IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

PETER NYACHIRA,	)	
	)	
Plaintiff,	)	
v.	)	No. 21-03211-CV-S-BP
	)	
NEW PRIME, INC.,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

Plaintiff filed this suit asserting that he was not paid the minimum wage required by federal and state law in violation of the Fair Labor Standards Act ("the FLSA") and Missouri's Minimum Wage Law ("the MMWL"); the Complaint also asserts a claim for unjust enrichment. The Complaint reflects Plaintiff's intent to seek certification of a collective action under the FLSA and a class action for the state claims.

Defendant has filed a Motion to Compel Arbitration pursuant to the Missouri Uniform Arbitration Act, ("the MUAA") and not the Federal Arbitration Act, ("the FAA"). After the motion was fully briefed the Court solicited supplemental briefing to, among other things, obtain clarification of Defendant's argument that the parties' agreements constituted a single contract. (Doc. 24.) Thereafter, the Court directed the parties to supplement the record with factual matters regarding the process whereby the various documents were signed. (Doc. 45.) The Court has considered all the materials submitted by the parties and now concludes that the Motion to Compel Arbitration, (Doc. 6), should be **DENIED**.

I. BACKGROUND

Defendant is a trucking company, and Plaintiff worked for Defendant as a truck driver from approximately October 2020 to January 2021. (Doc. 1, ¶¶ 6, 19.)[1] Plaintiff's period of employment included (or was preceded by) his participation in a training program provided by Defendant but paid for by Plaintiff.

Prior to or as part of his participation in the training program, Plaintiff was required to complete a series of approximately fifty "modules" or "tasks" on a website hosted by a company called Tenstreet. (Doc. 62, ¶ 2; Doc. 62-2; Doc. 62-3.) Some of these modules consisted of forms to be completed, others consisted of videos that he was required to watch, and others appear to have simply supplied information about Defendant or about being a truck driver. Two of the modules are at issue here. The first is one entitled "Form – Arbitration Clause" and the second is entitled "Form – Contract PSD." The Arbitration Clause is one of the first ten or eleven modules and the Contract is one of the last modules. (Doc. 62, ¶¶ 3-4.) The modules can be completed in any order, (*e.g.*, Doc. 62, p. 24; Doc. 62-15, ¶ 5),[2] but as stated the Arbitration Clause appears far earlier on the list of approximately fifty modules than does the Contract.

When an applicant clicks on the Arbitration Clause in the list of modules, he is taken to a screen that displays the Arbitration Clause. (Doc. 62-4.) The first two paragraphs discuss the arbitration requirement and state in part that "[a]ny disputes arising under . . . out of or relating to this agreement . . . and any disputes arising from the relationship created by the agreement . . .

[1] The Court acknowledges the parties' disagreement as to whether Plaintiff should be referred to as a driver, an employee, or a trainee. (Doc. 62, p. 4 n.2.) The Court's choice of terms is simply for convenience and should not be construed as a finding on this point.

[2] Page numbers are those generated by the Court's CM/ECF system.

shall be fully and exclusively resolved by arbitration . . . ."[3] The third paragraph is entitled "Notice of Opt-Out" and states as follows:

> You are permitted to opt out of the arbitration clause contained in this paragraph by submitting to [Defendant] written notice of your opt out decision within one year of your signature date. Though any communicated intention to opt out of arbitration will be honored by [Defendant], provided for your convenience on the next page is an opt out notice template that may be used to communicate your opt out notice to [Defendant] by either physical mail or e-mail.

The template or sample Opt-Out Form does not appear on the screen when the Arbitration Clause is accessed; an applicant would need to scroll down the page to see the sample Opt-Out Form. (Doc. 62, ¶ 7.)

The Arbitration Clause contains two boxes for initials, one above the two paragraphs discussing the arbitration provision and one next to section entitled "Notice of Opt-Out." There is also a signature line below the opt-out provision and a space for the date; however, none of these spaces can be completed on this screen. Instead, the applicant must click a box at the top of the form marked "Fill out Form," at which point the applicant is taken to an entirely different screen. (Doc. 62, ¶¶ 8-9.) The top of this screen, (Doc. 62-6), has a bar at the top stating "Arbitration Clause" but none of the terms of the Arbitration Clause are set forth. Below the bar there are two blanks for initials; the first one directs the applicant to "Initial here that you understand the terms of the Arbitration Agreement" and the second directs the applicant to "Initial here that you acknowledge you have the ability to opt out and the steps necessary to do so." Below these spaces is a space for the date (which is inserted automatically by the program); below the date is a space for the applicant to sign their name using either their finger or the mouse. The legend above the signature block states: "By signing below, I agree to use an electronic signature and acknowledge that an electronic signature is as legally binding as an ink

[3] All words in the Arbitration Clause are in all capital letters; the Court will not utilize all capital letters.

signature." When finished with this form, the applicant is directed to click "Save." The Save button will not operate if there is no signature, although it will operate if one or both boxes for initials are empty. (Doc. 62, ¶ 15.) Once the Save button is successfully clicked, the applicant is taken to a screen that looks like the original/uncompleted Arbitration Clause. (Doc. 62-7.) The top of the screen states "Here is a preview of the pdf we generated based on your answers." The signature inserted on the prior screen has been inserted at the bottom of the page (below the Notice of Opt-Out) and the date has been inserted as well. Any initials that the applicant supplied on the prior screen are transported to the appropriate boxes on this page. In Plaintiff's case, the Arbitration Clause has his initials in the first box but not the second. (Doc. 7-2, p. 9.)

From here, the applicant may click one of three links: Back, Download/Print Form, or Finish. Going "Back" returns the applicant to the screen that called for his signature. There is a factual dispute as to whether the applicant could actually print the form, but Defendant contends the issue is "irrelevant," (Doc. 62, p. 22), and the Court agrees. Once the applicant clicks the "Finish" button on this page, he is taken to a screen stating "Task Completed. Thanks. You have finished this task. Click the button below to check for any new tasks." (Doc. 62, ¶ 19.) Doing so eventually leads the applicant back to the list of modules and the Arbitration Clause module is no longer be accessible. (Doc. 62, ¶¶ 20-21.)

Completion of the Contract is accomplished in a similar manner. After clicking on the appropriate module, the applicant is taken to a page containing part of the first page of the Contract. (Doc. 62-8.) The applicant could, but is not required to, scroll down to see the remainder of the first page and the second page before proceeding further. (Doc. 62, ¶ 29.) And while there are blank spaces on the Contract, none of them are fillable on this screen. Instead, as with the Arbitration Clause, the applicant must click on a box marked "Fill out Form" to be

brought to a new screen. That screen, (Doc. 62-9), contains a bar at the top identifying it as "Contract PSD" but none of the Contract's terms are on this page. There are blanks for the applicant to insert personal information (such as name, social security number, and address) and a blank at the bottom for the applicant's signature. Above the signature blank is the following statement: "By signing below, I agree to use an electronic signature and acknowledge that an electronic signature is as legally binding as an ink signature." At the bottom of the page is a box marked "Save," but the box cannot be activated if the required information (e.g., name, social security number, address, and signature) are not provided. (Doc. 62, ¶¶ 34-36.) Once the information is saved, the applicant is taken to a screen that displays the Contract with the information supplied by the Applicant inserted in the appropriate spaces. As before, the bottom portion of the first page and the second page do not appear on the screen and there is no requirement that the applicant scroll to the bottom. (Doc. 62, ¶¶ 37, 39.) The applicant has the same three options that were presented with the Arbitration Agreement: Back, Download/Print Form, or Finish.

Plaintiff completed the modules on October 5, 2020. He filed this suit on August 12, 2021, (Doc. 1), and Defendant waived service on August 22, 2021. (Doc. 3.)

II. DISCUSSION

As stated earlier, Defendant's Motion to Compel Arbitration relies on the MUAA and not the FAA.[4] Defendant asks the Court to enforce the Arbitration Clause by compelling Plaintiff to arbitrate his claims. Plaintiff opposes the motion, contending that (1) no agreement to arbitrate

[4] The parties seem to agree that the Arbitration Clause is not governed by the FAA because the FAA does not apply to contracts of employment for a class of workers engaged in interstate commerce. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538-44 (2019) (discussing 9 U.S.C. § 1). Many of the cases cited by the parties involve the FAA, but the parties have not addressed the extent to which Missouri courts rely on the FAA to interpret the MUAA. Nonetheless, the Court has followed suit and occasionally cited cases involving the FAA, but (1) only to the extent that those cases do not conflict with Missouri decisions interpreting the MUAA and (2) primarily when there are no Missouri cases on point.

complying with the MUAA was ever formed, (2) no agreement to arbitrate currently exists because even if it was formed it was terminated when Plaintiff opted out of it by filing this lawsuit, and (3) if an agreement was formed, it should not be enforced because it is unconscionable. The Court agrees with Plaintiff's first two arguments, making it unnecessary to consider the third.[5]

A. Contract Formation and Compliance with the MUAA

1 Issues Related to Assent

The MUAA declares that any "provision in a written contract . . . to submit to arbitration any controversy thereafter arising between the parties" is valid except "upon such grounds as exist at law in equity for the revocation of any contract." MO. REV. STAT. § 435.350. In deciding whether to grant Defendant's Motion to Compel Arbitration, the Court must first determine if an agreement described in § 435.350 exists. *Id*. § 435.355.1; *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 437, 436 (Mo. 2020) (en banc). One of the requirements for forming such an agreement – as is the case for all contracts – is the requirement that there be offer and acceptance, which itself requires mutual agreement or assent. *E.g., Theroff*, 591 S.W.3d at 437, 439; *Johnson v. Menard, Inc.*, 632 S.W.3d 791, 796 (Mo. Ct. App. 2021); *EM Med., LLC v. Simwave LLC*, 626 S.W.3d 899, 907 (Mo. Ct. App. 2021). If both parties do not assent there can be no contract. *E.g., Theroff*, 591 S.W.3d at 438-39. Whether a party assented and thereby created a meeting of the minds is a question of fact for the Court to resolve. *E.g., Theroff*, 591 S.W.3d at 436; *Hall v. Fox*, 426 S.W.3d 23, 25 (Mo. Ct. App. 2014); *Baier v. Darden Restaurants*, 420 S.W.3d 733, 739-40 (Mo. Ct. App. 2014). "The party seeking to compel arbitration has the burden of proving that there existed an agreement to arbitrate."

[5] The Court has not discussed all the arguments Plaintiff has raised regarding contract formation, and this Order should not be construed as expressing a view on matters not specifically addressed herein.

Duncan v. TitleMax of Missouri, Inc., 607 S.W.3d 243, 249 (Mo. Ct. App. 2020); *see also Jimenez v. Cintas Corp.*, 475 S.W.2d 679, 683 (Mo. Ct. App. 2015).

Signatures are a common method of indicating assent, and Plaintiff's signature appears on the Arbitration Clause – but this does not automatically dictate a finding in Defendant's favor. Plaintiff did not put his signature on the Arbitration Clause; the computerized module took it from another location and put it on the Arbitration Clause. And the place where Plaintiff applied his signature did not ask him if he assented to the Arbitration Clause or even tell him that his signature was being placed on the Arbitration Clause; Plaintiff was only told that by signing in that separate location he was acknowledging that his electronic signature was legally binding, but his acknowledgment of this fact did not mean that he assented to the Arbitration Clause. And, because Plaintiff may not have even seen much less signed the Contract at the time he reviewed the Arbitration Clause, there is no basis for concluding that anything he did with respect to the Arbitration Clause (which does not reference the Contract) demonstrated that he agreed to arbitrate disputes arising from the Contract.

Moreover, while Defendant has insisted that the Arbitration Clause and the Contract form a single agreement, the facts set forth above suggest that the documents are completely distinct and that the Arbitration Clause is distinct from the Contract. This further makes the existence of an agreement to arbitrate disputes arising from the Contract less clear because the Arbitration Clause (1) specifies that disputes relating to "this agreement" (i.e., the Arbitration Clause) will be arbitrated, (2) makes no reference to the Contract, and (3) was necessarily signed at a different time than (and possibly before) the Contract.[6]

[6] Defendant has relied exclusively on the Arbitration Agreement and has not relied on any language in the Contract referring to arbitration to support its Motion to Compel, possibly because the Contract does not comply with the MUAA's notice requirements (which are discussed in Part II.A.2).

Moreover, when Plaintiff's signature "appeared" on the Arbitration Clause it appeared immediately below the Notice of Opt-Out. This further clouds the issue: the applicant is not told why he is affixing his signature and is not specifically told to sign the Arbitration Clause. Then, when his signature appears on the Arbitration Clause (having been imported there from a completely different page that does not ask if the applicant assents to the Arbitration Clause), it appears immediately below a provision stating that the applicant can opt out of the Arbitration Clause. At that point it is not clear what if anything the applicant is agreeing to, so the Court is not persuaded that Defendant has carried its burden of establishing a meeting of the minds.

2. Issues Related to the MUAA's Requirements

Regardless, and independently, the Court concludes that the Arbitration Clause is not a valid contract under the MUAA because it does not comply with § 435.460 of the Revised Missouri Statutes.[7] Section 435.460 states that a contract governed by the MUAA "shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters" a statement that "read[s] substantially" to say: "This contract contains a binding arbitration provision which may be enforced by the parties." Defendant correctly observes that § 435.460 is intended to ensure the parties are notified that the contract they are signing contains an arbitration provision, *see, e.g., TXR, LLC v. Stricker*, 440 S.W.3d 541, 544 (Mo. Ct. App. 2014), but the statute's purpose plainly was not accomplished here. Defendant contends § 435.460 was satisfied based on language at the top of the Arbitration Clause, above the first substantive paragraph. (Doc. 21, p. 10.) The language at the top of the Arbitration Clause is "above" the signature line in a general sense, but it is not near it. Meanwhile, immediately above the blank

[7] This provision of the MUAA is preempted and inapplicable if the arbitration agreement is governed by the FAA. *E.g., Bunge Corp. v. Perryville Feed & Produce*, 685 S.W.2d 837, 839 (Mo. 1985) (en banc). But as stated earlier, the parties seem to agree that the FAA does not apply in this case (or at least, Defendant has not argued that it does, nor has Defendant disputed that it must comply with the MUAA).

for the signature is language advising that the applicant can opt out, making it unclear what the applicant is assenting to. Compounding the confusion is the fact that applicants do not even place their signatures on the Arbitration Clause; they place their signatures on a completely different form that does not contain any language complying with § 435.460.[8]

For these reasons, the Court concludes that the Arbitration Clause is not a valid contract under the MUAA. Therefore, the Court cannot compel Plaintiff to arbitrate his claims.

B. Opt-Out

Plaintiff contends that even if he agreed to arbitrate, he opted out of the Arbitration Clause by filing this lawsuit. Defendant argues that (1) this is an issue for the arbitrator to decide and (2) filing a lawsuit cannot validly convey Plaintiff's desire to opt out. The Court disagrees with Defendant on both counts.

Defendant points to the Arbitration Clause's provision that the arbitrator shall decide jurisdictional issues, and simply declares (without explanation) that whether the arbitration agreement was terminated is a question of arbitrability that the arbitrator must decide. (Doc. 7, p. 16.) The Court disagrees. First, in this context questions relating to "jurisdiction" or arbitrability are those challenging whether a particular dispute is within the arbitration agreement's ambit and requires interpretation of the agreement. *E.g., AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986) ("[T]he question of arbitrability [asks] whether a[n] . . . agreement creates a duty for the parties to arbitrate the particular grievance . . . ."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 877 (8th Cir. 2009) (describing

[8] Defendant also argues that Plaintiff had actual notice of the arbitration provision, which it contends is sufficient to satisfy the MUAA's notice provision. (Doc. 21, pp. 10-11.) To support its legal argument Defendant relies on a decision of the Missouri Court of Appeals, but the court's discussion of this issue was dicta because the FAA governed the contract so § 435.460's notice requirement did not apply. *Hamilton Metals, Inc. v. Blue Valley Metal Prods Co.*, 763 S.W.2d 225, 227 (Mo. Ct. App. 1988). No other Missouri case has held that defective notice can be cured with proof of the signator's knowledge. Regardless, Defendant takes Plaintiff's affidavit out of context when it interprets it as an admission that Plaintiff knew what he was signing. (*See* Doc. 13-2, ¶ 7.)

arbitrability as in inquiry into whether a particular dispute falls within the agreement to arbitrate); *St. Paul Fire & Marine Ins. Co. v. Courtney Enterprises, Inc.*, 270 F.3d 621, 624 (8th Cir. 2001) (same). In contrast, whether a contract requiring arbitration currently exists at all is not a question of arbitrability, and the question of arbitrability (and who should answer questions of arbitrability) arises only if the Court first determines that there is an agreement to arbitrate. If the facts demonstrate (1) that a contract was never formed or (2) the parties canceled any agreement that existed (for example, by one party properly opting out of the agreement), no contract to arbitration presently exists and thus there no basis for the Court to compel arbitration.[9]

The Court finds in this case that if a contract to arbitrate ever existed, the agreement was canceled by Plaintiff pursuant to the terms provided in that contract. The Arbitration Clause requires that any attempt to opt out be in writing and delivered to Defendant within a year of Plaintiff's signature on the Arbitration Agreement. The lawsuit was in writing and was served on Defendant within one year of October 5, 2020. The Arbitration Clause specifically states that a particular form or particular language are not required and that it is sufficient if the writing "communicat[es] [an] intention to opt out of arbitration." Instituting a lawsuit in court communicates an intent to institute judicial proceedings and to not institute arbitral proceedings.

Other than simply stating that the lawsuit is insufficient, Defendant does not explain how the opt-out provision was not satisfied. Defendant contends that the written notice had to be

[9] Defendant finds support in the Missouri Supreme Court's decision in *Theroff*. There, the court noted a distinction between whether an agreement exists and whether an existing agreement is valid and held that questions relating to the existence of an agreement are always for the court to decide. 591 S.W.3d at 436-38 & n.6. But even if questions about validity have been delegated to the arbitrator, the Court is not holding that a contract was formed but is legally invalid; it is holding that no agreement to arbitrate presently exists because Plaintiff opted out. The Court further notes that Defendant cites no cases holding that whether an opt out provision was satisfied is a question of arbitrability, and in the one case cited by Defendant the court determined that it was the court's role, as part of its duty to determine if the parties agreed to arbitrate, to decide whether the plaintiff's attempt to opt out was effective.

delivered "*before* filing a lawsuit," (Doc. 7, p. 16 (emphasis in original)), but this requirement does not appear in the Arbitration Clause. The Arbitration Clause does not, for instance, state a party must opt out before filing a lawsuit or otherwise indicate that it constitutes a condition precedent to filing suit. Defendant also points to the unpublished decision in *Hanson v. TMX Fin., LLC*, 2019 WL 1261100 (D. Nev. Mar. 19, 2019), but that case is easily distinguishable. There, the opt-out provision required that the notice contain specified language and be mailed to a specific address. *Hanson*, 2019 WL 1261100, at *2. The plaintiff in that case acknowledged that a notice with the specified language was not sent to the specified address, *id*. at *3, so the filing of the lawsuit could not be considered a valid opt-out. Thus, the court in that case did not hold that filing a lawsuit cannot, as a matter of law, convey a party's intent to opt-out of an arbitration agreement; it held that the lawsuit did not satisfy that particular agreement's requirements for opting out. In contrast, the opt-out provision in this case does not require specific language, a particular method of delivery, or delivery to a specified address, nor is there any other basis for finding that the filing of the lawsuit did not comply with the opt-out provision. Defendant does not explain how delivery of the lawsuit (which inherently expressed Plaintiff's preference to sue in court rather than utilize arbitration) fails to satisfy the Arbitration Clause's opt out provision.

Defendant also contends that allowing service of a lawsuit to constitute a valid notice of opt out would preclude it "from enforcing the Arbitration Agreement for one year after its execution . . . ." (Doc. 7, pp. 16-17.) The Court disagrees; it is the very existence of the opt out provision, and not the form of notice, that prevents Defendant from being able to certainly compel arbitration within a year of the agreement's execution. Defendant's ability to enforce the

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Hanson v. TMX Fin., LLC, 2019 WL 1261100, at*2-3 (D. Nev. Mar. 19, 2019); *see also Capriole v. Uber Tech., Inc.*, 460 F. Supp. 3d 919, 927 (N.D. Cal. 2020) (holding issue was for the court to resolve and citing cases).

agreement would be just as "precluded" if Plaintiff had provided a separate written notice at any time within the year, including moments before filing the lawsuit.

Plaintiff was entitled to opt out of the Arbitration Clause by "submitting . . . written notice." No specific form was required so long as the notice communicated Plaintiff's intent, and he was not required to submit the notice to Defendant at any particular address. Accordingly, the Court concludes that this lawsuit, which (1) is in writing, (2) conveys Plaintiff's desire to proceed in court, and (3) was served on Defendant satisfies, these requirements.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Compel Arbitration, (Doc. 6), is **DENIED**.

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Date: May 5, 2022