



## **Nemecek v. Finger One, Inc. et al**

2020 | Cited 0 times | S.D. California | July 23, 2020

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

BRYANA NEMECEK, an individual, NICOLE BONDER, an individual, on behalf of herself and all those similarly situated,

Plaintiffs, v. FINGER ONE, INC., dba CLUB, a California corporation; AARON GOLDBERG, an individual;

Defendants.

Case No.: 3:20-cv-00048-DMS-LL

MOTION TO COMPEL ARBITRATION AND DENYING COLLECTIVE CLAIMS

Collective Claims. (ECF No. 15, 21.) Plaintiffs filed a response and Defendants filed a reply. For the following reasons, Arbitration // // // //

I. BACKGROUND tive action complaint for damages against Defendants Finger One, Inc. and Aaron Goldberg for failure to pay wages and tips. -3.) Plaintiffs Bryana Nemecek and Nicole Bonder are former exotic dancers/entertainers at Goldfinger in San Diego, California. (Id. at ¶ 14; Notice of Consent Form, ECF No.

5.) Plaintiffs claim that Goldberg is liable as an

in addition to Finger One, Inc. because he allegedly executed the compensation and payment policies for dancers. (Compl. at ¶¶ 16-17.)

The parties entered into two . which includes the following provision:

Arbitration Agreement. Performer agrees that any claims, disputes or matters arising out of or relating to this Agreement shall be decided solely through arbitration, in connection with the arbitration agreement that is attached hereto and incorporated herein.

-3, at ¶ 19; Ex. 1 to Umber Decl. ECF No. 12-3, at ¶ 19.) The parties also entered into a separate



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Arbitration Agreement, relationship (or term -4, ECF No. 12-4, at ¶ 1.) The

capacity, and shall Id. at ¶ 3.) misclassification of Contractor as an employee, among other claims. (Id. at ¶1.)

On January 7, 2020, Plaintiff Bryana Nemecek filed a complaint against Defendants alleging: (1) Failure to Pay Minimum Wage, in violation of 29 U.S.C. § 206 and Cal. Lab. Code §§ 1194, 1197; (2) Failure to Pay Overtime Wages, in violation of 29 U.S.C. § 207 and Cal. Lab. Code §§ 510, 1194, and 1197; (3) Unlawful Taking of Tips, in violation of 29 U.S.C. § 203; (4) Failure to Furnish Accurate Wage Statements, in violation of Cal. Lab. Code § 226; (5) Waiting Time Penalties under Cal. Lab. Code §§ 201-203; (6) Failure to Indemnify Business Expenses in violation of Cal. Lab. Code § 2802; (7) Compelled Patronization of Employer and/or Other Persons in violation of Cal. Lab. Code § 450; and (8) Unfair Competition in violation of Cal. Bus. & Prof. Code §§ 17200, et seq. Nicole Bonder filed a notice of consent to sue form on January 28, 2020. (ECF No. 5.) Defendants filed motions to compel arbitration against Bryana Nemecek and Nicole uant to Federal Rules of Civil Procedure, Rule 12(f). (Motion to Compel Bryanna Nemeck (ECF No. 12), Motion to Compel Nicole Bonder (ECF No. 21) (Collectively, ).

II. DISCUSSION Defendants contend Plaintiffs entered into a valid arbitration agreement, and as such, all collective claims must be stricken, the individual claims must be arbitrated, and the action must be dismissed with prejudice. Plaintiffs do not dispute the validity of the arbitration agreement but contend the action must be stayed rather than dismissed.

### A. Motion to Compel Arbitration

et seq., governs the enforcement of arbitration agreements involving interstate commerce. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 232 the enforcement of arbitration agreements according to their terms so as to facilitate

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011). s no place for the exercise of discretion by the district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to

, 718 F.3d 1052, 1058 (9th Cir. 2013) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985)) (emphasis in origin Chiron Corp. v. Ortho Diagnostic Sys., Inc.,

207 F.3d 1126, 1130 (9th Cir. 2000). If both factors are met, the Court must enforce the arbitration agreement according to its terms. Here, the parties do not dispute the validity of the arbitration agreement or whether it applies to the claims at issue. Accordingly, Defendant motion to compel arbitration is granted.



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Nevertheless, the parties dispute whether the case should be dismissed or stayed pending arbitration. Section 3 of Title 9 of the United States Code discusses stays of proceedings when the issue is referable to arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sparling v. Hoffman Constr. Co, Inc., 864 F.2d 635, 638

(9th Cir. 1988) plaintiffs agreed to arbitrate relevant claims).

Plaintiffs request that the Court stay the proceedings in accordance with the statute, while defendants contend the Court has authority to dismiss the case under Sparling. Plaintiffs contend the Court must stay the proceedings because Case 3:20-cv-00048-DMS-LL Document 31 Filed 07/23/20 PageID.394 Page 4 of 6 (Mot. at 3) (quoting A-ROO Distributing of California LLC v. Kloosterman, No. 18-cv- 1291 DMS (JLB), 2018 WL 6262940, at \*1 (S.D. Cal. Oct. 1, 2018) (Sabraw, J.)). Accordingly, Plaintiffs contend FLSA settlements can only be resolved with approval from the U.S. Secretary of Labor or the district court. Stores, Inc. v. United States, 679 F.2d 1350 (11th Cir. 1982); 29 U.S.C. § 216(b). Defendants disagree.

the text of the statute is clear: The shall on application of one of the parties stay the

is added). Accordingly, the Court need not decide whether a stay is mandatory to allow the court to approve the terms of the settlement. Although Defendants argue Sparling permits the court to dismiss, rather than stay, the action, it does not mandate the Court do so. Rather, Sparling allows the Court to exercise discretion in deciding whether to stay or dismiss the action. See 864 F.2d at 638. Accordingly, the matter will be stayed pending the outcome of arbitration.

### B. Motion to Strike

Defendants also Rule 12(f) of the Federal Rules of Civil Procedure. Rule 12(f) states that a district court impertinent, or The district court has discretion

when deciding whether to strike a part of the complaint. See Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921 F.2d 241, 244 (9th Cir. 1990). on to strike is to avoid the expenditure of time and money that must arise from litigating Whittlestone, Inc. v. Handi- Craft Co. nterpretation of a 12(f)



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motion begins with a determination of whether the material the party seeks to strike is: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. Id. at 973 74.

Defendants contend the Court should grant their motion to strike because of the Epic Systems v. Lewis. There, the Supreme Court held that class and collective action waivers do not violate the National Labor Relations Act and must be enforced as written under the FAA. Epic Sys. v. Lewis, 138 S. Ct. 1612, 1632 (2018). Because the arbitration agreement here includes such a provision, Defendants request that -14.) Plaintiffs do not oppose motion to strike, but the Court is unpersuaded that a motion to strike is the appropriate method for dispensing these claims. class claims is that the arbitration agreement bars them. However,

Defendants fail to provide a reason for striking the claims in accordance with Rule 12(f). They do not explain how the claims involve an insufficient defense, or are redundant, immaterial, impertinent, or scandalous. See Whittlestone, 618 F.3d at 973 motion to strike is therefore denied.

III. CONCLUSION For the foregoing reasons, motion to compel arbitration is granted and The Court stays the litigation to permit an arbitrator to decide the questions of arbitrability, and then, if permissible to arbitrate the substantive claims. Within 14 days of the completion of the arbitration proceedings, the parties shall jointly submit a report advising the Court of the outcome of the arbitration, and request to dismiss the case or vacate the stay. IT IS SO ORDERED. Dated: July 23, 2020

