] either party may initiate a mediation procedure." *Id.* Section 11.3 sets forth the arbitration provision of the Distribution Agreements and provides in pertinent part:

> If the parties are unable to resolve the dispute through mediation, either party may avail itself of the right to seek relief from an arbitrator, by filing a complaint within ten (10) days following the conclusion of the mediation process, which period shall constitute an agreed time limitation, and such complaint shall be limited to the cause(s) of action within the scope of the mediation conducted in accordance or Section 11.2 above. Any dispute between the parties subject to this Article shall be decided by neutral, binding arbitration conducted in

> accordance with the Judicial Arbitration and Mediation Services, Inc. ("JAMS").

Id. at 69, 103, 138.

In addition, Section 11.7 of the agreements, which is entitled "Individual Action," provides as follows:

> The parties agree that any proceeding in any forum to resolve any dispute, including mediation, arbitration, litigation, and/or government action involving DISTRIBUTOR [defined in the Distribution Agreements to be Silva's Baked Goods or Trout Slayers], shall be conducted on an individual basis only, and not on a class-wide basis or as a representative action, collective action, or a collective governmental action. The parties further agree that only [SBD] (and its affiliates and their respective owners, officers, directors, agents and employees, as applicable) and DISTRIBUTOR (and its affiliates and their respective owners, officers, and directors, as applicable) may be the parties to any proceeding described in this Section, and that no such proceeding shall be consolidated, combined, or joined with any other proceeding involving [SBD] and/or any other person without the written consent of all parties.

Id. at 71, 105, 140.

B. Procedural Background

Plaintiffs served their class action complaint, which was filed in Connecticut superior court, on Defendants on November 30, 2023. ECF No. 11 at 167. On December 5, Defendants' counsel contacted Plaintiffs' counsel to determine whether Plaintiffs were interested in mediating their disputes. ECF No. 11 at 167–68. Plaintiffs declined to participate in mediation. *Id.* at 168. Then Defendants' counsel contacted Plaintiffs' counsel to determine whether Plaintiffs would voluntarily dismiss the complaint and resolve their claims in individual JAMS arbitrations. *Id.* On December 11, Plaintiffs' counsel indicated that Plaintiffs intended to pursue their claims through litigation, that they believed their disputes were not covered by an arbitration agreement, and that the arbitration provisions in their Distribution Agreements were unenforceable. *Id.* On December 15, Defendants filed with JAMS demands for individual arbitration of Plaintiffs' claims. *Id.*

Defendants removed Plaintiffs' case from the Connecticut superior court to this Court on December 29. ECF No. 1. On January 5, 2024, Defendants filed the pending motion to compel arbitration, ECF No. 10; ECF No. 11, which is now fully briefed, *see* ECF No. 24; ECF No. 28.

III. LEGAL STANDARD

"In deciding motions to stay or compel arbitration, courts apply a standard similar to that applicable for a motion for summary judgment." *Boroditskiy v. Eur.*

Specialties LLC, 314 F. Supp. 3d 487, 492 (S.D.N.Y. 2018) (internal quotations marks omitted). That standard requires this Court to "consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits" and "draw all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) (internal quotation marks omitted).

IV. DISCUSSION

Defendants argue that Plaintiffs, "through corporate entities they created and owned," entered into the Distribution Agreements, and that the arbitration provisions of the Distribution Agreements are binding on Plaintiffs. ECF No. 11 at 2. Defendants further argue that the Distribution Agreements delegate to arbitrators all disputes concerning the scope of the agreements' arbitration provisions, including disputes over arbitrability. Plaintiffs counter that: (1) Plaintiffs are not parties to the Distribution Agreements, and thus the agreements are not binding on them; (2) even if the Distribution Agreements are binding on them, Plaintiffs are exempt from arbitrating their claims under § 1 of the Federal Arbitration Act ("FAA"); (3) the Distribution Agreements do not validly delegate questions of arbitrability to an arbitrator; (4) in the absence of an enforceable delegation clause, Plaintiffs' wage and hour claims are outside the scope of the arbitration agreements; (5) in any event, the arbitration provisions of the Distribution Agreements as a whole are unconscionable; and (6) SBC is not a party to

the Distribution Agreements and thus cannot invoke the agreements' arbitration provisions.

A. Exemption Under § 1 of the FAA

Plaintiffs argue that they are exempt from arbitration under § 1 of the FAA.[1] Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001), the Supreme Court explained the historical rationale for this exemption:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, *see* Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, *see* Transportation Act of 1920, §§ 300–316,

1. As discussed further below, the parties dispute whether the Distribution Agreements validly delegated arbitrability issues to an arbitrator. *See* Section IV.C *infra*. Nevertheless, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration" and "a court may use §§ 3 and 4 [of the FAA] to enforce a delegation clause . . . only if the contract in which the clause appears doesn't trigger § 1's 'contracts of employment' exception." *New Prime Inc. v. Oliveira*, 586 U.S. 105, 111–12, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019). As such, I begin by considering the applicability of § 1.

41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, *see* Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. § 651 (repealed). It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.

As for the residual exclusion of "any other class of workers engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the preceding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation. *See Pryner v. Tractor Supply Co.*, 109 F.3d, at 358 (Posner, C. J.). Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees, *see* 49 Stat. 1189, 45 U.S.C. §§ 181–188.

Id. at 121. Given this historical context—as well as the fact that the "engaged in . . . commerce" language of § 1 was located in a residual clause and the FAA's purpose of "overcom[ing] judicial hostility to arbitration agreements"—the Supreme Court explained that "the § 1 exclusion provision [should] be afforded a narrow construction." *Id.* at 118.

Plaintiffs assert that they are covered under § 1's exemption, arguing that the Supreme Court's holding in *New Prime Inc. v. Oliveira*, 586 U.S. 105, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019), "squarely addressed" the circumstances here. ECF No. 24 at 20. In *New Prime*, the Supreme Court determined that "Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of ***work*** by ***workers***." *Id.* at 116 (emphasis in original). Thus, the Court held that the phrase "contracts of employment" includes not just "contracts that reflect an employer-employee relationship," but also "contracts that require an independent contractor to perform work." *Id.* at 113.

But, contrary to Plaintiffs' assertions, *New Prime* did not address the issue raised by the Distribution Agreements, *i.e.*, whether a contract between two business entities could constitute a "contract[] of employment" within the meaning of § 1. *See, e.g., Bissonette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 194 n.2 (D. Conn. 2020), *vacated and remanded on other grounds*, No. 23-51, 2024 WL 1588708 (U.S. Apr. 12, 2024) ("The Supreme Court has never had occasion to determine whether the FAA Section 1 exemption would apply to an

alleged 'transportation worker' that is in fact a legal entity such as a corporation and not a person. . . . [B]ecause the parties [in *New Prime*] agreed that [the independent contractor or employee] was otherwise 'a worker engaged in interstate commerce' for purposes of the FAA, the issue was apparently not before the Supreme Court."); *Gray v. Schmidt Baking Co., Inc.*, No. 22-CV-00463-LKG, 2023 U.S. Dist. LEXIS 233022, 2023 WL 9285466, at *2 (D. Md. Oct. 16, 2023) ("[T]he Supreme Court has not addressed whether Section 1 of the FAA applies when the parties to an agreement are both business entities, such as a corporation or limited liability company . . . ."); *Fli-Lo Falcon, LLC v. Amazon.Com Inc.*, No. C22-441, 2022 U.S. Dist. LEXIS 173642, 2022 WL 4451273, at *5 (W.D. Wash. Sept. 8, 2022) ("The Supreme Court [in *New Prime*] was not tasked with, and has not yet addressed, the issue instead posed in this matter—whether an LLC or a corporate entity itself can qualify as a 'class of worker' engaged in foreign or interstate commerce."), *report and recommendation adopted*, No. C22-441, 2022 U.S. Dist. LEXIS 172750, 2022 WL 4448654 (W.D. Wash. Sept. 23, 2022), *aff'd*, 97 F.4th 1190 (9th Cir. 2024); *Carter O'Neal Logistics, Inc. v. FedEx Ground Package Sys., Inc.*, No. 2:17-cv-02799, 2020 U.S. Dist. LEXIS 262700, 2020 WL 13111153, at *3 (W.D. Tenn. Mar. 19, 2020) ("*New Prime* . . . does not stand for the proposition that the FAA exception for transportation workers applies to corporate entities.").

While the Supreme Court has not decided whether § 1 applies to contracts between two business entities, several lower courts have reached this question and have uniformly answered it in the negative. *See, e.g., Fli-Lo*

Falcon, LLC v. Amazon.com, Inc., 97 F.4th 1190, 1195–96 (9th Cir. 2024) ("The text of the transportation worker exemption makes clear—and we hold—that the [FAA's] residual clause does not extend to business entities like plaintiffs. . . . While a natural person such as an independent contractor may be a transportation worker, a nonnatural person such as a business entity that employs or contracts with transportation workers, is not and cannot be a transportation worker. Nor is such a nonnatural person 'similar in nature' to a transportation worker. . . . We also relatedly hold that 'contracts of employment' in the transportation worker exemption do not extend to commercial contracts like the DSP Agreements."); *Amos v. Amazon Logistics, Inc.*, 74 F.4th 591, 596 (4th Cir. 2023) ("[T]he Agreement at hand simply is not a 'contract of employment'—it does not promise work and compensation to an individual employee, and it contains none of the hallmarks of a traditional employment contract, such as provisions regarding salary, benefits, and leave time. The Agreement provides instead for certain business services to be provided by one business to another . . . ."); *Gray*, 2023 U.S. Dist. LEXIS 233022, 2023 WL 9285466, at *3–4 (holding that "the parties to the Distribution Agreements are business entities who have entered into a commercial contract for the distribution of baked goods" and as such "the Distribution Agreement is not an 'employment contract' and Plaintiffs are, therefore, precluded from invoking the exemption under Section 1 of the FAA"); *ShaZor Logistics v. Amazon.com, LLC*, 628 F. Supp. 3d 708, 2022 WL 4277190, at *2 (E.D. Mich. 2022) ("Section 1 is inapplicable to contracts between businesses[] because businesses do not sign employment contracts with one

another . . . ."); *R&C Oilfield Servs., LLC v. Am. Wind Transp. Grp.*, LLC, 447 F. Supp. 3d 339, 347 (W.D. Pa. 2020) (holding that an agreement between two business entities "cannot reasonably be construed as a contract of employment governing 'work by workers'"); *D.V.C. Trucking, Inc. v. RMX Glob. Logistics Inc.*, No. CIV.A. 05-CV-00705, 2005 U.S. Dist. LEXIS 50191, 2005 WL 2044848, at *3 (D. Colo. Aug. 24, 2005) (declining to apply § 1 exemption because the corporate plaintiff was "not an employed 'transportation worker' engaged in interstate commerce, but rather is a business corporation.").

I agree with the holding of these cases. The Distribution Agreements contain none of the characteristic elements of employment contracts, such as terms regarding salaries or benefits. Instead, they read like what they are—agreements between businesses. They provide that Silva's Baked Goods and Trout Slayers will buy baked goods from SBD, with title passing at the time of delivery; will have "the right to operate the business as [they] choose[]"; "shall bear all risks and costs of operating [their] business[es]"; and will be responsible for hiring and firing their own employees. ECF No. 11 at 49–53, 83–87, 118–22. In addition, the Distribution Agreements leave Silva's Baked Goods and Trout Slayers free both to distribute merchandise for other firms, unless those firms compete with SBD or joint carriage of the products would contaminate the SBD baked products, *id.* at 55–56, 89–90, 124–25, and to sell their distribution rights, provided SBD approves (which approval may not be unreasonably withheld), *id.* at 59, 93, 128. These are not terms typically seen in contracts between a business

and its workers; they are, instead, terms that suggest a supplier-distributor relationship between two companies. Further, corporations and limited liability companies ("LLCs") are not "workers" under the statute. Because the Distribution Agreements here are between two business entities, they are not contracts of employment and the § 1 exception does not apply.[2]

For these reasons, I conclude that Plaintiffs are not exempt from arbitration under § 1 of the FAA.

B. Application of the Arbitration Agreements to Plaintiffs and SBC

Plaintiffs argue that they are not parties to the Distribution Agreements and so are not bound by the

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2. Plaintiffs filed their brief before the Supreme Court's decision in *Bissonette v. Lepage Bakeries Park St., LLC*, and the brief anticipates that the *Bissonette* decision will affect the applicability of the § 1 exception to Plaintiffs. ECF No. 24 at 15. But the Supreme Court has now issued its decision, and it does not help Plaintiffs here. As the Court explained, "[t]he only question before us is whether a transportation worker must work for a company in the transportation industry to be exempt under §1 of the FAA." 2024 WL 1588708, at *4. Thus, the Court did not address the question at issue here—*i.e.*, whether a contract between two businesses can constitute a "contract[] of employment" under § 1 of the FAA. *See id.* at *6 ("We express no opinion on any alternative grounds in favor of arbitration raised below . . . ."); *see also Bissonette*, 460 F. Supp. 3d at 194 n.2 (*Bissonette* District Court explaining that "[n]either the Plaintiffs nor the Defendants draw a distinction between the Plaintiffs and their respective companies and neither has argued that the distinction has any bearing on the issues to be decided," and declining to "take up the issue").

agreements' arbitration provisions. Similarly, they argue that SBC is not a party to the agreements and thus cannot enforce the arbitration provisions.

"A motion to compel arbitration requires a court to consider at the outset whether the parties have actually agreed to arbitrate." *Green v. XPO Last Mile, Inc.*, 504 F. Supp. 3d 60, 66 (D. Conn. 2020). "[D]espite the strong federal policy favoring arbitration, arbitration remains a creature of contract," which requires courts to decide whether the parties have agreed to arbitrate, a question "governed by state-law principles of contract formation." *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 288 (2d Cir. 2019); *see also AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (internal quotation marks omitted)). And while no one disputes here that the Distribution Agreements are contracts and that they include arbitration clauses, the question whether the Plaintiffs and SBC are parties to or are otherwise bound by those Agreements is included within the broader issue of whether the parties agreed to arbitrate their disputes. *See Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 677 (2d Cir. 1972) ("[I]t is well established that whether a person is a party to the arbitration agreement also is included within the statutory issue of the making of the arbitration agreement." (internal quotation marks omitted)).

Maryland law governs that question here. "A federal trial court sitting in diversity jurisdiction must apply the law of the forum state to determine the choice-of-law." *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001). "Under Connecticut choice-of-law rules, Connecticut courts will give effect to the parties' contractual choice-of-law provisions." *New Falls Corporation v. Lerner*, 579 F. Supp. 2d 282, 286 (D. Conn. 2008). Here, the Distribution Agreements contain a choice-of-law provision indicating that "[t]he validity, interpretation and performance of this Agreement shall be controlled by and construed in accordance with the laws of the state of Maryland . . . ." ECF No. 11 at 74, 108, 143. So I must apply Maryland law to determine whether the parties to this suit have agreed to arbitrate their disputes.

Defendants argue that the threshold question of whether the parties have agreed to arbitrate has been delegated to the arbitrator. *See* ECF No. 11 at 23–24. But Maryland courts have held otherwise. "Although [Maryland] law looks with favor upon arbitration as a method of dispute resolution, it does not look with favor upon sending parties to arbitration when there is no agreement to arbitrate." *Town of Chesapeake Beach v. Pessoa*, 330 Md. 744, 757, 625 A.2d 1014 (1993); *see also Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 378 Md. 139, 147, 835 A.2d 656 (2003) ("[A] party cannot be required to submit any dispute to arbitration that it has not agreed to submit." (internal quotation marks omitted)). The issue of whether nonsignatories are bound by an arbitration agreement is included within the broader issue of contract formation, and so it is an issue for courts to

address. *See Bonner v. Kimmico, Inc.*, No. 23-CV-2062, 2023 U.S. Dist. LEXIS 227134, 2023 WL 8807029, at *3 n.5 (D. Md. Dec. 20, 2023) (resolving "the issue of whether nonsignatories . . . may be bound by the arbitration agreements" before delegating gateway questions of arbitrability to an arbitrator). So the issue of whether Plaintiffs are bound by the Distribution Agreements' arbitration provisions is for me, not an arbitrator, to decide.

Here, the language of the Distribution Agreements evinces an intent to bind both Plaintiffs and SBC to arbitrate their disputes. Section 11.7 of the Distribution Agreements, entitled "Individual Action," provides, in pertinent part, that "[t]he parties . . . agree that only [SBD] (and its affiliates and their respective owners, officers, directors, agents and employees, as applicable) and DISTRIBUTOR (and its affiliates and their respective owners, officers, and directors, as applicable) may be the parties to any proceeding described in this Section." ECF No. 11. at 71, 105 140. The types of proceedings described in Section 11.7 include "mediation, arbitration, litigation, and/or government action." *Id.* Silva and Rothkugel are the presidents and "controlling shareholder[s]" of their respective companies, ECF No. 11 at 75, 109, 144, making them both owners and officers of these companies. And SBC, as the parent company of SBD, *see* ECF No. 1 at 28; ECF No. 3 at 1 (explaining that SBC is SBD's "sole member"), qualifies as an owner or affiliate of SBD.

Plaintiffs argue that Section 11.7, which they call a "class action waiver," does not provide a basis to

compel them to arbitrate because it uses permissive language to describe the persons who "may be" parties to any proceeding. ECF No. 24 at 16 ("The language does not state that the owners must bring claims in arbitration . . . ."). Read as a whole, however, Section 11.7 supports Defendants' argument that a party to the agreement may compel the non-parties specifically listed in that section (*i.e.*, affiliates, owners, officers, and directors) to arbitrate. While the word "may" is by itself permissive, it is framed by the word "only," suggesting that the sentence as a whole is best read as a prohibition against joining any persons not a party and not listed in the parentheticals that follow the references to the parties to the Distribution Agreement. *See* ECF No. 11 at 71, 105, 140 ("*only* SCHMIDT (and its affiliates and their respective owners, officers, directors, agents and employees . . .) and DISTRIBUTOR (and its affiliates and their respective owners, officers and directors . . .) *may* be the parties . . . ." (emphasis added)). This language makes clear that (1) the parties to the Distribution Agreements and (2) the persons listed in the parentheticals (whom I will call "party-related persons")—and only these two categories of persons—"may be the parties" to the proceeding. A party to a legal proceeding can be either a plaintiff or a defendant, in the case of litigation, or a claimant or a respondent, in the case of arbitration. *See Black's Law Dictionary* (defining "party" as, among other things, "[o]ne by or against whom a lawsuit is brought (a party to the lawsuit)") (9th ed. 2009). This suggests that, under Section 11.7, the parties and party-related persons may be either type of "party" to the proceeding, *i.e.*, in the case of an arbitration, claimants or respondents. As

noted, Section 11.7 applies not only to arbitration but to "mediation . . . litigation, and/or government action," and in litigation at least, joinder rules ordinarily provide both that persons may participate as "parties" in litigation by choice or that they may be summoned in against their will. *See, e.g.*, Fed. R. Civ. P. 20 (permissive joinder rule describing when persons may join as plaintiffs and when persons may be joined as defendants). It is unclear why the parties to the Distribution Agreement would have contemplated a different rule for arbitration proceedings. Thus, the ordinary meaning of "parties" to a legal proceeding suggests that when they stipulated that certain persons "may be the parties," the parties to the Agreements meant that such persons could be either type of party and, therefore, that any such person could require any other such person to arbitrate.

Finally, I do not agree with Plaintiffs' suggestion that the language in Section 11.7 is ambiguous. *See* ECF No. 24 at 17. Under Maryland law, "[a]mbiguity arises when a term of a contract, as viewed in the context of the entire contract and from the perspective a reasonable person in the position of the parties, is susceptible of more than one meaning," *Impac Mortg. Holdings, Inc. v. Timm*, 474 Md. 495, 507, 255 A.3d 89 (2021), and "[t]he determination of whether language is susceptible of more than one meaning includes a consideration of the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution," *Calomiris v. Woods*, 353 Md. 425, 436, 727 A.2d 358 (1999) (internal quotation marks omitted). "A reasonable person in the position of the parties" would not, at the time the contract was drafted,

have read Section 11.7 to provide for only *voluntary* joinder by party-related persons. In a litigation, one of the scenarios addressed by Section 11.7, such a reading would violate ordinary joinder rules, as shown above; and in an arbitration, such a reading would preclude a complete resolution of the dispute in any situation in which party-related persons needed to be part of the proceeding for the arbitrator to consider all facets of the dispute, provide all relief warranted by the facts and the law, or otherwise do justice in the dispute. Indeed, the practical effect of such a reading would, despite the binding arbitration clause in Section 11.3, be to force the parties to the Distribution Agreements into litigation whenever a party-related person whose participation was necessary refused to join. Because I find that "a reasonable person in the position of the parties" would have viewed Section 11.7 to permit party-related persons to join as parties in an arbitration proceeding, voluntarily or by court order, I conclude that the Plaintiffs, who themselves signed the Distribution Agreements containing Section 11.7 as both officers of their corporate entities and as shareholder-guarantors, have agreed that they may be compelled to arbitrate. And because it is an "affiliate" of SBD, SBC may join as a party to the arbitration and may compel other party-related persons to join.

Courts applying Maryland law have reached similar conclusions. *See, e.g., Alamria v. Telcor Intern., Inc.*, 920 F. Supp. 658, 668 (D. Md. 1996) (holding that a nonsignatory of an arbitration agreement may nevertheless be bound to arbitrate because the agreement stated that "any other business entities, affiliates, individuals, subsidiaries, or

the like, of the Client that exist or shall be created in the future is part of this agreement"). And a similar case from this District is *Andreoli v. Comcast Cable Commc'ns Mgmt., LLC*, No. 3:19-CV-00954, 2020 U.S. Dist. LEXIS 44965, 2020 WL 1242919 (D. Conn. 2020). There, the court, applying Illinois law, concluded that the chief executive officer of a company consented to arbitrate her claims because she signed in her corporate capacity an agreement stating that "the parties" to be bound by the arbitration clause included "the parties' respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors and assigns." *Id.* at 82. Thus, the *Andreoli* court concluded that the executive "surely knew that she was agreeing to bind herself as an agent or employee of" her company. *Id.*

Plaintiffs rely on *Green v. XPO Last Mile, Inc.*, 504 F. Supp. 3d 60 (D. Conn. 2020), in arguing that they are not bound by any arbitration agreement. In that case, two owners of LLCs who acted as delivery drivers signed delivery service agreements with a logistics company on behalf of their LLCs. *Id.* at 64–66. After the drivers filed a complaint against the logistics company for alleged wage law violations, the company filed a motion to compel arbitration per the agreements' arbitration provisions. *Id.* at 65. Unlike in this case and *Andreoli*, there was no language in the agreement purporting to bind any owner, employee, or other affiliate of the LLCs to arbitration, and so the court noted that "[i]t is hornbook law that the fact that a corporate owner or agent may sign a contract on a company's behalf does not mean—without more—that the owner or agent is ***personally*** a party to the contract."

Id. at 68 (emphasis in original). Thus, the court held that the agreements were not binding on the drivers because they signed the agreements only in their representative capacities as owners of the LLCs. *Id.* at 68–73.

Green does not help Plaintiffs because, as the *Green* court explained, signing in a representative capacity a contract that includes an arbitration agreement does not "*without more*" require a corporate owner to arbitrate. *Id.* at 68 (emphasis added). But here there is "more"—namely, the fact that the arbitration provisions binds not only Plaintiffs' companies, but also their "affiliates and their respective owners, officers, and directors." By their plain language, the Distribution Agreements permit Plaintiffs' companies' "affiliates and their respective owners, officers, and directors" to be made parties to a legal proceeding, including arbitration.

C. Enforceability

Because I have concluded that the Distribution Agreements require Plaintiffs to arbitrate, I must grant Defendants' motion to compel arbitration unless I find that the arbitration provisions of the Distribution Agreements are unenforceable. Plaintiffs contend that they are, describing the arbitration provisions as being "[p]ermeated with [u]nconscionable [t]erms." *See* ECF No. 24 at 35–36. But I may not decide the issue of enforceability if the Distribution Agreements validly delegate that issue to the arbitrator. It is to the question of delegation that I turn next.

Appendix B

1. Delegation via Incorporation of JAMS Rules

The Distribution Agreements explicitly invoke Judicial Arbitration and Mediation Services, Inc. ("JAMS"), stating that "[a]ny dispute between the parties subject to this Article shall be decided by neutral, binding arbitration conducted in accordance with the [JAMS]." *See* ECF No. 11 at 69, 103, 138. JAMS rules provide that the arbitrator will rule on questions of enforceability and other "gateway" issues related to arbitrability: "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, *validity*, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator." JAMS, Employment Arbitration Rules and Procedures 11(b) (emphasis added); *see also* Rule 1(a)(noting that the Employment Arbitration Rules and Procedures apply whenever "the disputes or claims are employment-related."); ECF No. 1 ¶¶ 30–37(complaint alleging that Plaintiffs "are employees entitled to the protections of Connecticut's wage statutes," that "Defendant is [Plaintiffs'] employer," that "Defendant" made unlawful deductions from Plaintiffs' wages, and that "Defendant . . . failed to pay Plaintiffs overtime premiums for all hours worked in excess of forty hours per week," in violation of Connecticut wage statutes). "[D]isputes over validity," which Rule 11(b) delegates to the arbitrator, include disputes over unconscionability. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (describing "unconscionability" as a "basis of invalidity for the contract.").

To be sure, "gateway questions of arbitrability," *id.* at 69 (internal quotation marks omitted), including issues of validity,[3] are ordinarily for the Court to decide, but these issues are for the arbitrator where the parties "clearly and unmistakably" agree to arbitrate them. *See id.* at 69 n.1; *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65, 141 S. Ct. 107, 207 L. Ed. 2d 1050 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."). And incorporating the JAMS rules into an arbitration agreement by reference constitutes "clear[] and unmistakabl[e]" evidence that the parties agreed to delegate questions of arbitrability to an arbitrator.

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3. Courts often use "arbitrability" as a catch-all phrase for challenges to the scope and enforceability (*i.e.*, validity) of an arbitration clause, and have specifically treated unconscionability as falling under the broad umbrella of "arbitrability." *Rent-A-Center, West, Inc.*, 561 U.S. at 68–69 (describing the plaintiff's unconscionability challenge as a "gateway question[] of arbitrability" (internal quotation marks omitted)); *Pahwa*, 2016 U.S. Dist. LEXIS 177427, 2016 WL 7635748, at *18 ("The Supreme Court has . . . recognized that, through a delegation provision, parties can agree to arbitrate gateway questions of arbitrability, including whether the arbitration agreement is unconscionable." (internal quotation marks omitted)); *Yost v. Everyrealm, Inc.*, No. 22-CV-6549, 2023 U.S. Dist. LEXIS 62623, 2023 WL 2859160, at *7 (S.D.N.Y. Apr. 10, 2023) ("[A]s numerous courts have held, the AAA's Rules empower the arbitrator to resolve questions of arbitrability, including based on claims of as-applied unconscionability); *see also Emilio v. Sprint Spectrum L.P.*, 508 Fed. Appx. 3, 4 (2d Cir. 2013) ("[T]he enforceability of a class action waiver in an arbitration clause is a question of arbitrability . . . .").

The Second Circuit—along with "virtually every circuit to have considered the issue," *Patrick v. Running Warehouse*, LLC, 93 F.4th 468, 480–81 (9th Cir. 2024) (internal quotation marks and alterations omitted)—has held that "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005). As the language quoted above from JAMS Rule 11(b) makes clear, the JAMS rules "empower an arbitrator to decide the gateway issues of arbitrability." *Deleon v. Dollar Tree Stores, Inc.*, No. 3:16-CV-00767, 2017 U.S. Dist. LEXIS 12158, 2017 WL 396535, at *5 (D. Conn. Jan. 30, 2017). So incorporation of the JAMS rules in the Distribution Agreements clearly and unmistakably shows an intent to arbitrate gateway questions of arbitrability, *see Emilio v. Sprint Spectrum L.P.*, 508 Fed. Appx. 3, 5 (2d Cir. 2013) (finding incorporation of JAMS rules was clear and unmistakable delegation of arbitrability issues), including Plaintiffs' unconscionability challenge.

Plaintiffs resist this conclusion, arguing that the Distribution Agreements' reference to JAMS is insufficient to show delegation because "there has been no incorporation of any particular set of rules here." ECF No. 24 at 24. To be sure, JAMS has several sets of rules and the Distribution Agreements fail to identify which of these sets of rules would apply; indeed, the Agreements do not refer to "rules" at all, stating merely that "[a]ny dispute . . . shall be decided by neutral, binding arbitration conducted in accordance with [JAMS]." ECF No. 11at 103. But as

another court observed when reviewing an identically worded arbitration provision in a case also involving SBC and SBD, the use of the phrase "in accordance with" suggests that the parties to the Distribution Agreements meant to adopt JAMS's rules and procedures:

> Plaintiffs' proposed reading of Section 11.3 to mean that the arbitration would be conducted by JAMS, but not actually subject to JAMS Rules, is also unreasonable. The relevant language in Section 11.3 provides that the parties' dispute "shall be decided by a neutral, binding arbitration conducted in *accordance* with [JAMS]." ECF No. 28-2 at 27, 59. (emphasis supplied). The ordinary meaning of the word "accordance" is to follow a rule. *See Accordance* MERRIAM-WEBSTER DICTIONARY ("in a way that agrees with or follows (something, such as a rule or request)"); *see also Accordance* CAMBRIDGE DICTIONARY https://dictionary.cambridge.org/us/dictionary/english/accordance (last visited Feb. 14, 2023). And so, Section 11.3 makes clear that the JAMS[']s rules and procedures apply to the parties' disputes under the Distribution Agreement.

Gray v. Schmidt Baking Co. Inc., No. 22-CV-00463-LKG, 2023 U.S. Dist. LEXIS 31062, 2023 WL 2185778 *8 (D. Md. Feb. 23, 2023). Further, the JAMS rules themselves indicate that invoking JAMS as the arbitrator is enough to incorporate the applicable rules: "The Parties shall

be deemed to have made these Rules a part of their Arbitration Agreement whenever they have provided for . . . [a]rbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims [are 'employment-related']." JAMS Employment Arbitration Rules and Procedures, Rule 1(b); *see also* Rule 1(a). As suggested earlier, the claims Plaintiffs assert are plainly "employment-related" because they allege that Plaintiffs were Defendants' employees and that Defendants underpaid them in violation of Connecticut wage laws.[4] Finally, Plaintiffs do not point to any authority indicating that parties must refer to specific sets of rules to clearly and unmistakably delegate issues of arbitrability, nor can I find any.

Plaintiffs also argue that they are unsophisticated parties and so should not be bound by delegation via incorporation of the JAMS rules. ECF No. 24 at 25–26. But at least some courts in this Circuit have rejected this argument. *See Peni v. Daily Harvest, Inc.*, No. 22-CV-5443, 2022 U.S. Dist. LEXIS 205311, 2022 WL 16849451, at *7 (S.D.N.Y. Nov. 10, 2022) (noting that "[a]lthough the Second Circuit has not addressed whether the import of rule incorporation differs based on the parties'

4. In any event, other sets of JAMS rules that might conceivably apply here include the same broad delegation language that the employment rules do. *See* Rule 8 of the JAMS Streamlined Arbitration Rules & Rule 11 of the JAMS Comprehensive Arbitration Rules (both providing that that "[j]urisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator.").

sophistication, other circuits appear to apply the same rule even to unsophisticated parties" and holding that "the parties . . . delegated questions of arbitrability to the arbitrator through incorporation of the JAMS Rules" notwithstanding the plaintiff's argument that she was an "unsophisticated customer"); *see also Doctor's Assocs., Inc. v. Inder Pahwa & Satinder Pahwa*, No. 16-CV-00446, 2016 U.S. Dist. LEXIS 177427, 2016 WL 7635748, at *19 n.14 (D. Conn. Nov. 3, 2016) (rejecting defendants' argument that delegation via rule incorporation "has been limited . . . to arbitration agreements between sophisticated commercial parties"), *report and recommendation adopted sub nom. Doctor's Assocs. Inc. v. Pahwa*, No. 16-CV-446, 2016 U.S. Dist. LEXIS 177426, 2016 WL 7410782 (D. Conn. Dec. 2, 2016); *Doctor's Assocs., Inc. v. Tripathi*, No. 3:16CV00562, 2016 U.S. Dist. LEXIS 177595, 2016 WL 7634464, at *17 n.13 (D. Conn. Nov. 3, 2016) (same), *report and recommendation adopted*, No. 3:16-CV-562, 2016 U.S. Dist. LEXIS 177596, 2016 WL 7406725 (D. Conn. Dec. 2, 2016), *aff'd sub nom. Doctor's Assocs., LLC v. Tripathi*, 794 F. App'x 91 (2d Cir. 2019).[5] And

5. Plaintiffs cite two contrary cases. In the first, the Eastern District of New York declined to find that an arbitration agreement clearly and unmistakably delegated issues of arbitrability where the agreement incorporated AAA rules. *Vidal v. Advanced Care Staffing, LLC*, No. 1:22-CV-05535, 2023 U.S. Dist. LEXIS 59411, 2023 WL 2783251, at *9 (E.D.N.Y. Apr. 4, 2023). But that court held that the delegation was not clear and unmistakable largely because it found "language [in the agreement] explicitly providing for judicial intervention on issues of enforceability." 2023 U.S. Dist. LEXIS 59411, [WL] *Id.* at *11. No such language exists here. In the second case, the District of Maryland held that delegation via integration of the AAA rules would not apply to an agreement

while the Second Circuit has not yet addressed this issue, every Circuit to consider it has declined to distinguish between sophisticated and unsophisticated parties. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 851 (6th Cir. 2020) (noting that "nothing in the Federal Arbitration Act purports to distinguish between 'sophisticated' and 'unsophisticated' parties"); *Richardson v. Coverall N. Am., Inc.*, 811 F. App'x 100, 104 (3d Cir. 2020) (rejecting the plaintiff's argument that delegation via rule integration was "unreasonable in agreements involving 'unsophisticated parties'" and noting that such a rule would "ignore even the plainest of delegations"); *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 552 (5th Cir. 2018) (rejecting the plaintiff's "policy-based" exception to delegation via rule integration for unsophisticated parties). The question whether incorporation provides "clear[] and unmistakabl[e]" evidence of intent to delegate should not turn on the sophistication of the parties.[6]

"between a Fortune 500 company and a consumer." *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 555 (D. Md. 2019). But in reaching this conclusion, the court relied at least in part on caselaw that has since been overturned. *See id.* (citing *Richardson v. Coverall N. Am., Inc.*, No. CV18532MASTJB, 2018 U.S. Dist. LEXIS 167240, 2018 WL 4639225, at *3 (D.N.J. Sept. 27, 2018), *rev'd in part, vacated in part*, 811 F. App'x 100 (3d Cir. 2020) (rejecting notion that it was unreasonable to rely on incorporated rules in cases involving unsophisticated parties because that position "would disregard the 'clear and unmistakable' standard and ignore even the plainest of delegations.").

6. In any event, Plaintiffs here have not done enough to show that they are, in fact, unsophisticated parties. Plaintiffs assert that they are unsophisticated because they are "truck drivers"

Appendix B

2. Unconscionability of Delegation Clause

Plaintiffs also challenge the enforceability of the delegation clause itself, arguing that it "unconscionable and unenforceable." ECF No. 24 at 26. In spite of the broad language of the JAMS rules, which require submission to the arbitrator of all disputes over "formation, existence, integration or scope of the agreement," the question of the enforceability of the delegation clause is for me to decide. *See Rent-A-Ctr.*, 561 U.S. at 71 ("If a party challenges

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and because Silva only has a high school education and Rothkugel "has never studied business." ECF No. 24 at 11, 24–25. But the record indicates that they were sophisticated enough to create and profitably run their corporate entities. Silva, as President of Silva's Baked Goods, sold the distribution rights to many of his company's customers for approximately double the financed price, *see* ECF No. 28-1 at ¶¶ 33, 39–44, and his company made hundreds of thousands of dollars in pre-tax net revenue over the course of his company's ownership of the distribution rights, *see id.* at ¶¶ 37, 46. Similarly, Rothkugel, as President of Trout Slayers, sold the distribution rights to his sales area for nearly double its financed price, *see id.* at ¶¶ 18–22, and his company made nearly a hundred thousand dollars in pre-tax net revenue over the course of his company's one-year ownership of the distribution rights, *see id.* at ¶ 28. Thus, Plaintiffs were sophisticated enough to profitably operate their businesses and to engage in transactions to sell their distribution rights at considerable profits. In light of these facts, Plaintiffs' purportedly limited formal education and their status as "truck drivers" is not sufficient to demonstrate that they are "unsophisticated." *See, e.g., Peterson v. Tiffin Motor Homes, Inc.*, No. 17-CV-01186, 2019 U.S. Dist. LEXIS 205728, 2019 WL 6320341, at *11 (W.D.N.Y. Nov. 26, 2019), *report and recommendation adopted*, No. 17-CV-1186, 2020 U.S. Dist. LEXIS 39539, 2020 WL 10223304 (W.D.N.Y. Mar. 5, 2020).

the validity . . . of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with the agreement" and explaining that the "precise agreement to arbitrate at issue" in that case was "the delegation provision—the provision that gave the arbitrator exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement," rather than the "remainder of the contract," which was an arbitration agreement (internal quotation marks omitted)).

Under Maryland law,[7] a party seeking to challenge the enforceability of an arbitration agreement must prove both substantive and procedural unconscionability. *Felix v. Richard D. London & Assocs., P.C.*, No. 19-CV-2795, 2020 U.S. Dist. LEXIS 153209, 2020 WL 4933632, at *5 (D. Md. Aug. 24, 2020) ("Maryland courts require both procedural and substantive unconscionability before they will refuse to enforce an arbitration agreement."); *Freedman v. Comcast Corp.*, 190 Md. App. 179, 207–08, 988 A.2d 68 (Md. Ct. Spec. App. 2010) ("The prevailing view is that both procedural and substantive unconscionability must be present in order for a court to invalidate a contractual term as unconscionable."). "Substantive unconscionability involves those one-sided terms of a contract from which

7. Because unconscionability is a state-law doctrine that challenges the enforceability of a contract or terms therein, the Distribution Agreements' choice-of-law provision controls, and so I must apply Maryland law to this issue. *See Hottle v. BDO Seidman LLP*, 268 Conn. 694, 706 & n.7, 707, 719–22, 846 A.2d 862 (2004) (applying New York law to an arbitrability dispute under a contractual choice-of-law provision).

a party seeks relief (for instance, 'I have the right to cut off one of your child's fingers for each day you are in default'), while procedural unconscionability deals with the process of making a contract—'bargaining naughtiness' (for instance, 'Just sign here; the small print on the back is only our standard form')." *Walther v. Sovereign Bank*, 386 Md. 412, 427, 872 A.2d 735 (2005) (internal quotation marks omitted).

i. Substantive Unconscionability

Substantively unconscionable terms are "unreasonably favorable to the more powerful party," "impair the integrity of the bargaining process or otherwise contravene the public interest or public policy," "attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law," or are otherwise "unreasonably and unexpectedly harsh." *Id.* at 426.

Plaintiffs argue that the arbitration provisions' cost-and fee-shifting provisions are unconscionable as applied to the delegation clause. *See* ECF No. 24 at 28–32. Specifically, they argue that the arbitration agreements' provision that "the prevailing party in any arbitration or other action to enforce this Agreement will be entitled to recover its reasonable attorney's fees, expert fees, costs and expenses in connection with such action" is substantively unconscionable. ECF No. 11 at 71, 105 140.

Under Maryland law, cost-and fee-shifting provisions are assessed on a "case-by-case" basis, with a "focus upon a claimant's expected or actual arbitration costs and his

ability to pay those costs, measured against a baseline of the claimant's expected costs for litigation and his ability to pay those costs." *Walther*, 386 Md. at 440. The party resisting enforcement of the arbitration agreement has the burden of demonstrating that arbitration costs constitute a "prohibitive expense." *Id.; see also Doyle v. Fin. Am., LLC*, 173 Md. App. 370, 391, 918 A.2d 1266 (Md. Ct. Spec. App. 2007) (affirming judgment of lower court to compel arbitration where "no evidence was presented by appellants to demonstrate the excessive costs of the arbitration forum").

Here, Plaintiffs have not demonstrated that arbitration costs would be prohibitive. Plaintiffs assert that if they "challenge the cost-shifting issue in front of an arbitrator and lose, they must pay thousands of dollars to have obtained a decision on the issue." ECF No. 24 at 30. They do not, however, explain how they reached this estimate; rather, they simply point to arbitration costs incurred in other cases. But Plaintiffs "cannot meet [their] burden of showing that [they] likely will incur prohibitive arbitrator fees simply by showing the fees that some arbitrators are charging somewhere." *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173, 182 (4th Cir. 2013). Moreover, Plaintiffs have not "provided evidence or argument about the value of [their] claim[s], which is a critical factor in a 'prohibitive costs' analysis." *Id.* Plaintiffs therefore have not carried their burden of demonstrating that they would likely face prohibitive costs if they were required to arbitrate their disputes.

In any event, Plaintiffs' concerns regarding the cost- and fee-shifting provisions seem to be moot given a notice

sent to the parties from JAMS indicating that its Policy on Employment Arbitration Minimum Standards will apply "notwithstanding any contrary provisions in the parties' pre-dispute arbitration agreement." ECF No. 28-2 at 11, 19. The JAMS Policy on Employment Arbitration Minimum Standards makes clear that

> [a]n employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration. The only fee that an employee may be required to pay is the initial JAMS Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator's services.

Id. at 28-2 at 15, 23. Thus, it appears the arbitration agreements' cost-and fee-shifting provisions are moot.

For these reasons, the arbitration agreements' cost-and fee-shifting provisions are not substantively unconscionable and will not bar application of the delegation clause.

ii. Procedural Unconscionability

Procedural unconscionability "concerns the process of making a contract and includes such devices as the use of fine print and convoluted or unclear language, as well as deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms."

Stewart v. Stewart, 214 Md. App. 458, 477, 76 A.3d 1221 (Md. Ct. Spec. App. 2013) (internal quotation marks omitted).

Plaintiffs argue that the delegation clauses are procedurally unconscionable because they are "contained within contracts of adhesion between parties of unequal bargaining power."[8] ECF No. 24 at 33. "However, the fact that a contract is one of adhesion does not mean that it is automatically deemed per se unconscionable." *Dieng v. Coll. Park Hyundai*, No. 2009-CV-0068, 2009 U.S. Dist. LEXIS 58785, 2009 WL 2096076, at *6 (D. Md. July 9, 2009). Rather, "[a] court will . . . look at the contract and its terms with some special care . . . but it will not simply excise or ignore terms merely because . . . they may operate to the perceived detriment of the weaker party." *Meyer v. State Farm Fire Cas. Co.*, 85 Md. App. 83, 89–90, 582 A.2d 275 (Md. Ct. Spec. App. 1990). As discussed

8. Though this argument applies to the contract as a whole, "[a] party may contest the enforceability of the delegation clause with the same arguments it employs to contest the enforceability of the overall arbitration agreement." *Hengle v. Treppa*, 19 F.4th 324, 335 (4th Cir. 2021); *see also Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291 (4th Cir. 2020) ("[C]ourts have construed a party's argument that the delegation clause suffers from the same defect as the arbitration provision to be a sufficient challenge to the delegation provision itself." (internal quotation marks omitted)); *Kai Peng v. Uber Techs., Inc.*, 237 F. Supp. 3d 36, 55 (E.D.N.Y. 2017) ("[T]o the extent that Plaintiffs argue that the delegation clause itself is unconscionable for the same reasons that the Services Agreements or arbitration provisions as a whole are unconscionable, the Court considers those arguments as applied to the delegation clause." (internal citations omitted)).

previously, I have carefully considered the substantive terms of the agreement challenged by the Plaintiffs and find that they are not unconscionable.

Plaintiffs further argue that the delegation clauses are procedurally unconscionable because the "clauses . . . do not contain any opt-out provisions." ECF No. 24 at 34. But Plaintiffs do not point to any authority indicating that the lack of an opt-out clause will render an otherwise lawful arbitration agreement unconscionable. While courts have found that an arbitration agreement "with a clearly-stated opportunity to opt-out without retaliation[] is not procedurally unconscionable," *Varon v. Uber Techs., Inc.*, No. 15-CV-3650, 2016 U.S. Dist. LEXIS 58421, 2016 WL 1752835, at *5 (D. Md. May 3, 2016), Plaintiffs cite no cases suggesting that the converse is true.

Plaintiffs also suggest that the arbitration provisions were not sufficiently conspicuous within the Distribution Agreements. *See* ECF No. 24 at 33 ("Unbeknownst to Plaintiffs, the agreements contained an arbitration clause."). But that argument is unconvincing, as § 11.3 of the Distribution Agreements is explicitly and conspicuously titled "**ARBITRATION**" in bolded, underlined, and all capitalized letters. ECF No. 11. at 69, 103, 138 (emphasis in original); *see also Gray*, 2023 U.S. Dist. LEXIS 31062, 2023 WL 2185778, at *10 (considering a substantially identical agreement to those at issue here and noting that "a careful review of the Distribution Agreement makes clear that the dispute resolution and arbitration provision are clearly identified in Article 11").

Finally, I note that SBD sent Plaintiffs disclosure documents 14 days in advance of their signing of the Distribution Agreements. On the first page of these disclosures, SBD advised Plaintiffs to "[r]ead all of your contract carefully" and to "[s]how your contract and this Disclosure document to an advisor, like a lawyer or accountant." ECF No. 28-1 at 21. These disclosures, the opportunity to review the contracts beforehand, and the advice to consult an attorney or accountant further support the conclusion that the delegation clauses contained in the Distribution Agreements are not procedurally unconscionable. *See, e.g., Gray*, 2023 U.S. Dist. LEXIS 31062, 2023 WL 2185778, at *10 (holding that "Plaintiffs have not shown that the arbitration agreement is procedurally unconscionable" in part because "they were afforded at least 14 days to review the Distribution Agreement[] and were advised in writing to seek the advice of an attorney or accountant").

For these all these reasons, the delegation clauses are neither procedurally nor substantively unconscionable.

D. Stay of Action

In sum, Plaintiffs are not exempt under § 1 of the FAA; the arbitration agreements are binding on them as owners and officers of their respective businesses; and the arbitration agreements validly delegate their unconscionability challenges to the to arbitrator. Thus, all of Plaintiffs' remaining arguments are to be decided by an arbitrator. Under *Katz v. Cellco Partnership*, I must stay this action pending the outcome of arbitration. 794

F.3d 341, 345 (2d Cir. 2015) ("We join those Circuits that consider a stay of proceedings necessary after all claims have been referred to arbitration and a stay requested.").

V. CONCLUSION

For the reasons explained herein, the Motion to Compel Arbitration, ECF No. 10, is GRANTED, and the action is stayed. The Clerk is instructed to administratively close this case. Either party may move to reopen this case following the decision by the arbitration panel. Any such motion must be filed within 30 days of the rendering of the decision and a copy of the decision must be filed with the Court.

IT IS SO ORDERED.

/s/ Michael P. Shea
Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut

May 2, 2024