Michael J. Riccobono, Esq. (I.D. # 012192009)
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone (973) 656-1600
Facsimile (973) 656-1611
Attorneys for Defendants

KARINA JANCO, Plaintiff, vs. BAY RIDGE AUTOMOTIVE MANAGEMENT CORP., FREEHOLD CHRYSLER JEEP, INC.; JEREMIAH HUPKA; ERIC LESHIN; DONNA TALARICO, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION : MONMOUTH COUNTY DOCKET NO.: MON-L-1967-20 CIVIL ACTION **ORDER**

THIS MATTER HAVING been opened to the Court by Defendants Bay Ridge Automotive Management Corp., Freehold Chrysler Jeep, Inc., Jeremiah Hupka, Eric Leshin, and Donna Talarico (collectively, "Defendants") on a Motion to Dismiss the Complaint pursuant to New Jersey Court Rule 4:6-2(e), and to Compel Arbitration; and the Court having reviewed the papers submitted in support of and in opposition to the motion; and having heard the arguments of counsel; and good cause having been shown:

IT IS on this 22nd day of January 2021, **ORDERED** that:

1. Defendants' Motion to Dismiss and to Compel Arbitration is hereby GRANTED in its entirety;
2. Plaintiff's Complaint be, and hereby is dismissed without prejudice;

3. Plaintiff is hereby compelled to submit all claims in the Complaint to arbitration in accordance with the terms of the arbitration agreement; and
4. Counsel for Defendants shall serve a signed copy of this Order on all counsel within seven (7) days after receiving a signed copy from the Court.

/S/ HENRY P. BUTEHORN, J.S.C.
HENRY P. BUTEHORN, J.S.C.

Opposed _xx____

Unopposed _____

See Rider and Statement of Reasons

Rider and Statement of Reasons for January 22, 2021 orders granting defendants' motion to compel arbitration and denying plaintiff's cross-motion
MON-L-1967-20

The court considered all the written submissions in relation to this motion. The court also considered the arguments of counsel at oral argument held on this date. The court outlined the background of the case and arguments of the parties at the outset of oral argument and incorporates same here.

Plaintiff was employed by defendant and filed the complaint in this action asserting several claims under New Jersey's Law Against Discrimination. Defendant seeks an order dismissing the complaint and ordering the parties to participate in arbitration pursuant to an agreement to arbitrate such claims. The arbitration agreement at issue is contained in a document titled "Mutual Agreement to Arbitrate Claims." Defendants fall within the definition of "employer" in the document. Plaintiff, who signed the document, is the defined employee. Paragraph three (3) of the document reads, in relevant part, as follows:

> Employer and Employee mutually consent to the resolution by final and binding arbitration of all disputes, claims or controversies of any kind between them, whether now in existence or that may arise in the future, including but not limited to all disputes arising out of, relating to, and/or in connection with Employee's employment with Employer and/or cessation or termination of such employment, to the fullest extent allowed by law, except as to: (a) any issue concerning the formation, existence, validity, arbitrability, and/or enforceability of this Agreement, which shall be decided only by a court of competent jurisdiction, not by arbitration; and (b) those claims set forth in Paragraph 4 (Claims Not Covered) of this Agreement ("Collectively, Claims"). Claims include, without limitation, and subject to applicable law, the following, whether brought by Employer or Employee:…claims for discrimination, harassment, and/or retaliation based on race, color, national origin, ancestry, sex, gender, gender identity, sexual orientation, age, religion, creed, physical or mental disability, political affiliation, medical condition, marital status, family care, parental status, citizenship status, military and veteran's status, pregnancy and related conditions, genetic information, and any other basis protected by applicable law; … and claims for violation of any federal, state, local or other law…."

Arbitration is a favored means of dispute resolution both under federal and state law.[1] Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 440 (2014). "An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." McKeeby v. Arthur, 7 N.J. 174, 181 (1951) (citation omitted). The arbitration agreement must be the product of mutual assent. Atalese, ante 219 N.J. at 442 (quoting NAACP of Camden Cty. East v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). Mutual assent requires that all parties understand the terms of the agreement they have signed. Ibid. That "requires [] the parties understand the terms of their agreement[,]" and where the "agreement includes a waiver of a party's right to pursue a case in a judicial forum, 'clarity is required.'" Barr V. Bishop Rosen & Co., Inc., 442 N.J. Super. 599, 606 (quoting Moore v. Woman to Woman Obstetrics & Gynecology, LLC, 416 N.J. Super. 30, 37 (App. Div. 2010)).

Arbitration agreements, as here, may be contained in employment contracts as there is no public policy reason to not enforce properly drafted such agreements in an employment contract. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 135 (2001). In a series of recent decisions our State Supreme Court has underscored the strong policy of enforcing arbitration clauses. See See Skuse v. Pfizer, 244 N.J. 30 (2020); Goffe v. Foulke Management Corp., 238 N.J. 191 (2019); see also Flanzman v. Jenny Craig, Inc., 244 N.J. 119 (2020); Arafa v. Health Express Corp., 243 N.J. 147 (2020).

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[1] The arbitration agreement at issue here states "[t]he Federal Arbitration Act governs interpretation and enforcement of this Agreement to the maximum extent permitted by law, and this Agreement is to be construed as broadly as possible." (Agreement, paragraph two (2)). For those cases involving an arbitration agreement governed by the Federal Arbitration Act (FAA), federal law permits "states to regulate contracts, including contracts containing arbitration agreements under general contract principles." Martinadale v. Sandivik, Inc., 173 N.J. 76, 85 (2002). Therefore, New Jersey may "regulate agreements, including those that relate to arbitration, by applying its contract-law principles that are relevant in a given case." Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003). That being the case, New Jersey courts look to state-law contract principles involving waiver of rights. See Atalese, 219 N.J. at 441.

However, "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" Atalese, ante 219 N.J. at 442-43 (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). Any contractual waiver of rights, including arbitration provisions, must reflect that the parties have clearly and unambiguously agreed to the terms. Id. at 443. The parties must have full knowledge of their rights and show an intent to surrender those rights. Ibid.

In addition to the above paragraph identifying the claims that are subject to arbitration, the paragraph above the signature lines of the arbitration agreement at issue here reads:

> **EMPLOYEE HAS CAREFULLY READ THIS ARBITRATION AGREEMENT, UNDERSTANDS ITS TERMS, AND HAS ENTERED INTO THIS AGREEMENT VOLUTNARILY. EMPLOYEE UNDERSTANDS THAT BY SIGNING BELOW, EMPLOYEE GIVES UP ALL RIGHTS TO A JURY TRIAL AND GIVES UP THE RIGHT TO PROCEED ON A CLASS AND/OR COLLECTIVE ACTION BASIS AS TO ALL CLAIMS COVERED BY PARAGRAPH 3 OF THIS AGREEMENT.** (Bold and capitals in original).

That language unambiguously explains that, by signing the agreement, the employee "gives up all rights to a jury trial." Moreover, the agreement explains the procedures that will be followed in the arbitration. (See paragraph six (6), "Arbitration Procedures")[2]. That explanation further indicates the difference between arbitration and a jury trial; reading the arbitration procedures as outlined in this arbitration agreement adds further clarity and removes any

[2] Paragraph six (6) identifies the forum in which the arbitration will take place, the American Arbitration Association (AAA). It identifies the Rules and Procedures that will be followed in that forum; the AAA Employment Arbitration Rules and Procedures. It even provides the website at which those Rules and Procedures were available. It indicates a neutral arbitrator will be selected and the pool of available arbitrators; the panel of the AAA. It indicates the arbitrator will make the decision and provide it in written form. It further indicates the arbitrator shall have the authority to award full relief available in a court of law, including that provided by statute. The paragraph makes clear the claims will be decided by a single arbitrator, the scope of the arbitrator's decision, and the process that will take place prior and leading to the decision.

potential ambiguity as to the right being waived by agreeing to arbitrate those claims falling within the agreement. (Id.).

The arbitration agreement is clear and the court finds its language and clear and mutual understanding to submit all disputes within its scope to arbitration. It also clearly expresses an understanding that the arbitration constitutes a waiver of trial by jury and the difference between the a jury trial and arbitration. The agreement also identifies the forum and the procedure for arbitration within the Arbitration Procedure paragraph; that further explains the difference between arbitration and litigation.

The entire document was three (3) pages in normal size type; it was not buried among other documents. It emphasizes the waiver of a jury trial by placing that portion in all capital letters. It also places the emphasized language indicating a waiver of a jury trial in the area plaintiff signed the document to ensure it is not overlooked. Plaintiff acknowledged the terms of the agreement in her application for employment and confirmed it upon her contract of employment. Finally, the sentence immediately preceding the signature lines states “I fully and voluntarily consent and agree to the terms of this Agreement without any form of coercion, duress, or undue influence.”

The agreement also outlines the claims and issues the parties agree will be subject to arbitration. As for the scope of the claims the parties agreed to submit to arbitration, the agreement expressly outlines those matters, or claims; the list is expansive and detailed. The claims at issue in this case are under the NJLAD. Plaintiff argues that the agreement did not voluntarily clearly and unmistakably indicate an agreement to arbitrate a discrimination or LAD claim, or the statutory claim. However, the court finds the contrary.

Parties may agree in the contract to "waive statutory remedies in favor of arbitration." Leodori v. Cigna Corp., 175 N.J. 293, 300 (internal quotation marks omitted), cert. denied 540

U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003). However, if a party seeks to enforce an arbitration provision in an employment agreement in which an employee waives a constitutional or statutory right to sue, the waiver must be clear. That is, there must be indication of mutual assent along with a knowing and voluntary waiver of rights. Ibid; see also Skuse v. Pfizer, Inc., 244 N.J. 30 (2020). "[A] party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Garfinkel, ante 168 N.J. at 132 (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)). The party giving up their right must "have full knowledge of his legal rights and intent to surrender those rights." Knorr v. Smeal, 178 N.J. 169, 177 (2003).

In Garfinkel, ante, the arbitration clause in the employment contract at issue stated: "Except as otherwise expressly set forth in Paragraphs 14 or 15 hereof, any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration . . . in accordance with the rules then obtaining of the American Arbitration Association . . . ." Id. at 128. The Court held, "because of its ambiguity[,] the language contained in the arbitration clause [did] not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Id. at 127. Similarly, the Appellate Division held an arbitration clause in an employment contract between a lawyer and law firm, that required arbitration of "'any controversy, claim, or dispute arising out of or relating to this Agreement, including the construction, interpretation, performance, breach, termination, enforceability, or validity thereof[,]'" did not apply to that plaintiff's LAD claims. Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 296 (App. Div. 2013).

The arbitration clauses in Garfinkel and Waskevich did not expressly reference the statute the plaintiffs in those cases asserted claims their employer sought to force to arbitration. However, Garfinkel also noted it was not necessary for the agreement to "refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights." Garfinkel, ante 168 N.J. at 135. Rather, in order to pass muster "a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims." Ibid.

That court finds the foregoing was indicated in the arbitration agreement in this case. It clearly stated the arbitration agreement included claims for discrimination, harassment, and/or retaliation based on race, color, national origin, ancestry, sex, gender, gender identity, sexual orientation, age, religion, creed, physical or mental disability, political affiliation, medical condition, marital status, family care, parental status, citizenship status, military and veteran's status, pregnancy and related conditions, genetic information, and any other basis protected by applicable law." If further included those claims "for violation of any federal, state, local or other law." Although it referenced Federal and not State laws, the particular laws cited reflected the type of statutory claims that would be subject to arbitration and that included discrimination type laws. That underscored the prior reference in the paragraph to all claims for "discrimination, harassment, and/or retaliation" as are asserted in this case.

Plaintiff argues the arbitration agreement should be found unenforceable upon the doctrine of unconscionability. "The common law doctrine of unconscionability has proved difficult to define and has been rarely invoked undoubtedly because, other than in exceptional

cases, it has been largely viewed as grossly interfering with the freedom to contract." Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 557 (Ch. Div. 2002). A contract may be deemed unconscionable where there is an "absence of meaningful choice" at the inception of the contract coupled with contractual terms "unreasonably favorable to the other party." Id. at 564.

Courts have considered two (2) aspects in evaluating whether a contract is unconscionable: (1) unfairness in the formation of the contract, and (2) excessively disproportionate terms. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). They are generally referred to as either procedurally or substantively unconscionable. The former arises out of defects in the process by which the contract was formed, and "can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting" at the time of agreement. Delta Funding Corp. v. Harris, 189 N.J. 28, 55 (2006) (quoting Sitogum, ante 352 N.J. Super. at 564-55). Substantive unconscionability "simply suggests the exchange of obligations so one-sided as to shock the court's conscience." Ibid. (quoting Sitogum, ante 352 N.J. Super. at 564-65).

The court does not find either applicable in this case. On the issue of procedural unconscionability the court's previous findings as to the agreement itself establish it was not hidden or unduly complex. Plaintiff does not point to her age, literacy or lack of sophistication. She points to the manner in which she was presented the agreement. The court will accept plaintiff's certification as true in this determination and in that regard she states the Arbitration Agreement was provided with other paperwork at what plaintiff indicates was an orientation. Plaintiff states the only instruction she was provided was to sign the paperwork. She states the materials were indicated as "onboarding" documents. Plaintiff states the paperwork difficult to read as she did not have her glasses on during the meeting and could not read the "fine print."

The actual document, a copy of which is submitted with this motion, is in clear and legible type. The type is of normal size and appearance; there was no "fine print" on that document. The document was not hidden from defendant either. The arbitration agreement was its own document and not mixed with or hidden within some other document including different matters. The Arbitration Agreement was three (3) pages with regular margins and clearly legible. There is also the portion, as previously noted, in bold face type with all capital records.

In addition, the defendant did not deprive her of using her glasses nor prevent her from obtaining same. She indicates she only spent five (5) or ten (10) minutes to review and sign all the papers handed to her that day because she wanted to get to work. However, there is no evidence plaintiff was hurried, rushed or forced to sign the documents. There is no evidence plaintiff made any indication she could not read nor understand the documents. She was not deprived additional time to review the documents nor to take them home and review prior to signing. There is no evidence she even requested further time or to take the documents home. Nor is there any evidence she made an inquiry about the document, that opportunity was denied, or that plaintiff was in anyway affirmatively misled about the documents or their content.

The court finds the circumstances of how the documents were presented, the opportunity for review, and information contained explaining the documents similar to that in Skuse, ante. Here, rather than an email, the materials were in printed form. Rather than labeled "training" as in Skuse, here the documents were indicted as "onboarding." The content of the Arbitration Agreement, as previously outlined, was clear and thorough. Plaintiff says she simply signed the documents believing they were of no particular significance. However, the court finds the circumstances or setting procedurally unconscionable such as to find the agreement unenforceable. Nor is there a basis upon which to find it substantively unconscionable. The agreement was part of a mutual exchange of promises between the parties and not one (1) sided.

Plaintiff also argues the claims against the individual defendants are not subject to the arbitration agreement because the individuals are not parties to the agreement. However, the court finds the claims against them are necessarily incorporated therein. The court's analysis starts with the understanding that the LAD prohibits "employers" from engaging in unlawful employment practices and discrimination. N.J.S.A. 10:5-12(a). "[T]he LAD was intended to prohibit discrimination in the context of an employer/employee relationship." Pukowsky v. Caruso, 312 N.J. Super. 171, 184 (App. Div. 1998). That being the case, the absence of an employment relationship between a plaintiff and a defendant will preclude liability. Thomas v. Cnty. Of Camden, 386 N.J. Super. 582, 594 (App. Div. 2006).

The LAD defines "employer" as including "all persons as defined in [N.J.S.A. 10:5-5(a)] unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." N.J.S.A. 10:5-5(e). Although the LAD's definitions of the terms "employer" and "employee" are admittedly broad, D'Annunzio v. Prudential Ins. Co. of Am., 383 N.J. Super. 270, 277 (App. Div. 2006), aff'd as modified, 192 N.J. 100 (2007), it has been established that a supervisor or co-worker is not an "employer" under the LAD. Tarr v. Ciasulli, 181 N.J. 70, 82-83 (2004). However, the LAD makes it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act." N.J.S.A. 10:5-12(e); see Tarr, ante 181 N.J. at 83.

"[I]ndividual liability of a supervisor for acts of discrimination or for creating or maintaining a hostile environment can only arise through the 'aiding and abetting' mechanism that applies to 'any person.'" Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 594 (2008) (quoting N.J.S.A. 10:5-12.1(e)). Under the LAD, "aiding and abetting 'require[s] active and purposeful conduct.'" Id. (quoting Tarr, ante, 181 N.J. at 83). Therefore,

> in order to hold an employee liable as an aider or abettor, a plaintiff must show that "'(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'"
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> Id. (quoting Tarr, ante 181 N.J. at 84).

Therefore, the claims are interrelated and part of the claims against the employer principal. That makes them subject to the arbitration clause.

That brings the court to the final issue. As noted, plaintiff asserts claims under the NJLAD in this action. The statute was amended effective March 2019 to state:

> a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.
> b. No right or remedy under the "Law Against Discrimination" or any other statute or case law shall be prospectively waived.
> N.J.S.A. 10:5-12.7

Defendant argues that statute cannot negate the arbitration agreement here because this agreement is controlled by the Federal Arbitration Act (FAA). It is without dispute the FAA states arbitration agreements 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. Moreover, the FAA preempts state laws that "discriminate on its face against arbitration" or "covertly accomplishes the same objective by disfavoring contracts that…have the defining features of arbitration agreements." Kindred Nursing Centers Ltd P'ship v. Clark, 137 S. Ct. 1421, 1426.

There are no published cases analyzing whether the arbitration clause would be enforceable in light of this amendment.[3] However, our courts have addressed the issue in

[3] The unpublished cases in the Appellate Division do not apply the statute because the contract was entered prior to the statute effective date. Gaffney v. Levine, 2020 N.J. Super. Unpub. LEXIS 186 (App. Div. Jan. 29, 2020); Hannen v. Group One Auto., Inc., 2019 N.J. Super. Unpub. LEXIS 2658 (App. Div. Dec. 30, 2019); Guirguess v. Public Serv. Elec. & Gas Co., 2019 N.J. Super. Unpub. LEXIS 2501 (App. Div. Dec. 10, 2019).

relation to another statute. Estate of Anna Ruszala ex rel. Mizerak v. Brookdale Living Communities, Inc., 415 N.J. Super. 272 (App. Div. 2010) involved a claim against a nursing home under the Nursing Home Responsibilities and Rights of Residents Act, N.J.S.A. 30:13-1 to -17. That Act creates a private cause of action for any person whose rights as defined in the Act are violated. The action can be filed against any person coming such a violation. N.J.S.A. 30:13-8(a). The plaintiff in Ruszala filed suit against Brookdale Living Communities under the Act. The defendant in that case sought to enforce an arbitration agreement and the plaintiff point to a 2003 amendment to the Act comparable to N.J.SA. 10:5-12.7. The Nursing Home Rights Act amendment provided:

> [a]ny provision or clause waiving or limiting the right to sue for negligence or malpractice in any admission agreement or contract between a patient and a nursing home or assisted living facility licensed by the Department of Health and Senior Services pursuant to the provisions of *P.L.* 1971, c. 136 (C. 26:2H-1 *et seq.*), whether executed prior to, on or after the effective date of this act, is hereby declared to be void as against public policy and wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding.
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> N.J.S.A. 30:13-8.1

The Appellate Division found that statute was nullified by the FAA. That court explained:

> Under §2 of the FAA, arbitration agreements "shall be 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. The FAA thus preempts any state law or regulation that seeks to preclude the enforceability of an arbitration provision on grounds other than those which "exist at law or in equity for the revocation of any contract." 9 U.S.C. §2; see also Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002).
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> Our State's prohibition of arbitration agreements in nursing home contracts, designed to protect the elderly, is thus irreconcilable with our national policy favoring arbitration as a forum for dispute resolution. Under our federal system of government, national policy prevails. Therefore, the FAA's clear authorization nullifies the specific prohibition of arbitration provisions in nursing home or assisted living facilities' contracts contained in N.J.S.A. 30:13-8.1.

Estate of Ruszala, ante 415 N.J. Super. at 293.

The 2019 amendment to New Jersey's LAD is no different than the 2003 amendment to the Nursing Home Rights Act. And for the same reasons the Ruszala court found the 2003 amendment to the Nursing Home Rights Act nullified by the FAA this court finds the 2019 amendment to the N.J. LAD nullified by the FAA as well. See also Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012) (holding a West Virginia nursing home statute, that prohibited arbitration of personal injury and wrongful death suits, preempted by the FAA and federal policy favoring arbitration); At&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 131 S. CT. 1740, 1747, 179 L. Ed. 2d (2011) (stating "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); Preston v. Ferrer, 552 U.S. 346, 356, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); Perry v. Thomas, 482 U.S. 483, 491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (FAA pre-empts state-law requirement that litigants be provided a judicial forum for wage disputes); Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute); Ope Int'l Lp v. Chet Morrison Contrs., 258 F.3d 443 (5th Cir. 2001) (finding the FAA preempts a state statute finding arbitration provisions in certain construction contracts void and unenforceable as against public policy).

Therefore, the court grants defendant's motion to dismiss and compels arbitration of this matter. The parties are compelled to participate in arbitration on the claims in this action and the complaint here is dismissed without prejudice. As a consequence there is no basis upon which to grant plaintiff's motion for counsel fees and that must be denied.