

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TERRELL ABERNATHY, et al.,

Petitioners,

v.

DOORDASH, INC.,

Respondent.

No. C 19-07545 WHA
Related to
No. C 19-07646 WHA

**ORDER RE MOTION TO COMPEL
ARBITRATION, MOTION TO STAY
PROCEEDINGS, AND MOTION TO
SEAL**

CHRISTINE BOYD, et al.,

Petitioners,

v.

DOORDASH, INC.,

Respondent.

INTRODUCTION

In this labor classification action, petitioners seek to compel arbitration. Respondent moves to stay the proceedings pending preliminary and final approval of a class settlement in a state action. For the reasons stated below, petitioners' motion to compel is **GRANTED IN PART** and is otherwise **DENIED**. Respondent's motion to stay is **DENIED**.

1 **STATEMENT**

2 Petitioners are 5,879 couriers who work for respondent, DoorDash, Inc. In order to make
 3 deliveries for respondent, petitioners allegedly each clicked through a contract that contained a
 4 “Mutual Arbitration Provision,” that required among other things, that each petitioner and
 5 respondent “mutually agree to this Mutual Arbitration Provision, which is governed by the
 6 Federal Arbitration Act (9 U.S.C. §§ 1-16) (“FAA”) and shall apply to any and all disputes
 7 arising out of or relating to this Agreement, [including] CONTRACTOR’s classification as an
 8 independent contractor” and required the arbitrations to be administered by the American
 9 Arbitration Association (AAA). The agreement also provided that the parties “mutually agree
 10 that by entering into this agreement to arbitrate, both waive their right to have any dispute or
 11 claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or
 12 representative action” In turn, AAA’s Commercial Arbitration Rules require each
 13 individual to pay a filing fee of \$300 and the responding company to pay a filing fee of \$1,900.

14 Petitioner couriers say they have been improperly classified as independent contractors
 15 rather than employees. Accordingly, in August 2019, petitioners’ counsel filed individual
 16 demands for arbitration with the AAA on behalf of 2,250 individuals (*Abernathy* petitioners)
 17 claiming violations of statutes such as the Fair Labor Standards Act and the California Labor
 18 Code. In September 2019, petitioners’ counsel filed further demands on behalf of 4,000 more
 19 individuals with the AAA (*Boyd* petitioners) making the same claims. Petitioner couriers paid
 20 over \$1.2 million in filing fees. AAA then imposed a deadline of October 28 for respondent
 21 DoorDash to pay its share of the fees for the *Abernathy* arbitrations and a deadline of
 22 November 7 for the *Boyd* arbitrations (Keller Decl. ¶¶ 12, 17–21). On October 28,
 23 respondent’s counsel emailed AAA and petitioners’ counsel stating they had “determined that
 24 there are significant deficiencies with the claimants’ filings,” and that “Doordash is under no
 25 obligation to, and will not at this time, tender to AAA the nearly \$12 million in administrative
 26 fees.” On November 8, AAA emailed the parties and stated, “Respondent has failed to submit
 27 the previous requested fees for the 6,250 individual matters; accordingly, we have
 28 administratively closed our files” (Keller Decl. Ex. J, N).

1 On November 15, petitioner couriers commenced this action to compel arbitration for the
2 *Abernathy* petitioners (Case No. C 19-07545 WHA) and moved for a temporary restraining
3 order a few days later. On November 19, additional petitioners (through the same counsel)
4 sought to compel arbitration in the Superior Court of California for the *Boyd* petitioners.
5 Respondent then removed the *Boyd* action here (Case No. C 19-07646 WHA). All cases
6 wound up before the undersigned judge.

7 A hearing ensued on the motion for temporary restraining order as to the *Abernathy*
8 petitioners on November 25. DoorDash had begun to require couriers, in order to sign in for
9 new work, to click through a new agreement that required arbitration with the International
10 Institute for Conflict Prevention & Resolution (CPR), instead of AAA. At the hearing,
11 however, respondent DoorDash represented that couriers could opt out of the new arbitration
12 agreement, and instead continue to arbitrate under AAA if they so desired, so petitioners
13 withdrew their motion for temporary restraining order.

14 Meanwhile, in 2018, some couriers had filed a class action (through different counsel) in
15 the Superior Court of California, County of San Francisco, alleging respondent had willfully
16 misclassified its couriers. *Marciano v. DoorDash, Inc.*, No. CGC-18-567869 (S.F. Super. Ct.
17 Dec. 7, 2018). A class settlement was recently pending preliminary approval there. Some of
18 the unnamed class members in the class action are petitioners in the instant actions. Although
19 the underlying legal issues are dissimilar to those for the motion to compel here, any petitioner
20 who accepts the *Marciano* settlement will release the claims that would be arbitrated here.
21 Petitioners' counsel here filed a brief there on behalf of proposed intervenors to object to the
22 *Marciano* settlement. On January 30, 2020, the *Marciano* court vacated the hearing on the
23 motion for preliminary approval of the settlement and designated the action as a complex case
24 (Dkt. No. 168-1, Ex. L).

25 Herein, petitioner couriers have now filed an amended motion to compel arbitration with
26 the AAA which seeks to compel arbitration on behalf of 5,879 individuals. Respondent
27 separately moves to stay the motion to compel pending the preliminary and final approval of
28 the settlement agreement in *Marciano*. This order follows full briefing and oral argument

ANALYSIS**1. MOTION TO COMPEL ARBITRATION.**

Under the Federal Arbitration Act, a district court determines “whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue.” *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If the court is satisfied “that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4.

Here, petitioners contend (and respondent does not dispute) that at least 5,010 petitioners have signed declarations attesting to “click[ing] through” DoorDash’s AAA arbitration agreement. As stated above, the agreement provides that the parties “mutually agree to this Mutual Arbitration Provision, which is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) (“FAA”) and shall apply to any and all disputes arising out of or relating to this Agreement, [including] CONTRACTOR’s classification as an independent contractor” Significantly, the agreements for these 5,010 petitioners are valid, cover the claims in suit, and require arbitration before the AAA.

There are 869 petitioners that DoorDash argues do not have a valid agreement with DoorDash. Instead of submitting declarations for these petitioners, petitioners’ counsel submitted mere “witness statements” in which they stated, among other things, their residential address, the amount of time they have worked for DoorDash, and that they did not recall opting out of arbitration. The November order, however, specifically asked petitioners to provide a declaration setting forth “the identifying information he or she used to register with DoorDash” and “at least referencing in an ascertainable way the specific arbitration he or she clicked through.” The submitted witness statements do not provide such information and without them, this order cannot conclude that an arbitration agreement exists as to those petitioners.

DoorDash has also raised questions as to the authority of petitioners’ counsel to represent certain other petitioners and seek relief on their behalf. While the factual requisites have been

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1 referred to the AAA for decision. If it turns out that Keller Lenkner has overstated its
2 authority, or for any procedural reason, petitioners have not perfected their right to arbitrate,
3 this order imposes on Keller Lenkner a requirement to fully reimburse DoorDash for all
4 arbitration fees and attorney’s fees and expenses incurred by DoorDash in defending the
5 arbitration, and the arbitrator shall so award them.

6 The motion to compel arbitration is **GRANTED** as to the 5,010 petitioners who submitted
7 declarations. DoorDash is ordered to immediately commence AAA arbitration with these
8 petitioners. The motion is **DENIED** as to the 869 petitioners who submitted mere witness
9 statements.

10 Petitioner couriers have further requested that respondent pay all attorney’s fees and costs
11 related to the arbitration under California Senate Bill 707, which took effect on January 1,
12 2020. In relevant part, the law states:

13 In an employment or consumer arbitration that requires, either
14 expressly or through application of state or federal law or the rules
15 of the arbitration administrator, the drafting party to pay certain
16 fees and costs before the arbitration can proceed, if the fees or
17 costs to initiate an arbitration proceeding are not paid within 30
18 days after the due date, the drafting party is in material breach of
19 the arbitration agreement, is in default of the arbitration, and
20 waives its right to compel arbitration under Section 1281.2.

21 It further states that if the above occurs, the employee may: “(1) Withdraw the claim from
22 arbitration and proceed in a court of appropriate jurisdiction (2) Compel arbitration in which
23 the drafting party shall pay reasonable attorney’s fees and costs related to the arbitration” Cal.
24 Civ. Proc. Code § 1281.97. The law also states “[t]he court shall impose a monetary sanction
25 against a drafting party that materially breaches an arbitration agreement pursuant to
26 subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the
27 drafting party to pay the reasonable expenses, including attorney’s fees and costs, incurred by
28 the employee or consumer as a result of the material breach.” Cal. Civ. Proc. Code § 1281.99.

29 “A retrospective operation will not be given to a statute which interferes with antecedent
rights . . . unless such be ‘the unequivocal and inflexible import of the terms, and the manifest
intention of the legislature.’” *United States Savings & Loan v. Federal Reserve Bank*, 450 U.S. 70, 78, 79

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