**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**



ELIOT COHEN, PHILIP RICASATA and CHARLES SHOEMAKER, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., and UBS AG,

Defendants.

12 Civ. 2147 (BSJ) (JLC)

**Memorandum and Order**

**BARBARA S. JONES**
**UNITED STATES DISTRICT JUDGE**

Plaintiffs Eliot Cohen ("Cohen"), Philip Ricasata ("Ricasata") and Charles Shoemaker ("Shoemaker"), as well as David Hale ("Hale") and Stan Sklenar ("Sklenar") who filed consents to sue in this action, (collectively "Plaintiffs") are all California residents. Along with other members of the proposed California class and nationwide collective group, they either currently work or previously worked for Defendant UBS Financial Services Inc. ("UBS")[1] as financial advisors in California and nationwide. Plaintiffs bring the instant action

[1] Although UBS Financial Services Inc was Plaintiffs' sole employer, the Third Amended Complaint also names UBS AG as a Defendant. The Court adopts "UBS" herein to refer to both named defendants.

asserting class and collective action claims for UBS' alleged violations of the Fair Labor Standards Act ("FLSA"), the California Labor Code ("CLC"), and the California Unfair Competition Law ("UCL"). In response to Plaintiffs' Third Amended Complaint, Defendants have filed the present Motion to Compel Arbitration and Stay the Action. Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, Defendants move on the grounds that, in arbitration agreements signed by Plaintiffs during the course of their employment with UBS, Plaintiffs agreed to individually arbitrate the claims made in their Third Amended Complaint. For the reasons discussed the Court **GRANTS** Defendants' motion.

**FACTUAL BACKGROUND**

As part of their employment with UBS, each of the Plaintiffs executed a Financial Advisor Compensation Plan (the "FA Compensation Plan"). The FA Compensation Plan states in relevant part that:

> [Y]ou and UBS agree that any disputes between you and UBS including claims concerning compensation, benefits or other terms or conditions of employment . . . or any other claims whether they arise by statute or otherwise, including but not limited to, claims arising under the Fair Labor Standards Act . . . or any other federal, state or local employment . . . laws, rules or regulations, including wage and hour laws, will be determined by arbitration . . . By agreeing to the terms of this Compensation Plan . . ., you waive any right to commence, be a party to or an actual or putative class member of any class or

> collective action arising out of or relating to your employment with UBS . . . [2]

(Decl. of Catherine Reyna ("Reyna Decl."), Ex. 1 at p. 26.)

In addition to the FA Compensation Plan, which was executed by all of the Plaintiffs, the Plaintiffs each also entered into additional agreements which contained the same or substantially similar language. Although the specific agreements signed by each Plaintiff differ, the relevant agreements include: Employee Forgivable Loan and Promissory Notes; Financial Advisor Account Reassignment Agreements; FA/PW Partnering Agreements; and Account Reassignment Agreements. See (Reyna Decl., Exs. 11-19.)

**STANDARD OF REVIEW**

In deciding whether to grant a motion to compel arbitration pursuant to the FAA, courts apply a summary judgment standard. Lavoice v. UBS Fin. Servs., Inc., No. 11 Civ. 2308, 2012 WL 124590, at *2 (S.D.N.Y. Jan. 13, 2012) (citing Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 549 (S.D.N.Y. 2011)). "A motion to compel arbitration may be granted when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Id. (internal citations omitted). The burden

[2] The FA Compensation Plans for 2007, 2008, 2009, and 2010 each contain identical arbitration agreements and class and collective action waivers. See Decl. of Catherine Reyna ("Reyna Decl."), Exs. 1-4.

of proving that the claims at issue are unsuitable for arbitration falls on the party opposing the motion. Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 91 (2000). To the extent that "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." Id. at 92.

"Once a court is satisfied that an arbitration agreement is valid and the claim before it is arbitrable, it must stay or dismiss further judicial proceedings and order the parties to arbitrate." Lavoice, 2012 WL 124590, at *2 (citing Nunez v. Citibank, N.A., No. 08 Cv. 5398, 2009 WL 256107 at *2 (S.D.N.Y. Feb. 3, 2009)).

**DISCUSSION**

Relying on this Court's decision in the related Lavoice[3] action, UBS argues that the agreements previously signed by Plaintiffs compel them to pursue their claims in an arbitral forum. In support of this argument, UBS argues that: (1) Plaintiffs agreed to arbitration in the arbitration agreements; (2) Plaintiffs claims are covered by the arbitration agreements; (3) Courts routinely enforce agreements to arbitrate FLSA and

[3] Plaintiffs in the instant action were employed in the same position at UBS as the Plaintiff in the Lavoice action, and Plaintiffs bring substantially similar claims in both actions. The parties in the instant action are also represented by the same counsel as those in Lavoice.

state labor law claims; and (4) Plaintiffs' arbitration agreements are enforceable even though they prohibit Plaintiffs from pursuing class or collective action claims.[4] UBS also argues that, in the event that the Court chooses not to enforce the arbitration agreements, the Court should find that: (1) Cohen's FLSA claims are time barred; (2) Plaintiffs' claims pursuant to the California Labor Code Private Attorneys General Act ("PAGA") are time barred; and (3) Plaintiffs lack standing to bring claims for injunctive relief.

In their opposition to UBS' motion, Plaintiffs do not dispute that: (1) they agreed to arbitrate in the relevant agreements; (2) their claims are covered by the arbitration agreements; and (3) FLSA and state labor law claims can be arbitrable. Plaintiffs instead argue that the agreements at issue are unenforceable because: (1) their terms violate the arbitration rules of the Financial Industry Regulatory Authority ("FINRA"); (2) they would prevent Plaintiffs from vindicating their federal statutory rights; and (3) through its conduct in this litigation, UBS has waived its right to seek relief under the FAA.

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[4] "As a general matter, when a party bound by an arbitration agreement raises a claim founded on statutory rights, a district court must determine: (1) whether the parties agreed to arbitrate; (2) the scope of that agreement; and (3) if federal statutory claims are asserted, whether Congress intended those claims to be nonarbitrable." Lavoice, 2012 WL 124590, at *2 (internal citations omitted).

## I. Impact of FINRA Rules

Plaintiffs argue in the first instance that the agreements at issue are unenforceable because they violate the FINRA rules which govern arbitration for financial advisors such as Plaintiffs. To support their position, Plaintiffs rely on the Supreme Court's decision in Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 285 (2007). In Billing, buyers of newly issued securities filed an antitrust lawsuit against the underwriting firms that marketed and distributed those securities. The underwriter defendants moved to dismiss on the grounds that the federal securities laws impliedly precluded the application of antitrust laws to the conduct in question. Finding that "the securities laws are clearly incompatible with the application of the antitrust laws in this context," the Supreme Court held that such antitrust lawsuits were precluded by SEC regulations. Id. at 285. Likening their position to that of the Defendants in Billing, Plaintiffs argue that the arbitration agreements between the parties are unenforceable because they conflict with FINRA's own arbitration rules. Plaintiffs cite Rules 13204(a) and 13204(b) of the FINRA Code of Arbitration Procedure for Industry Disputes (the "Code"), which respectively state that "class action claims may not be arbitrated under the Code" and that "[a]ny claim that is based upon the same facts and law, and involves the same defendants as

in a . . . putative class action . . . shall not be arbitrated under the Code." Referring to these two provisions, Plaintiffs argue essentially that, since the Code expressly prohibits the arbitration of claims which could be brought collectively or by a class, FINRA rules preclude the enforcement of the arbitration agreements pursuant to the FAA.

Having reviewed the Code, the Court disagrees with Plaintiffs' reading and finds that enforcement of the arbitration agreements would not be inconsistent with FINRA's rules. Although Rule 13204 appears to prohibit arbitration of class or collective claims, the rule also expressly states that its subparagraphs "do not otherwise affect the enforceability of any rights under the Code or any other agreement." (emphasis added). The rule therefore: (1) recognizes that parties may choose to enter into additional agreements beyond the scope of the Code; and (2) provides that the Code does not affect the enforceability of these additional agreements. That the arbitration agreements here would preclude Plaintiffs from pursuing a class or collective action does not change the Court's view. Indeed, Rule 13204(a) specifically speaks to the possibility that a "member of the certified or putative class elects not to participate in the class." Furthermore, the Court's reading of the Code is consistent with numerous decisions which have acknowledged that parties may contract

beyond the default arbitration rules of the securities industry. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 113 (2d Cir. 1990) ("[T]he rules of a securities exchange are contractual in nature. . . [w]here, as here, the parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls."); Credit Suisse First Boston Corp. v. Pitofsky, 4 N.Y.3d 149, 155 (2005) ("CSFB and its registered representatives were free to negotiate the terms by which they would arbitrate employment-related disputes . . . Accordingly, the parties were free to supplant or modify the Form U-4 arbitration agreement . . . ."); and Chanchani v. Salomon/Smith Barney, Inc., No. 99 Civ 9219, 2001 WL 204214, at *5 (S.D.N.Y. Mar. 1, 2001) ([T]he terms of the U-4s and the NYSE rules in no way prohibit member organizations from entering into separate, private arbitration agreements with their employees.")

To the extent that Plaintiffs argue that the Supreme Court's decision in Billing compels a different result, their argument misconstrues both the Code and that case. As an initial matter, as has already been discussed, Plaintiffs' selective reading of the Code as absolutely prohibiting class and collective waiver is incorrect. In addition, Billing dealt with the specific impact of the federal securities regulations on antitrust laws, and its holding cannot be broadly construed

as advocated for by Plaintiffs. The Court accordingly finds that there is nothing within the FINRA rules which would preclude enforcement of the arbitration agreements between the parties.

## II. Statutory Rights Analysis

Plaintiffs' next argument as to why the arbitration agreements are unenforceable mirrors that previously advanced by the plaintiff in the related Lavoice action. Relying primarily on the Second Circuit's decisions in its Amex line of cases, Plaintiffs argue that the arbitration agreements at issue cannot be enforced because they would prevent Plaintiffs from vindicating their federal statutory rights under the FLSA. See In re American Express Merch. Litig. (Amex III), 667 F.3d 204 (2d Cir. 2011), aff'g on reh'g Amex II, 634 F.3d 187 (2d Cir. 2011), reh'g en banc denied by 681 F.3d 139 (2d Cir. 2012), cert. granted, American Exp. Co. v. Italian Colors Restaurant, No. 12-133, 2012 WL 3096737, at *1 (U.S. Nov. 9, 2012).

To the extent that Plaintiffs rely on Ranier v. Citigroup Inc., 827 F. Supp. 2d 294 (S.D.N.Y. 2011), and D.R. Horton, Inc. and Michael Cuda, N.L.R.B. 12-CA-25764, 2012 WL 36274, *1 (Jan. 3, 2012), for the proposition that "a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law," Ranier, 827 F. Supp. 2d at 314, this Court, as it did in Lavoice, declines to follow these decisions. The Supreme

Court held in AT&T Mobility LLC v. Concepcion, that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. 1740, 1748 (2011). The Court therefore finds that it would be inconsistent with the FAA for the Court to find as a matter of law that class waivers are *per se* unenforceable in this context.

The Court turns next to Plaintiffs' argument that, although class waivers like the ones at issue are not *per se* unenforceable, the waivers here cannot be enforced because they preclude Plaintiffs from vindicating their statutory rights. In support of this argument, Plaintiffs rely on the Second Circuit's decision in Amex III which was issued subsequent to this Court's opinion in Lavoice.

In Amex III, the Second Circuit revisited its decision in Amex II[5] in light of the Supreme Court's decision in Concepcion. The Second Circuit held in Amex III that, although "Concepcion plainly offers a path for analyzing whether state contract law is preempted by the FAA," 667 F.3d at 213, "as the class action waiver in this case precludes plaintiffs from enforcing their [federal] statutory rights, we find the arbitration provision

[5]For a more detailed discussion of the Second Circuit's decisions in Amex I and Amex II, and the Supreme Court's decision in Concepcion, the Court refers to its decision granting the motion to compel arbitration in Lavoice. 2012 WL 124590.

unenforceable." Id. at 218. In reaching its decision, the Second Circuit relied "on the need for plaintiffs to have the opportunity to vindicate their statutory rights," id. at 219, and gave weight to the fact that "the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws." Id. at 217. Following the Second Circuit's guidance in Amex II and III, courts in this district have held that arbitration agreements are unenforceable when they would effectively prevent plaintiffs from vindicating their statutory rights. See Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 394 (S.D.N.Y. 2011), reconsideration denied by No. 10 Civ. 6950, 2011 WL 2671813, *1 (S.D.N.Y. July 7, 2011), and Sutherland v. Ernst & Young LLP, 847 F. Supp. 2d 528 (S.D.N.Y. 2012).

In its motion to compel, although it also argues that the Supreme Court's holding in Concepcion abrogates the Second Circuit's decision in Amex III,[6] UBS primarily rests on an argument that Plaintiffs have failed to meet their burden of demonstrating that they could not vindicate their statutory

[6] The Court notes that there is a circuit split on the issue of whether waivers which preclude the effective vindication of statutory rights can be enforced. Compare Amex III,667 F.3d 204 and Coneff v. AT&T Corp., 673 F.3d 1155, 1159 (9th Cir. 2012). The Supreme Court has granted certiorari to hear this issue. See American Express Co. v. Italian Colors Restaurant, No. 12-133, 2012 WL 3096737 (U.S. Nov. 9, 2012).

rights through arbitration. In determining whether a class action waiver is unenforceable, "each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements." Amex III, 667 F.2d at 219 (internal citation omitted). Having reviewed the parties' submissions, the Court agrees with UBS and finds that enforcement of the class and collective action waivers in this case would not preclude Plaintiffs from vindicating their statutory rights under Amex III.

***A. Plaintiff Cohen***

With respect to Cohen, since he has only asserted state law claims,[7] the Supreme Court's decision in Concepcion precludes the Court from engaging in a vindication of rights analysis as to this plaintiff. See Orman v. Citigroup, Inc., No. 11 Civ. 7086, 2012 U.S. Dist. LEXIS 131532, at *8-9 (S.D.N.Y. Sep. 12, 2012) ("The Court cannot identify any cases in which a vindication of statutory rights analysis under the FAA has been applied to state statutory claims. Indeed, applying a vindication analysis to state statutory claims would appear to be incompatible with

[7] See (Pls.' Surreply Mem. of Law. in Opp'n to Defs.' Mot. to Compel Arbitration and Stay this Action 4, n. 12.) ("Mr. Cohen . . . has only a California state claim and not an FLSA claim.")

the Supreme Court's analysis in Concepcion.") The Court accordingly finds that "the vindication of statutory rights doctrine does not apply to bar arbitration" of Cohen's claims. Id. at *9-10.

***B. Plaintiffs Ricasata, Sklenar, Hale, and Shoemaker***

In support of their argument that the costs of arbitration would so exceed the possible benefits that they would be practically precluded from vindicating their statutory rights, the remaining plaintiffs, Ricasata, Sklenar, Hale, and Shoemaker, have submitted to the Court: (1) their prospective FINRA filing fees; (2) the low probability that they would prevail in FINRA arbitration; and (3) an estimate of their potential damages. The Court has considered Plaintiffs' arguments and finds that, like the plaintiff in Lavoice, Plaintiffs have failed to meet their burden of demonstrating that they would be unable to vindicate their statutory rights in the arbitral forum.

Although Plaintiffs initially submitted that the damages for Sklenar, Ricasata, Shoemaker and Hale were in the $2,777.78 to $22,379.68 range, (Pls.' Mem. of Law in Opp'n to Defs.' Mot. to Compel Arbitration and Stay this Action 16, n. 29), in their Surreply, Plaintiffs amended these calculations such that their claimed damages for these individuals now range from $49,021.33 to $178,580.22, (Pls.' Surreply Mem. of Law in Opp'n to Defs.'

Mot. to Compel Arbitration and Stay this Action 5). These substantial damages, taken with the fact that Plaintiffs would be able to recover an award of attorney's fees in arbitration, lead the Court to find that these plaintiffs would be able to vindicate their statutory rights under the FLSA in arbitration. While Plaintiffs make the additional argument that their damages figure should be reduced to account for their low probability of prevailing, they have provided the Court with nothing to support their self-serving estimates as to the likelihood of success. The Court accordingly gives no weight to this dubious argument.

The relative position of these plaintiffs is easily distinguished from those of the plaintiffs in Chen-Oster, 785 F. Supp. 2d 394, and Sutherland, 847 F. Supp. 2d 528.[8] In Chen-Oster, the plaintiff sought to bring a pattern and practice claim under Title VII, a type of claim which can only be pursued by a class. 847 F. Supp. 2d at 408. Sutherland involved a plaintiff seeking to recover an overtime loss of a mere $1,867.02. 847 F. Supp. 2d at 531. Given that they may pursue their FLSA claims individually, and their estimated damages all

[8] The Court notes that Plaintiffs' damages are comparable to that of the plaintiffs in Ranier. As previously noted, however, the court in Ranier did not find the class waiver unenforceable because the plaintiffs would be precluded from enforcing their statutory rights due to cost. 827 F. Supp. 2d at 314. Instead, in Ranier, Judge Sweet held that "a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law." 827 F. Supp. 2d at 314.

exceed $45,000, the Court finds it clear that Ricasata, Sklenar, Hale, and Shoemaker are each differently situated than either of these two plaintiffs who they have attempted to liken themselves.

For all of these reasons, the Court finds that Cohen, Ricasata, Sklenar, Hale, and Shoemaker have each failed to demonstrate that enforcement of the arbitration agreements at issue would preclude them from vindicating their rights under the FLSA.

## III. Waiver

In addition to their arguments that the arbitration agreements are unenforceable, Plaintiffs also argue that, by its conduct in this litigation, UBS has waived its right to compel arbitration. Plaintiffs' argument primarily hinges on their assertions that: (1) UBS waived its right to pursue a motion to compel arbitration when it chose to transfer the action rather than pursue such a motion in the Central District of California; and (2) UBS has chosen to transfer the case to a district court that lacks the power to compel the parties to arbitrate in California.

With respect to Plaintiffs' argument that UBS has waived, the Court notes that in this Circuit, "[a] party is deemed to have waived its right to arbitration if it engages in protracted litigation that results in prejudice to the opposing party." S

& R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998) (internal citations omitted). Furthermore, "[g]iven th[e] presumption of arbitrability, waiver of arbitration is not to be lightly inferred." Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995). In the instant action, the Court finds that there is no evidence that Defendants have engaged in the type of dilatory tactics that would warrant a finding of waiver.

The Court finds similarly unavailing Plaintiffs' argument that this Court cannot grant UBS' motion because: (1) the parties' agreement identifies California as the location of arbitration; and (2) this Court lacks authority to compel arbitration beyond this district. Although several courts have held that, when an arbitration agreement contains a forum selection clause, only a district court in that forum can compel arbitration,[9] these decisions are inapposite because the arbitration agreements in the instant action do not contain forum selection clauses. While Plaintiffs argue that the agreements at issue effectively contain a forum selection clause through their incorporation of FINRA Rule 13213(a)(1), this rule

[9] See J.P. Morgan Secs. Inc. v. La. Citizens Prop. Ins. Corp., 712 F. Supp. 2d 70, 82-83 (S.D.N.Y. 2010) (citing Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007, 1010 (6th Cir. 2003); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer, 49 F.3d 323, 326-31 (7th Cir. 1995); and Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214, 1218-20 (10th Cir. 2005))

merely states that "[t]he Director will decide which of FINRA's hearing locations will be the hearing location for the arbitration" and "the Director will generally select the hearing location closest to where the associated person was employed . . . ." Since here, the Director of FINRA Dispute Resolution has yet to select a forum for arbitration outside of this district, the Court finds that the instant action does not present "a situation analogous to that caused by arbitration agreements containing forum selection clauses." J.P. Morgan Secs. Inc. v. La. Citizens Prop. Ins. Corp., 712 F. Supp. 2d 70, 81 (S.D.N.Y. 2010). There is accordingly nothing that would prevent the Court from compelling arbitration in this case.[10]

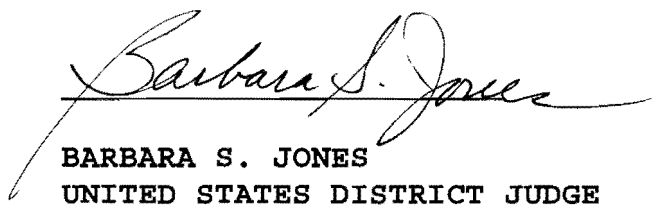
**CONCLUSION**

The Court **GRANTS** Defendants' motion to compel arbitration and stay this action in its entirety.

The Clerk of the Court is directed to terminate motion #61 on the ECF docket and to stay the case.

[10] The Court also notes that UBS states in its Reply brief that it will not object to Plaintiffs making a request to the Director of FINRA Dispute Resolution for the arbitration to proceed in California.

**SO ORDERED:**



**BARBARA S. JONES**
**UNITED STATES DISTRICT JUDGE**

Dated: New York, New York
December 3, 2012