UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CARMEN WALLACE and BRODERICK BRYANT, individually and on behalf of all other similarly situated individuals, Plaintiffs, v. GRUBHUB HOLDINGS INC. and GRUBHUB INC. Defendant	Civil Action No. 1:18-cv-04538

PLAINTIFFS' OPPOSITION TO GRUBHUB'S MOTION TO DISMISS PLAINTIFFS' COLLECTIVE AND CLASS ACTION COMPLAINT

In their Motion to Compel Arbitration (Dkt. 32), Defendants GrubHub Holdings Inc. and GrubHub Inc. (hereinafter, "GrubHub"), ask this Court to compel the claims of named Plaintiffs Carmen Wallace and Broderick Bryant, and the additional individuals who have opted in as Plaintiffs pursuant to Section 216(b) of the FLSA, 29 U.S.C. §216(b) (hereinafter "Plaintiffs"), to individual arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* GrubHub also asks the Court to strike Plaintiffs' class and collective allegations. As set forth further below, GrubHub's Motion should be denied.[1]

GrubHub cannot compel Plaintiffs to arbitrate because they are exempt from the

[1] GrubHub admits that it does not have an arbitration agreement for one of the opt-in Plaintiffs, LaTigre Waters (Dkt. 31 at 2, ¶ 5; 32 at 5 n.7). Thus, GrubHub clearly cannot compel LaTigre Waters' claims to arbitration.

Federal Arbitration Act ("FAA") under the transportation worker exemption, 9 U.S.C. §1.[2] This exemption applies to "contracts of employment of transportation workers." See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001). Here, Plaintiffs are drivers who deliver takeout food and thus are workers directly involved in interstate commerce. While some courts have held that independent contractor agreements constitute "contracts of employment" for purposes of the Section 1 transportation worker exemption (and thus there is no need at the outset of a case to determine if the workers are employees or independent contractors), see, e.g., Oliveira v. New Prime, Inc., 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S. Ct. 1164 (2018), the Ninth Circuit has directed that the trial court should make an initial preliminary determination as to whether the workers are employees, so as to qualify for the exception. See Van Dusen v. Swift Transp. Co., 544 F. App'x 724 (9th Cir. 2013). Thus, here, the Court could either follow Oliveira, and recognize that Plaintiffs fall under the transportation worker exemption from the FAA regardless of whether they were properly classified or not, or alternatively the Court could follow the more conservative approach of the Ninth Circuit and make a preliminary determination as to whether GrubHub drivers are employees and thus fall under the transportation worker exemption to the FAA. If the Court chooses to follow the Ninth Circuit approach, the Court should convene the parties to discuss

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[2] In Souran v. GrubHub Holdings, Inc., Seventh Circuit No. 17-1320, C.A. No. 16-cv-06720 (N.D. Ill.) (an identical case to this one, see infra note 5), following the Supreme Court's decision in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), the parties argued to the Seventh Circuit about whether the case should be remanded. Plaintiffs took the position that the case should be remanded to the district court to consider the argument raised here, that GrubHub's delivery drivers fall under the FAA's Section 1 transportation workers exemption. See Souran Plaintiffs' Statement of Position (attached here as Exhibit 1). GrubHub opposed Plaintiffs' argument for a remand to address this argument. See GrubHub's Statement of Position (Exhibit 2). The Seventh Circuit agreed with Plaintiffs to remand the case. See Order (Exhibit 3).

how it will proceed to make that preliminary determination – either based on briefing or a preliminary evidentiary hearing. See Doe v. Swift Transp. Co., Inc., 2015 WL 274092, *3-4 (D. Ariz. Jan. 22, 2015) (ordering discovery on the issue of whether plaintiffs' contracts were "contracts of employment" in advance of a trial on plaintiffs' employment status for the purposes of the FAA).

Either way, following either the First Circuit's approach in Oliveira or the Ninth Circuit's more conservative approach in Swift, the Court[3] should deny GrubHub's motion

[3] The question of whether GrubHub may compel arbitration of the Plaintiffs' claims must be decided by this Court and not an arbitrator. In order to delegate arbitrability questions to an arbitrator, an arbitration agreement must be "clear and unmistakable" that such "gateway" questions would go to an arbitrator. See AT&T Techs. V. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). GrubHub makes much of the fact that its arbitration agreement incorporates the AAA Commercial Arbitration Rules, which allows for arbitrability questions to be decided by an arbitrator. However, as GrubHub admits, its arbitration agreement expressly reserves *to the Court* to decide the enforceability of the class action waiver in the agreement. Dkt. 32, at 4. Plaintiffs are raising this entire challenge to GrubHub's arbitration agreement because of the class action waiver; indeed, were it not for the class waiver in the agreement, Plaintiffs would not even be opposing arbitration. Thus, this is a question that must be decided by the Court. (Or at the very least, given these competing provisions, the delegation of this gateway issue is *not* "clear and unmistakable".)

Moreover, courts in the Seventh Circuit have held that the applicability of the FAA Section 1 exemption is a question for the Court, not an arbitrator. See Atwood v. Rent-A-Center East, Inc., 2016 WL 2766656, *1-*2 (S.D. Ill. May 13, 2016) (noting that while "[i]t's true that delegation clauses . . . require the Court to defer to the arbitrator on many gateway matters, like unconscionability matters," questions regarding the Section 1 exemption "are of an entirely different character" because "they go to the Court's ability to employ the federal statute, and not to the underlying arbitration agreement's validity." Therefore, rather than an arbitrator, "the Court must decide whether [an arbitration agreement] is exempted from the federal act."). See also Oliveira, 857 F.3d at 13-15 (Section 1 exemption is for Court to decide, not arbitrator); In re Van Dusen, 654 F.3d 838, 844 (9th Cir. 2011) (same). None of the cases that GrubHub cites in support of its argument that arbitrability should be delegated to an arbitrator pertain to the question of whether the applicability of the FAA Section 1 exemption is for a court or an arbitrator to decide.

to compel arbitration.[4]

II. FACTUAL BACKGROUND

This action was filed on June 29, 2018, by delivery drivers who have worked for GrubHub, alleging that they were misclassified as independent contractors rather than employees and that, as a result, they suffered wage violations under federal and state law. (Compl. ¶¶ 1-4, Dkt. 1.)[5] To date, fifty-four drivers from around the country are now a part of this case, either as named plaintiffs or opt-in plaintiffs. The Plaintiffs include individuals who performed delivery work for GrubHub in Illinois, California, Florida, New York, Texas, Pennsylvania, New Jersey, Georgia, Maryland, Arizona, Indiana, Colorado, and Virginia. (Dkt. 4-1.)

GrubHub is a Chicago-based food delivery service that dispatches delivery drivers throughout the country via an on demand dispatch system. (Compl. ¶¶ 13-15, Dkt. 1.) According to its website, "Grubhub is the nation's leading online and mobile food ordering company dedicated to connecting hungry diners with local takeout

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[4] As will be explained below, see infra at 6-7, because the drivers are exempt from the FAA and the arbitration agreement does not provide for the application of state arbitration law in the absence of the FAA, GrubHub cannot enforce its arbitration clause against Plaintiffs. However, even if this Court were to apply state arbitration law (since the FAA does not apply here), the vast majority of states that have addressed this issue have held arbitration agreements containing class action waivers to be illegal and unenforceable under state law. Thus, without the overlay of federal preemption (because the FAA does not apply here), GrubHub cannot enforce arbitration agreements containing class action waivers that violate state law.

[5] The named and opt-in Plaintiffs were previously opt-in plaintiffs in the related case of Souran v. GrubHub Holdings Inc. et al., No. 16-cv-6720 (N.D. Ill.), which contains virtually identical allegations to this case. Plaintiffs withdrew their opt-ins in the Souran case and have filed this case because they had attempted to opt in to the Souran case but submitted their opt-in forms past the deadline. Because GrubHub would not agree to these drivers' opt-in forms being submitted late in the Souran case, Plaintiffs filed this new case as a related case.

restaurants." (Compl. ¶ 16, Dkt. 1.) GrubHub employs delivery drivers who are scheduled and dispatched through a mobile phone application or through GrubHub's website and who deliver food orders from restaurants to customers at their homes or businesses. (Compl. ¶ 15, Dkt. 1.) GrubHub advertises on its website that "Ordering from your favorite website is even easier than eating," and "if you want to order delivery or pickup, this is an easier way for you to do that from a huge variety of restaurants." See Exhibits A and B to Liss-Riordan Decl., attached hereto as Exhibit 4. GrubHub's website also explains that using GrubHub's apps, customers can "[t]rack your order and keep in the know about your delivery with push notification." (Exhibit C to Liss-Riordan Decl.) GrubHub delivery drivers deliver the food orders that GrubHub's customers place through its website and application, and therefore the drivers are at the core of GrubHub's business.

Although GrubHub exercises a high degree of control over the delivery drivers' work, and the drivers perform services directly within the usual course of GrubHub's business (food delivery), GrubHub does not classify its delivery drivers as employees but rather as independent contractors. (Compl. ¶ 17, Dkt. 1.) GrubHub requires its delivery drivers to provide their own vehicles, smartphones, and data plans in order to work for GrubHub. (Compl. ¶¶ 26-32, Dkt. 1; GrubHub Agreement, Dkt. 32-3 at 20.) GrubHub sets the pay for each delivery in its sole discretion, and generally, drivers are paid through a flat fee for each delivery completed plus gratuities added by customers (though GrubHub will at times supplement these payments). (Compl. ¶ 17, Dkt. 1; Exhibit D to Liss-Riordan Decl.) GrubHub tracks drivers' delivery acceptance ratings and delivery completion ratings, and it requires drivers to maintain certain thresholds,

which it sets in its discretion, or drivers risk termination. (Compl. ¶ 22, Dkt. 1; Exhibit E to Liss-Riordan Decl.) GrubHub also communicates with delivery drivers in real time regarding orders, and it communicates directly with customers and follows up with delivery drivers if the customer complains that something was not delivered or that the delivery otherwise failed to meet their expectations. (Compl. ¶ 20, Dkt. 1; Exhibit A to Liss-Riordan Decl.)

The expenses that GrubHub requires its drivers to bear have caused their hourly pay to fall below minimum wage. (Compl. ¶¶ 26-32, Dkt. 1.) In addition, GrubHub delivery drivers have frequently worked more than forty hours per week but have not been paid time-and-a-half for those hours. (Compl. ¶¶ 33-35, Dkt. 1.)

GrubHub generally requires its delivery drivers to sign an independent contractor agreement that includes an arbitration provision. (Dkt. 32-2; Dkt. 32-3; Dkt. 32-4; Dkt. 32-5; Dkt. 32-6; Dkt. 32-7.) The arbitration provision prohibits drivers from bringing class actions. (Dkt. 32-2; Dkt. 32-3; Dkt. 32-4; Dkt. 32-5; Dkt. 32-6; Dkt. 32-7.)

III. ARGUMENT

GrubHub's Motion to Compel Arbitration must be denied because GrubHub delivery drivers are exempt from the Federal Arbitration Act ("FAA") altogether under the "transportation worker" exemption in the statute, 9 U.S.C. § 1. Because the drivers are exempt from the FAA, and because GrubHub's agreement does not provide for any state's arbitration law to govern its agreement in the absence of the FAA, the agreement is unenforceable. See Easterday v. USPack Logistics LLC, Civ. Act. No. 1:15-cv-07559, Order at 21-22, Dkt. 42 (D.N.J. June 29, 2016) (suggesting that where an arbitration clause states that the FAA shall govern, but does not provide for what state's

arbitration law will govern in the event that the FAA is held not to apply, then the arbitration agreement will not be unenforceable) (citing Palcko v. Airborne Express, Inc., 372 F.3d 588, 590-96 (3d Cir. 2004)).[6]

Moreover, even if this Court were to find that state arbitration law were applicable in the absence of the FAA, the vast majority of states that have addressed this issue have held arbitration agreements containing class action waivers to be illegal under state law.[7] Thus, stripped of federal preemption, which would not apply if the FAA does not apply here (which it does not because Plaintiffs fall within the "transportation worker" exemption to the FAA), the vast majority of states' laws do not allow enforcement of arbitration clauses containing class action waivers.[8]

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[6] In Palcko, the Third Circuit found that where the arbitration agreement in question explicitly selected Washington law to govern in the event that the FAA was found to be inapplicable, the arbitration agreement would indeed be enforceable under Washington law. See Palcko, 372 F.3d at 596. The negative implication of Palcko, however, is that where an arbitration agreement explicitly selects the FAA to govern its enforceability but does not select another source of law to govern if the FAA is inapplicable, that agreement cannot be enforced if the FAA does not apply.

[7] See, e.g., Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1, 22-45 (2006); Gentry v. Superior Court, 165 P.3d 556, 560-69 (Cal. 2007); McKenzie Check Advance of Florida, LLC v. Betts, 112 So. 3d 1176 (Fla. 2013); Picardi v. Eighth Judicial Dist. Court of State, ex rel. County of Clark, 127 Nev. 106, 111-14 (2011); Herron v. Century BMW, 387 S.C. 525, 536 (2010); Fiser v. Dell Computer Corp., 144 N.M. 464, 467-71 (2008); Feeney v. Dell Inc., 454 Mass. 192, 198-205 (2009); Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 108 (2008); Scott v. Cingular Wireless, 160 Wash. 2d 843, 853-60 (2007); Muhammad v. County Bank of Rehoboth Beach, Delaware, 189 N.J. 1, 22 (2006); Wisconsin Auto Title Loans, Inc. v. Jones, 290 Wis. 2d 514, 553-54 (2006); Leonard v. Terminix Intern. Co., L.P., 854 So. 2d 529, 539 (Ala. 2002); State ex rel. Dunlap v. Berger, 211 W. Va. 549, 561-64 (2002); Vasquez-Lopez v. Beneficial Oregon, Inc., 210 Or. App. 553, 569-572 (Or. App. Ct. 2007); Schwartz v. Alltel Corp., 2006 WL 2243649, *4-5 (Ohio Ct. App. June 29, 2006); Thibodeau v. Comcast Corp., 912 A.2d 874, 879-86 (Pa. Super. Ct. 2006); Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 30, 309-140 (Mo. App. 2005).

[8] For any states that have not yet addressed this issue, the Court cannot presume that the state (in the absence of federal preemption) would allow arbitration agreements

As noted above (see supra note 3), the applicability of the transportation worker exemption is an issue that must be decided by the Court, not delegated to an arbitrator.[9] See In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011); Oliveira, 857 F.3d at 15. This rule makes eminent sense because the Court's authority to compel arbitration in the first instance arises under the FAA, and if GrubHub drivers are not covered by the FAA at all, then this Court lacks authority to compel Plaintiffs to arbitrate their claims. Id. Thus, this Court must first determine whether drivers are exempt from the FAA.

Section 1 of the FAA exempts from the Act's coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. To qualify for this exemption from the FAA, an individual must (1) work for a business pursuant to a "contract of employment," and (2) be a "transportation worker," who is "engaged in interstate commerce." See Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001)). Here, Plaintiffs and other GrubHub delivery drivers are exempt from the FAA because they are clearly transportation workers, transporting prepared foods and drinks in the flow of interstate commerce, and they perform these services pursuant to a "contract of employment."

1. GrubHub Drivers Perform Services Pursuant to a "Contract of Employment"

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containing class action waivers. Instead, it is apparent that states have generally rejected federal jurisprudence allowing for the enforcement of class action waivers.

[9] GrubHub's contract provides that, in the event that the class action waiver is found to be unenforceable, drivers' claims must proceed before in court rather than in arbitration. (Dkt. 32-3 at p. 12, ¶ 12(b).)

With respect to the first factor, GrubHub drivers qualify for the § 1 transportation worker exemption from the FAA because they have worked for GrubHub pursuant to "contracts of employment." Some courts have interpreted the "contract of employment" language of § 1 broadly and have held that it includes contracts governing working relationships for both employees and independent contractors.[10] Thus, under this reasoning, it is not even necessary for a court to decide (as an initial matter) whether the workers are indeed employees or are instead independent contractors. However, the U.S. Supreme Court will decide next term whether the First Circuit was correct in this approach in Oliveira, where the Court decided that independent contractors worked under "contracts of employment" and thus are exempt from the FAA.

But there is no need for this Court to await the Supreme Court's ruling in Oliveira because the Court can adopt the Ninth Circuit's approach. The Ninth Circuit has determined that, when faced with claims by workers who are classified as independent contractors and who contend that they are subject to the "transportation worker" exemption to the FAA, the Court should make an initial determination as to whether or not they are employees. See Van Dusen v. Swift Transp. Co., 544 F. App'x 724 (9th Cir. 2013).[11]

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[10] See Oliveira, 857 F.3d at 24 ("[A] transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1."); Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc., 325 F. Supp. 2d 1252, 1258 (D. Utah 2004) ("[T]he Court considers the Operating Agreements to determine whether or not they are 'contracts of employment' of a class of workers engaged in interstate commerce within the meaning of the FAA" and "it is not dispositive that Plaintiffs are categorized in the Operating Agreements as employees or independent contractors").

[11] In Swift, following this ruling by the Ninth Circuit, the district court made an initial determination that the class members in that case were indeed employees and thus fell under the transportation worker exemption to the FAA. See Doe v. Swift Transp. Co., 2017 WL 67521, *15 (D. Ariz. Jan. 6, 2017). The defendant appealed that

Thus, following this approach, the Court could make a threshold determination as to whether GrubHub drivers are employees or independent contractors (and thus, whether the § 1 transportation worker exemption applies), following briefing on that issue or a mini bench-trial. See In re Swift Transportation Co. Inc., 830 F.3d 913 (9th Cir. 2016) ("[W]hen the district court sought to resolve the § 1 question through discovery and a trial, it did not contravene our instructions); Guidotti v. Legal Helpers Debt Resolution, LLC, 716 F.3d 764, 776 (3d Cir. 2013) (holding that where facts have been presented that place the agreement to arbitrate in issue, the parties may conduct limited discovery, after which time the moving party should submit a renewed motion to compel to be determined on a summary judgment standard).[12]

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determination, which is now pending at the Ninth Circuit. See Van Dusen v. Swift Transp. Co. Inc., et al., Ninth Cir. Appeal No. 17-15102. That appeal solely addresses whether the district court was correct in that case to decide that the class members there are employees. Because the Ninth Circuit has already determined that such a determination is needed, there is no need for this Court to await the Ninth Circuit's next decision in that long-running case, which would simply address whether the district court reached the right result in making that initial determination in that case.

[12] Given page limitations (and prior to discovery), Plaintiffs do not have sufficient space in this brief to set forth a full record and explanation as to why GrubHub drivers are employees and not independent contractors under the laws of the various states in which they worked. However, summarized very briefly, Plaintiffs submit that discovery will reveal numerous facts that will demonstrate that GrubHub drivers are employees under the various tests. For example, under the "ABC" tests utilized to distinguish employees from independent contractors in California, New Jersey, and Illinois, see Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 958-63 (2018); Hargrove v. Sleepy's LLC, 220 N.J. 289, 305-06 (2015); Novakovic v. Samutin, 354 Ill. App. 3d 660, 668, the fact that the drivers worked in GrubHub's usual course of business, food delivery, will be dispositive in determining that the drivers are employees. Under that test, the alleged employer must prove all three prongs of the test, including Prong B, that the work is performed outside the defendant's usual course of business. GrubHub will not be able to satisfy this prong, as GrubHub drivers clearly perform services within GrubHub's usual course of business (food delivery). See Exhibit A, B, and C to Liss-Riordan Decl. Indeed, one court has already found that GrubHub is in the food delivery business (despite its efforts to deny this obvious fact). Lawson v. GrubHub, Inc., 302 F. Supp. 3d 1071, 1091 (N.D. Cal. 2018); Lawson v. GrubHub, Inc., 2017 WL 2951608, *6 (N.D. Cal. July 10, 2017).

2. GrubHub Drivers Are Transportation Workers Engaged in Interstate Commerce

Further, GrubHub drivers qualify for the transportation worker exemption to the FAA because they are transportation workers engaged in interstate commerce, as the drivers are generally engaged in the flow of goods and services in interstate commerce by delivering goods from restaurants to GrubHub's customers. See International Broth. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (concrete delivery driver was an interstate transportation worker); Seven-Up/RC Bottling Co. of S. Cal. v. Amalgamated Indus. Workers Union, Local 61, NFIU/LIUNA,

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Likewise, other states such as Nevada, New York, Maryland, Florida, Texas, Pennsylvania, Georgia, Arizona, Indiana, Colorado and Virginia use multi-factor balancing tests that emphasize the employer's right to control or are similar to the economic realities test of the Fair Labor Standards Act. See, e.g., Terry v. Sapphire Gentlemen's Club, 130 Nev. 879, 958 (2014) (finding exotic dancers to be employees under Nevada law); Hart v. Rick's Cabaret Intern., Inc., 967 F. Supp. 2d 901, 924-26 (finding exotic dancers to be employees under New York law); Carlson v. FedEx Ground Package Systems, Inc., 787 F.3d 1313, 1318-27 (11th Cir. 2015) (FedEx drivers may be employees under Florida law); Commonwealth, Dep't of Labor & Indus. v. Stuber, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) (construction worker was an employee under Pennsylvania law). Under those tests as well, Plaintiffs expect the evidence will demonstrate that the drivers are GrubHub's employees. While drivers may retain some choice in determining when and where they carry out their work, GrubHub exercises extensive control over its drivers in many ways. For example, GrubHub requires drivers to remain in certain zones while they are working their shifts (which GrubHub refers to as blocks), and GrubHub tracks the drivers' locations via GPS to ensure compliance. (Compl. ¶ 22, Dkt. 1; GrubHub Agreement, Dkt. 33-2 at 4.) GrubHub tracks various metrics regarding its delivery drivers' performance, including their acceptance rating and completion rating, and it utilizes those ratings to terminate drivers that do not meet its standards. (Exhibit E to Liss-Riordan Decl.) The company also sets the pay rates for its drivers in its sole discretion and assigns deliveries to drivers in its sole discretion. (Compl. ¶ 27, Dkt. 1; Exhibit D to Liss-Riordan Decl.) Further, GrubHub does not require any particular skills or prior experience making deliveries; it simply requires that drivers be able to pass a background check, be at least nineteen years old, and have a safe driving record. (GrubHub Agreement, Dkt. 32-3 at 2-3.) GrubHub has no formal education requirements, nor does it require any professional driving experience or prior experience making deliveries. (GrubHub Agreement, Dkt. 32-3 at 2-3.)

183 F. App'x 643, 643–44 (9th Cir. 2006) (unpublished) (drivers delivering sodas were exempt from the FAA pursuant to transportation worker exemption); Christie v. Loomis Armored US Inc., 2011 WL 6152979, *3 (D. Co. Dec. 9, 2011) (currency delivery driver was transportation worker in interstate commerce).

GrubHub may argue that its drivers do not actually cross state lines when making deliveries. However, in order to be "engaged in [interstate] commerce" so as to fall under the FAA §1 transportation worker exemption, it is not necessary for the transportation workers to have physically crossed state lines in order to deliver goods. "[H]ad Congress intended the residual clause of the exemption to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly." Palcko v. Airborne Express, Inc., 372 F.3d 588, 594 (3rd Cir. 2004); see also Christie, 2011 WL 6152979, *3; Gonzales v. Raich, 545 U.S. 1, 33-34 (2005); Wickard v. Filburn, 317 U.S. 111, 124 (1942). Rather, the relevant inquiry is whether the transportation worker is "actually involved within the flow of interstate commerce." Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 836 (8th Cir. 1997); see also Christie, 2011 WL 6152979, at *3 (quoting Siller v. L & F Distributors, Ltd., 109 F.3d 765 765, (5th Cir. 1997) (workers who remain within the boundaries of state are "engaged in interstate commerce" so long as they transport goods "'in the flow of interstate commerce.'")). For instance, in Christie, the court held that a currency delivery driver, who drove exclusively within the boundaries of a single state, was operating in interstate commerce because currency is "a good that is undisputedly in the stream of interstate commerce." 2011 WL 6152979, *3; see also Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (postal worker who did not cross

state lines engaged in interstate commerce because postal workers are "responsible for dozens, if not hundreds, of items of mail moving in interstate commerce on a daily basis.") (internal quotation marks omitted). Here, GrubHub drivers are likewise plainly involved in the flow of interstate commerce because they facilitate the transportation of goods to customers that may have originated across state lines.[13]

GrubHub may also attempt to argue that the prepared meals that its drivers deliver are no longer in the flow of interstate commerce because the interstate journey of raw ingredients that are later transformed into prepared meals ends when those ingredients are delivered as inventory for local restaurants. This argument fails, as a number of courts have recognized that when food products are transported across state lines, the processing and transformation of the raw goods in the state in which they are ultimately delivered do not end their interstate journey. See Dean Milk Co. v. F.T.C., 395 F.2d 696, 714-15 (7th Cir. 1968); Foremost Dairies, Inc. v. F.T.C., 348 F.2d 674, 676-78 (5th Cir. 1965); Glowacki v. Borden, Inc., 420 F. Supp. 348, 351, 353 (N.D. Ill. 1976) (holding that transformation of pasteurized milk to chocolate milk by adding "sugar, chocolate, and an emulsifier" did not transform the milk to such a degree as to end its interstate journey); Scardino Milk Distribs., Inc. v. Wanzer & Sons, Inc., 71 C 693, 1972 WL 498, at *5 (N.D. Ill. Aug. 11, 1972) (holding that transformation

[13] Several courts have also found that "the employee need not actually transport the goods himself for the exemption to apply," demonstrating the kind of broad application that courts have given to the Supreme Court's definition of "transportation worker." See, e.g., Zamora v. Swift Transp. Co., 2008 WL 2369769, *6 (W.D. Tex. June 3, 2008) (terminal manager of large trucking company was exempt because his responsibilities were "critical to the operation of the trucks, the trucking terminal and the trucking company" which were "significant instrumentalities of interstate commerce"); Palcko, 372 F.3d at 590 (field services supervisor who monitored the performance of package delivery drivers was exempt as a transportation worker engaged in interstate commerce).

of milk into "four types of cottage cheese, three types of half & half, vanilla and chocolate ice milk mix and sour cream" did not end the milk's interstate journey).[14] In any event, GrubHub drivers deliver prepared food as well as packaged goods, such as sodas and other products (like chips), that have traveled interstate and have not been altered in any way by the restaurant and thus are indisputably still in the flow of interstate commerce. See Seven-Up/RC Bottling Co. of S. Cal., 183 F. App'x at 643–44 (9th Cir. 2006) (drivers delivering sodas were exempt from the FAA pursuant to Section 1). Moreover, it is not necessary that all good that the workers are delivering are in the flow of interstate commerce. See, e.g., Siller v. L & F Distributors, Ltd., 109 F.3d 765 (5th Cir. 1997) (finding interstate commerce where only "approximately 39% of the truckloads … contained some out-of-state products", noting that "even if the hauls contain only slight amounts of goods traveling in interstate commerce, they will be deemed interstate commerce in its entirety.").[15]

GrubHub drivers like Plaintiffs are clearly "transportation workers" within the

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[14] Though some courts have mused in dicta that pizza delivery drivers may not be covered by the exemption, see Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1289 (11th Cir. 2005), and Veliz v. Cintas Corp., 2004 WL 2452851, at *6-7 (N.D. Cal. Apr. 5, 2004), these cases differ from this case because GrubHub is clearly in the ***delivery business***, while pizza restaurants are in the pizza business, and pizza delivery forms only an incidental, not necessarily core, part of their business.

[15] GrubHub may also argue that it is not a transportation company, but is instead an "ordering platform," connecting customers with independent contractor delivery drivers such that it is not part of the transportation industry and neither are its drivers. As explained previously, one court has already rejected the argument that GrubHub is simply an ordering platform and instead found that it is indeed a food delivery company. See Lawson, 302 F. Supp. 3d at 1090-91 (N.D. Cal. 2018). Furthermore, this argument has been rejected by other courts considering similar arguments by such "gig economy" companies as Uber, see O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1141-45 (deciding that Uber is a transportation company, not merely a technology company as Uber had urged); Cotter v. Lyft, Inc., 60 F.Supp.3d 1067, 1077 (N.D. Cal. 2015) (likewise determining that Lyft is a transportation company). Regardless of the company's attempts to redefine itself, there can be no question that Plaintiffs were transportation workers as they are indisputably delivery drivers.

meaning of Section 1 because they are workers whose primary duty is to physically transport goods, and GrubHub's primary purpose is to transport goods – namely, prepared food orders. See, e.g., Int'l Broth. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (holding truck drivers who delivered goods to be transportation workers); Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005) (stating that individuals who drive delivery trucks for a company in the transportation industry are "indisputably … transportation worker[s]") (setting forth factors to consider in determining whether workers fall under Section 1 exemption). Here, the sole purpose of the drivers' work for GrubHub is to transport goods (i.e. prepared and pre-packaged foods).[16]

IV. CONCLUSION

For the reasons set forth herein, GrubHub's motion should be denied. Plaintiffs are exempt from the FAA under the transportation worker exemption (and state law, stripped of federal preemption, does not allow enforcement of an arbitration clause such as this one containing a class action waiver). If it believes it to be necessary, the Court should allow limited discovery and additional briefing or an evidentiary hearing or mini-trial to make a preliminary determination as to whether GrubHub drivers are employees for the purposes of this exemption.

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[16] GrubHub may cite to Levin v. Caviar, 146 F. Supp. 3d 1146 (N.D. Cal. 2015), in which a district court judge held "gig economy" food delivery drivers not to qualify for the Section 1 transportation worker exemption from the FAA. However, that case settled while on appeal (on a classwide basis), and thus the decision was never reviewed by the Court of Appeals. Plaintiffs submit that Levin was incorrectly decided, as the court erroneously relied on dicta in Hill, 398 F.3d at 1289, and Veliz, 2004 WL 2452851, at *6-7, which are easily distinguishable from this case, as Plaintiffs explained supra in n.14.

Dated: September 20, 2018

Respectfully submitted,

CARMEN WALLACE and BRODERICK BRYANT, on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan_____
Shannon Liss-Riordan,
pro hac vice
Thomas Fowler,
pro hac vice
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, Massachusetts 02116
(617) 994-5800
sliss@llrlaw.com
tfowler@llrlaw.com

James B. Zouras
Ryan Stephan
Stephan Zouras, LLP
205 N. Michigan Avenue, Suite 2560
Chicago, Illinois 60601
312-233-1550
jzouras@stephanzouras.com
rstephan@stephanzouras.com

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, a true and accurate copy of the foregoing Motion was filed via this Court's CM/ECF system.

/s/ Shannon Liss-Riordan___
Shannon Liss-Riordan