UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENDALL HARRIS, individually, and on behalf of others similarly situated,

Plaintiff,

Case No. 2:17-cv-11601-RHC-RSW

vs.

PROCORP, LLC and TIMOTHY SCHULTZ,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STAY PROCEEDINGS FOR FAILURE TO STATE A CLAIM, AND TO COMPEL ARBITRATION AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Kendall Harris, by and through his undersigned counsel, pursuant to LR 7.1(c) of the United States District Court for the Eastern District of Michigan, hereby responds in opposition to Defendant Procorp, LLC's ("Procorp") and Timothy Schultz's ("Schultz") Motion to Dismiss or Stay Proceedings for Failure to State a Claim, and to Compel Arbitration ("Motion") (ECF No. 11).

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I. STATEMENT OF ISSUES PRESENTED

A) Whether a contractual provision prohibiting Plaintiff from litigating his claims under Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq*. on a collective basis is enforceable

Plaintiff's Answer: No

Defendants' Answer: Yes

B) Whether a contractual provision requiring Plaintiff to bring claims under the FLSA within 180-days is enforceable

Plaintiff's Answer: No

Defendants' Answer: Yes

C) Whether the fact that Defendant Timothy Schultz is technically a separate legal entity from Defendant Procorp, LLC makes him immune from personal liability under the FLSA

Plaintiff's Answer: No

Defendants' Answer: Yes

II. STATEMENT OF CONTROLLING AUTHORITY

A) *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 2017 U.S. App. LEXIS 9272, at *31 (6th Cir. 2017)

Holding as a matter of first impression in this Circuit that "an arbitration provision requiring employees covered by the [National Labor Relations Act] individually to arbitrate all employment-related claims is not enforceable" because "[s]uch a provision violates the NLRA's guarantee of the right to collective action and, because it violates the NLRA, falls within the [Federal Arbitration Act]'s saving clause."

B) *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013)

Affirming district court's declaratory ruling that arbitration provision did not authorize class arbitration, based primarily on its finding that the "the clause nowhere mention[ed] it."

C) *Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 607 (6th Cir. 2013)

Holding that the limitations period in employee's agreement with employer was invalid because it "operate[d] as a waiver of her FLSA claim."

D) *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994)

Holding that "a corporate officer with operational control of a corporation's

covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." (quoting *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)).

III. LEGAL ARGUMENT

A) The Arbitration Provision in Procorp's Subcontract Agreement is Unenforceable as a Matter of Law

Defendants argue that "[t]his Court must compel arbitration of the individual claims of Plaintiff, and dismiss the collective action claims." (ECF No. 11, Pg ID 52). The reasons Defendants advance are that Plaintiff's Subcontract Agreement with Procorp is enforceable under the Federal Arbitration Act ("FAA"), that the Agreement is valid under general principles of contract law, and that Plaintiff's claims for unpaid overtime under the FLSA are within the scope of the Agreement. (*Id.* at Pg ID 58-62). Defendants rely on two prior Eastern District of Michigan cases in which Defendant Schultz's other company's successfully enforced arbitration provisions that are allegedly "substantially similar" to the one in Procorp's Subcontract Agreement. (*Id.* at Pg ID 58-62 (citing *Conner v Right Choice Staffing*, Case No. 5:14-cv-12887-JEL-RSW (E.D. Mich. 2014) and *Vincent Thomas and Alan Queen v Right Choice Staffing*, Case No. 4:15- cv-10055 (E.D. Mich. 2015)).

None of Defendants' arguments are sufficient to overcome the Sixth Circuit's holding in *Alt. Entm't, Inc*. that "an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable" because "[s]uch a provision violates the NLRA's guarantee of the right to collective action and, because it violates the NLRA, falls

within the FAA's saving clause." 2017 U.S. App. LEXIS 9272, at *31. Here, Plaintiff is an employee covered by the NLRA, and Procorp's Subcontract Agreement purports to require him to individually arbitrate his employment-related claims. This puts the case squarely within the holding of *Alt. Entm't*.

Defendants' Motion does not address or even cite the Sixth Circuit controlling authority in *Alt. Entm't*. Moreover, Defendants did not advance any argument that could plausibly contend that their arbitration provision is enforceable under *Alt. Entm't*. Therefore, Defendants' request to compel arbitration must be denied.

1. Summary of *Alt. Entm't*

On May 26, 2017, the Sixth Circuit affirmed an order by the National Labor Relations Board finding that an employer violated Section 8(a)(1) of the National Labor Relations Act by, *inter alia*, compelling employees, as a condition of employment, to sign arbitration agreements waiving their right to pursue class or collective actions in all forums, arbitral and judicial. *Alt. Entm't*, 2017 U.S. App. LEXIS 9272, at *13-31.

The Court's decision turned on what was then "a question of first impression in this circuit": "[w]hether federal law permits employers to require individual arbitration of employees' employment-related claims…." *Id.* at *14. As the Court noted, the Seventh and Ninth Circuits have held that "arbitration provisions

mandating individual arbitration of employment-related claims violate the NLRA and fall within the FAA's saving clause," *id.* at *9 (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 985-86 (9th Cir. 2016)), the Fifth and Eighth Circuits have held that "that arbitration provisions mandating individual arbitration of employment-related claims do not violate the NLRA and are enforceable under the FAA," *ibid.* (citing *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) and *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016)), and "[o]n January 13, 2017, the Supreme Court granted writs of certiorari in *Morris*, *Lewis*, and *Murphy Oil* and consolidated the three cases." *Id.* at *14, n.4 (citing 137 S. Ct. 809, 196 L. Ed. 2d 595 (2017)).

As the Sixth Circuit recognized, this issue "implicates two federal statutes, the Federal Arbitration Act and the National Labor Relations Act." *Id.* at *12-13. While the FAA provides that arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, "[t]he FAA does not, however, make arbitration agreements more enforceable than other contracts—'[a]s the 'saving clause' . . . indicates, the purpose of Congress . . . was to make arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* at *13 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 18 L.

Ed. 2d 1270 (1967)) (alterations in original).

With respect to the NLRA, the Court noted that "Section 7 of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*., states that, 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,'" *Id*. at *13 (quoting 29 U.S.C. § 157), and that "Section 8 states that, 'It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.'" *Id.* at *13-14 (quoting 29 U.S.C. § 158). Further "Contractual provisions that 'illegal[ly] restrain[]' employees' rights under the NLRA are unenforceable." *Ibid.* (quoting *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361, 60 S. Ct. 569, 84 L. Ed. 799 (1940)) (alterations in original).

Following the Seventh and Ninth Circuits in *Lewis* and *Morris*, respectively, the *Alt. Entm't* reasoned that:

> The NLRA prohibits mandatory arbitration provisions barring collective or class action suits because they interfere with employees' right to engage in concerted activity, not because they mandate arbitration. These are grounds that would apply to any contract. Because the NLRA makes such a contractual provision illegal on generally applicable grounds—interference with the right to concerted activity—the FAA does not require enforcement. According to the FAA's saving clause, because any contract that attempts to undermine

> employees' right to engage in concerted legal activity is unenforceable, an arbitration provision that attempts to eliminate employees' right to engage in concerted legal activity is unenforceable. Paying due respect to the text of the FAA, including its saving clause, makes clear that the NLRA and the FAA are compatible.

Id. at *18.

The Court further concluded "the NLRA is unambiguous and that the statute itself makes clear that the right to concerted activity is a substantive right," and that even "if the NLRA is ambiguous about whether the right to concerted legal activity is a substantive right, at the very least the NLRB's determination that the right is substantive is a permissible construction of the NLRA entitled to *Chevron* deference. *Id.* at *22 (citing *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2012 WL 36274, at *6 (Jan. 3, 2012) (holding that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial") and *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Finally, even if the right to concerted legal activity were *not* substantive, the Court found, it would *still* be the case that the NLRA prohibits enforcement of individual-arbitration provisions. *See id.* at *30 ("§ 8 makes it illegal to force workers, as a condition of employment, to give up the right to concerted legal action, whether that right is substantive or procedural.").

Alt. Entm't persuasively and definitively addressed all of the key authorities

on which employers typically rely in seeking to enforce arbitration agreements. The Court criticized the approach taken by the Fifth and Eighth Circuits, finding that it "started with the wrong question" by "asking at the outset whether 'the policy behind the NLRA trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements,'" rather than "asking whether the statutes are compatible," *id.* at *15-16 (quoting *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 358 (5th Cir. 2013), and further criticized these Circuits' reliance on the premise that "'[t]he use of [Rule 23] class action procedures . . . is not a substantive right'" which the *Alt. Entm't* found to be "correct, but irrelevant." *Id.* at *18. The Court also addressed three Supreme Court cases—*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)—and concluded that "[n]one of these cases, nor any other Supreme Court case, compels the conclusion that it is lawful to forbid employees from pursuing collective legal action regarding their employment-related claims." *Alt. Entm't*, 2017 U.S. App. LEXIS 9272, at *23-29.

Thus, *Alt. Entm't* is eminently applicable here and binds the Court to find that the arbitration provision in Procorp's Subcontract Agreement is unenforceable as a matter of law.

2. Application of *Alt. Entm't* to This Case

Here, Plaintiff brings this action for unpaid overtime pay pursuant to Section 16(b) of the FLSA, which provides:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

In addition to Plaintiff Harris, six (6) additional former Procorp employees have filed written consent forms. (ECF Nos. 2, 10).

"The class-based litigation format authorized by 29 U.S.C. § 216(b), labeled a collective action, 'serves an important remedial purpose' by allowing 'a plaintiff who has suffered only small monetary harm [to] join a larger pool of similarly situated plaintiffs' in order to reduce individual litigation costs and employ judicial resources efficiently." *Gaffers v. Kelly Servs*., 203 F. Supp. 3d 829, 843 (E.D. Mich. Aug. 24, 2016) (quoting *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 586 (6th Cir. 2009)). There are only two statutory requirements for maintaining an FLSA collective action: "1) the plaintiffs must actually be 'similarly situated,' and 2) all plaintiffs must signal in writing their affirmative consent to participate in the

action." *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006).

i) FLSA Collective Actions are "Concerted Activity" Under the NLRA as Applied in *Alt. Entm't*

While *Alt. Entm't* did not involve an FLSA collective action (but rather, an NLRB proceeding), this in no way limits the applicability of *Alt. Entm't* to this case. *Alt. Entm't* based its analysis on the NLRA's broad definition of "concerted activity" which the Court noted "includes 'resort to administrative and judicial forums,'" and is not limited "to situations in which … fellow employees combine with one another in any particular way.'" *Alt. Entm't*, 2017 U.S. App. LEXIS 9272, at *17 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978) and *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984)). The Court further noted that prohibiting employers from obtaining waivers of employees rights to engage in concerted activity serves to "'equalize the bargaining power of the employee with that of his employer by allowing employees to band together,'" *Alt. Entm't*, 2017 U.S. App. LEXIS 9272, at *17 (quoting *City Disposal*, 465 U.S. at 835), a rationale that is fully constant with the underlying remedial goals of the FLSA. *See Gaffers*, 203 F. Supp. 3d at 841 (relying on *Lewis* to deny a motion to compel arbitration in an FLSA collective action based in part on the reasoning that "the employer that absconds from collective litigation of [FLSA] claims secures for itself the same unfair competitive advantage that it would by refusing to pay at the required rates

in the first instance") (Lawson, J.).

Indeed, FLSA collective actions are perhaps the *most* common procedural posture in which courts have found individual arbitration provisions unenforceable under the NLRA. *See e.g. Morris*, 834 F.3d 975 (finding arbitration provision unenforceable under the NLRA and therefore reversing district court's order dismissing FLSA collective action and compelling individual arbitration); *Lewis*, 823 F.3d 1147 (finding arbitration provision unenforceable under the NLRA and therefore affirming district court's denial of employer's motion to dismiss FLSA collective action and compel individual arbitration); *Gaffers*, 203 F. Supp. 3d at 835-842 (finding arbitration provision unenforceable based on its pre-*Alt. Entm't* prediction that the Sixth Circuit would agree with *Lewis*, and therefore denying employer's motion to dismiss FLSA collective action and compel individual arbitration); *Davis v. Vanguard Home Care, LLC*, 2016 U.S. Dist. LEXIS 161647, *5-12, 2016 WL 6877731 (N.D. Ill. Nov. 22, 2016) (finding arbitration provision unenforceable pursuant to *Lewis* and therefore denying employer's motion to dismiss FLSA collective action and compel individual arbitration); *Whitworth v. SolarCity Corp.*, 2016 U.S. Dist. LEXIS 158903, *5-10 (N.D. Cal. Nov. 16, 2016) (finding arbitration provision unenforceable pursuant to *Morris* and therefore denying employer's motion to dismiss FLSA collective action and compel individual arbitration); *Curtis v. Contract Mgmt. Servs.*, 2016 U.S. Dist. LEXIS

134129, *7-12 (D. Me. Sept. 29, 2016) (finding arbitration provision unenforceable under the NLRA and therefore denying employer's motion to dismiss FLSA collective action and compel individual arbitration).

The fact that *Morris* and *Lewis* both arose from FLSA collective actions is particularly significant given that *Alt. Entm't* fully embraced and followed the reasoning of both cases. Given that "no NLRB charge was first brought in *Lewis* and *Morris*," *Schnaudt v. Johncol, Inc*., 2016 U.S. Dist. LEXIS 132321, *30 (S.D. Ohio Sept. 27, 2016), it is logical to infer that had the *Alt. Entm't* Court had any reservations about the applicability of its holding outside the NLRB context, it would qualified its acceptance of these cases. But there is not so much as a footnote in *Alt. Entm't* indicating that its holding is only applicable in NLRB proceedings, or that the Seventh or Ninth Circuits were incorrect in applying that holding in FLSA collective actions. To the extent Defendants attempt to argue otherwise, their arguments should be rejected.

ii) Plaintiff Has Sufficiently Alleged that he and Other Drivers and Porters are Employees for Purposes of the NLRA

The NLRA provisions referenced in *Alt. Entm't* apply to "employees." 29 U.S.C. §§ 157, 158. Plaintiff's Complaint alleges that he and other drivers and porters were in fact employees of Procorp, but were misclassified as independent contractors. (ECF No. 1, at ¶¶ 43-66). In ruling on motions to compel arbitration similarly involving disputes over employment status, courts have looked to the

pleadings and assessed whether the plaintiffs have plausibly alleged that they were employees of the defendant. *See Curtis*, 2016 U.S. Dist. LEXIS 134129, *20 ("Because the Complaint asserts that CMS acted as a joint employer of the Plaintiffs, I assume for the sake of this motion that the employer/employee relationship exists.") (internal citations omitted); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 303, 2016 U.S. Dist. LEXIS 104921, *38-40 (D. Mass. Aug. 9, 2016) ("The Court will assume that Bekele is an employee for purposes of this motion.").

Here, Plaintiff's Complaint provides detailed, specific allegations supporting his claim that he and other Procorp drivers and porters were employees. (ECF No. 1, at ¶¶ 43-66). While Plaintiff's Complaint relates these facts to the test for employment status under the FLSA, *see Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015), these same facts show that Plaintiff and other Procorp drivers and porters were employees under the applicable NLRA standard, given that "'[t]he substantive differences between the two tests are minimal.'" *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 352, (6th Cir. 2011) (quoting *Shah v. Deaconess Hosp*., 355 F.3d 496, 499 (6th Cir. 2004)).

Accordingly, for purposes of the instant Motion, the Court should find that Plaintiff is an "employee" and thus covered by the NLRA, as applied in *Alt. Entm't*.

iii) The Arbitration Provision in Procorp's Subcontract Agreement Purports to Require Plaintiff to Litigate his FLSA Claims on an Individual Basis

The arbitration provision in Procorp's Subcontract Agreement with Plaintiff provides:

> Any and all disputes arising out of this Subcontract between Contractor and Subcontractor shall be resolved by binding arbitration. In doing so, the parties expressly waive their right to jury trial if any, on these issues and further agree that the award of the arbitrator shall be final and binding upon them as though rendered by a court and shall be enforceable in any court having jurisdiction over the same.

(ECF No. 11-3).

The effect of this provision that Plaintiff must litigate his FLSA claims against Procorp on an individual basis only. Defendants seem to agree, as their position is that "[t]his Court must compel arbitration of the *individual* claims of Plaintiff, and dismiss the collective action claims because Defendants cannot be compelled to class arbitration." (ECF No. 11, Pg ID 52). (emphasis added).

Even though the provision itself does not expressly require "individual" arbitration or prohibit collective proceedings, the court is bound under another Sixth Circuit precedent—*Reed Elsevier, Inc. v. Crockett*—to construe the provision as if it did contain such language. 734 F.3d at 599-600.

In *Reed Elsevier*, the Court affirmed a district court's declaratory ruling that arbitration provision did not authorize class arbitration, based primarily on its

finding that the "the clause nowhere mention[ed] it." *Id.* at 599. As the Court explained:

> The Supreme Court has made clear that "[a]n implicit agreement to authorize class-action arbitration" should not be inferred "solely from the fact of the parties' agreement to arbitrate." … That, at bottom, is the inference that Crockett asks us to make here. The agreement in this case does not provide for classwide arbitration.

Ibid. (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010)) (alterations in original).

Reed Elsevier thus stands for the proposition that where (as here) an agreement is silent as to whether it requires arbitration to be conducted on an individual basis only, the court must infer that it does.

Several courts applying the same holding as the *Alt. Entm't* have found arbitration provisions to be unenforceable despite not expressly requiring "individual" or prohibiting "collective" or "class" litigation. *Gaffers*, 203 F. Supp. 3d at 842 ("If the agreement explicitly permitted collective arbitration, then the Court would be compelled to weigh carefully the federal policy interests in favor of and against compelling the parties to honor the agreement to arbitrate wage disputes. But that is not the agreement before the Court, and the Court may not construe it to allow collective arbitration in the absence of express consent to that form of action."); *Rivera v. Saul Chevrolet, Inc.*, 2017 U.S. Dist. LEXIS 70960, *14 (N.D. Cal. May 9, 2017) (noting that "courts in this district have consistently

held that concerted action waivers in arbitration agreements that are found unenforceable under *Morris* cannot be severed from the Arbitration Agreement because the presence of the concerted action waiver shows a lack of consent to compelled arbitration of concerted legal claims such as collective or class causes of action" and collecting cases).

Thus, the fact that Procorp's Subcontract Agreement does not expressly require "individual" arbitration or prohibit collective proceedings in no way removes it from the scope of *Alt. Entm't*.

B) The "Limited Time" Provision in Procorp's Subcontract Agreement is Unenforceable as a Matter of Law

The FLSA provides for a two-year statute of limitations, extended to three years if the violation is willful. 29 U.S.C. § 255. It is established in the Sixth Circuit that provisions that attempt to shorten the statute of limitations for FLSA actions are invalid. *See Boaz v. FedEx Customer Info. Servs.*, 725 F.3d 603, 605 (6th Cir. 2013) (ruling that an employment agreement's six-month limitations was an impermissible "waiver of [plaintiff's] claims under the FLSA"); *Pruiett v. W. End Rests., LLC*, No. 3:11-00747, 2011 U.S. Dist. LEXIS 131369, at *16-17 (M.D. Tenn. Nov.14, 2011) ("Plaintiffs' substantive right to full compensation under the FLSA may not be bargained away. Accordingly, the [one year] contractual limitations provision is unenforceable as to FLSA claims."); *Wineman v. Durkee Lakes Hunting & Fishing Club, Inc.*, 352 F. Supp. 2d 815, 823 (E.D. Mich. 2005)

(Lawson, J.) ("[T]his Court cannot enforce the [six month] period of limitations with respect to the FLSA claims in this case because it violates public policy").

Here, Defendants' Subcontract Agreement brazen attempts to curtail employee rights by giving Plaintiff a mere 180 days to commence his claims before they are extinguished:

> Contract agrees that any claims arising out of a dispute by Contractors regarding this agreement may only be brought if it is commenced within 180 days following the incident giving rise to such dispute and Contractor hereby waives all other statutes of limitations to the contrary. Contractor's failure to commence such proceedings within 180 days shall result in the automatic release and waiver of any rights Contractor may have had to prosecute such claims.

(ECF No. 11-3, at 5 ¶ 13)

Pursuant to *Boaz*, the Court should rule that this provision is invalid as a matter of law.

C) Plaintiff's Complaint Alleges a Plausible Claim for Individual FLSA Liability Against Defendant Timothy Schultz

Defendants argue that Plaintiff's claims against individual Defendant Schultz should be dismissed because "Schultz never personally hired Plaintiff, and Plaintiff did not work for Schultz individually." Doc. 16, at 19. Defendants misstate the applicable legal standard, and their argument should be rejected as meritless.

To survive a motion to dismiss, "a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 689 (2009) (internal citation omitted).

It is well-established in the Sixth Circuit that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Fegley v. Higgins*, 19 F.3d 1126, 1131 (6th Cir. 1994) (quoting *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991)); *see also Perkins v. S & E Flag Cars, LLC*, 2017 U.S. Dist. LEXIS 41592, at *5 (S.D. Ohio Mar. 22, 2017) ("Given that the FLSA . . . hold certain individuals directly liable as employers . . . Plaintiffs have no need to pursue the [individual defendant's] liability indirectly through an alter ego or veil piercing theory").

Plaintiff has alleged that Defendant Schultz is the president and owner of Procorp, LLC, and maintains high levels of control over its operations. (ECF No. 1, at ¶¶ 16-21). The plaintiffs in *Queen v. Right Choice Staffing Group, LLC*, cited in Defendants' Motion, made similar allegations against Defendant Schultz in that lawsuit, which the court found to be sufficient to withstand dismissal under Rule 12(b)(6). 2015 U.S. Dist. LEXIS 87073, at *11. Here too, Plaintiff has sufficiently stated a claim against Schultz, specifically, that he is a corporate officer with operational control of Procorp, LLC and is therefore jointly and severally liable for damages. The Court should therefore reject Defendant's request to dismiss

Plaintiff's claims against Schultz.

IV. CONCLUSION

Defendants' Motion completely fails to address the Sixth Circuit's controlling decision in *Alternative Entertainment*. Defendants instead address a set of alternative facts, in which arbitration clauses are still enforceable and in which cases like *Connor* and *Queen* are still good law. *Alt. Entm't* makes clear that arbitration provisions that prohibit collective actions such as Defendants' are unenforceable. For that reason, and for the other reasons stated above, Defendants' Motion should be denied in its entirety.

Dated: July 7, 2017

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Certificate of Service

I certify that on July 7, 2017, I electronically filed the forgoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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