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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RACHEL BRAYMAN, individually and on behalf of all other similarly situated individuals; ADRIANA PONCE, individually and on behalf of all other similarly situated individuals; DANA MCCARTHY, individually and on behalf of all other similarly situated individuals,

Plaintiffs - Appellees,

v.

KEYPOINT GOVERNMENT SOLUTIONS, INC., a Delaware corporation,

Defendant - Appellant.

Nos. 22-1118 & 22-1168

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-00550-WJM-NRN)

Margaret Parnell Hogan, Littler Mendelson, P.C., Denver, Colorado (Jennifer S. Harpole and Thomas W. Carroll, Littler Mendelson, P.C., Denver, Colorado; Jacqueline E. Kalk, Littler Mendelson, P.C., Minneapolis, Minnesota; and Everett Clifton Martin, Littler Mendelson, P.C., Los Angeles, California, with her on the brief) for Defendant - Appellant.

Anna P. Prakash and Caroline E. Bressman (Rachhana T. Srey, with them on the brief), Nichols Kaster, PLLP, Minneapolis, Minnesota, for Plaintiffs - Appellees.

Before **HARTZ**, **EBEL**, and **MATHESON**, Circuit Judges.

HARTZ, Circuit Judge.

Plaintiffs have brought two actions against KeyPoint Government Solutions: a collective action under the Fair Labor Standards Act (the FLSA) on behalf of KeyPoint employees nationwide, and a state-law putative class action on behalf of California employees. They allege that KeyPoint violated the FLSA through policies requiring employees to work uncompensated overtime and also violated certain provisions of California's wage-and-hour laws.

Before us on interlocutory appeal are two district-court rulings challenged by KeyPoint: (1) the denial of KeyPoint's motion to compel arbitration of California state-law claims by some California Plaintiffs; and (2) the certification under Fed. R. Civ. P. 23 of the California employee class. Exercising jurisdiction under 9 U.S.C. § 16(a)(1)(C) and Rule 23(f), we reverse the district court's denial of KeyPoint's motion to compel arbitration, vacate the court's certification of the Rule 23 class, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

KeyPoint provides investigative services and background screening for federal government agencies. These services are performed by Field Investigators, whose duties include performing interviews, searching public records, and writing reports of their investigations. Field Investigators work remotely out of their homes but are assigned to geographic regions and are required to travel to and from interviews and

record-collection sites. They are expected to generally work Monday through Friday but have flexibility to decide how to structure their workday.

Field Investigators are supervised by Field Managers, who monitor investigator performance, manage investigator workloads, approve timecards and overtime, adjust investigation deadlines, enforce KeyPoint's overtime policy, and take disciplinary action. Field Managers do not, however, assign work to investigators; all assignments are distributed to investigators by KeyPoint's logistics team. The California Plaintiffs were supervised by at least 15 different Field Managers, but the Field Managers for California report to a single Regional Field Director.

Field Investigators are hourly employees covered by the FLSA (no exemption applies) and are required to report their time on weekly time sheets. KeyPoint's employee handbook states:

> When an employee works, he/she must report all time worked. Non-exempt employees should not work any time that is not authorized by their supervisors. Do not start work early, finish work late, work during a meal break, or perform any other extra or overtime work unless directed to do so.

Aplt. App. at 6252. Each investigator, upon submission of the weekly time sheet, must "certify as to the accuracy and completeness of the information included" on the time sheet. *Id.* at 775.

1. KeyPoint's Productivity and Overtime Policies

KeyPoint requires Field Investigators to meet certain productivity, timeliness, and quality metrics. Productivity is measured by "source units," which represent the

"presumed amount of effort" to complete a specific task. *Id.* at 4090 (emphasis omitted). Investigative tasks have a source-unit value determined by KeyPoint's logistics team. For example, conducting a subject interview is worth three to four source units (depending on the federal agency) and checking a documentary record is worth half a source unit. The source-unit value for each type of task is fixed, but the amount of time required to complete a given task may vary depending on factors such as the amount of travel required, traffic, uncooperative interviewees, cancelations, and interviewee availability.

Each Field Investigator is required to produce a minimum number of source units per hour worked, based on the investigator's experience (level one through six) and geographical classification (metro or non-metro). For example, a level-one, non-metro employee is expected to complete 0.375 source units per hour (or 15 source units per 40-hour workweek) and a level-six, metro employee is expected to complete 0.760 source units per hour (or 30.5 source units per 40-hour workweek). But not all tasks required by KeyPoint are awarded source units. For example, time spent on certain administrative tasks and travel counts towards the investigator's hours worked but does not provide any source-unit credit. And if any task is "cancelled, referred, [or] rescheduled," the investigator receives no credit for any work performed toward that task. *Id.* at 5826. Plaintiff Adriana Ponce said in her exit interview that "[t]here is a lot of work that gets done that the [Field Investigator] doesn't get credit for." *Id.* at 3818. Say, a reference in San Diego moves: "You call them a couple times, send an email, go to their house and leave a card. They finally call you and tell you they

moved to San Francisco – you have to reassign that subject reference and there is no credit for the time spent tracking that person down." *Id.* KeyPoint refers to such work on a task that leads to no source-unit credit as "evaporation," and it instructs investigators to monitor evaporation and ask for replacement work if needed.

KeyPoint assigns investigators more work than is required to meet their source-unit requirements. All investigators are expected to complete 85 to 90% of their assignments by KeyPoint's internal assignment-completion date (ACD). Field Investigators can submit a request to the Field Manager to change an assignment's ACD, but doing this is administratively burdensome and time consuming, and time spent changing an ACD will count toward an investigator's total hours worked without producing source units.

Source units are awarded when a Field Investigator completes and transmits a report. All reports are subject to quality review, and any report that does not meet standards is sent back to the investigator as a "rework" for correction. KeyPoint requires that 85% of an investigator's work be accepted without needing revision. If a report is sent back for rework, the investigator is required to fix the issues within five days, but there is no source-unit credit for the time spent on a rework. Investigators who do not meet KeyPoint's productivity, timeliness, and quality standards are subject to disciplinary action including demotion and termination.

KeyPoint allows Field Investigators to work overtime, but only with prior written authorization from the Field Manager. Working unapproved overtime can result in disciplinary action, including termination. Plaintiffs allege that KeyPoint has

an unwritten productive-overtime policy that requires investigators to meet their ordinary source-unit requirements for any overtime worked, so overtime cannot be used to catch up on work. Supporting this allegation, one Field Manager explained in an email that "overtime is not used to catch up" because "OT has the same source [unit] expectation as your normal work hours." *Id.* at 1357. Thus, if a level-one investigator worked an additional 40 hours of overtime for the month, that employee would "owe [KeyPoint] an additional 15 SUs (for the additional 40 hours)." *Id.* Regional Field Directors place a limit on the total overtime hours available to each region per month. Plaintiffs allege that Field Managers refused to approve all overtime hours worked.

Plaintiffs claim that because of these policies, investigators regularly worked unpaid overtime hours to complete their work and meet KeyPoint's production expectations and job requirements, and that even when an investigator could meet the source-unit requirements, he or she would still have to work off the clock to meet all the deadlines. All 214 KeyPoint investigators who opted into this collective action have stated in answers to interrogatories that they worked more than 40 hours per week without receiving overtime compensation and that KeyPoint knew or should have known about their uncompensated work.

2. The Arbitration Agreement

In October 2015 KeyPoint began requiring new hires to sign an arbitration agreement. Under this agreement employees must arbitrate all disputes regarding "compensation, classification, minimum wage, . . . overtime, breaks and rest

periods." *Id.* at 325. Two provisions of the agreement are central to this appeal. Section 1, entitled "How This Agreement Applies," contains the Arbitrator Decides Clause, which states:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement. However, the preceding sentence shall not apply to the "Class Action Waiver" described below.

Id. (The Class Action Waiver provision, which appears in § 5 of the agreement, states that the employee waives any right to arbitrate as a class and that only a court can determine the validity or enforceability of the waiver.[1])

Section 2, entitled "Limitations On How This Agreement Applies," contains the Pending Litigation Exception, which states:

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[1] The paragraph containing the waiver states:

> Both KeyPoint and you *agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective, or private attorney general representative basis*; there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding ("Class Action Waiver"). The Class Action Waiver does not apply to any claim you bring in arbitration as a private attorney general solely on your own behalf and not on behalf of or regarding others. *Disputes regarding the validity or enforceability of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator*. In any case in which (1) the dispute is filed or pursued as a class, collective, representative or private attorney general representative action and (2) there is a final judicial determination that all or part of the Class Action Waiver is invalid or unenforceable, the class, collective, or representative private attorney general action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is valid and enforceable shall be enforced in arbitration.

Aplt. App. at 327 (italics added and bold typeface omitted).

> [N]otwithstanding any other language in this Agreement, this Agreement does not apply to any currently pending litigation between Employee and KeyPoint as of the date this Agreement is signed by Employee, and this Agreement does not apply to any class, collective, or other representative action proceeding that is currently pending and to which you are a current or purported class member as of the day this Agreement is signed by Employee.

Id. The parties do not dispute that the arbitration agreement is a valid and enforceable contract between KeyPoint and the employees who have signed it.

B. Procedural History

In March 2018 Plaintiff Rachel Brayman brought a collective action in the United States District Court for the District of Colorado against KeyPoint on behalf of herself and others similarly situated. She alleged that KeyPoint violated the FLSA, which requires employers to pay all nonexempt employees one and one-half times the regular rate of pay for all hours worked over 40 hours per workweek. *See* 29 U.S.C. § 207.

The district court conditionally certified the collective action, and Plaintiffs' counsel sent notice to those who satisfied the collective-action class definition.[2] Including the original named Plaintiffs, 214 Plaintiffs have joined the collective action (the FLSA opt-in Plaintiffs), and 63 of them worked in California (the California opt-in Plaintiffs). On July 9, 2020, Plaintiffs filed their First Amended

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[2] Ultimately, the FLSA collective-action class was defined as:

> All persons who worked as, or who were hired to be, a Field Investigator, Background Investigator, or in other position with similar job duties, for Defendant KeyPoint Government Solutions, Inc. at any time from April 6, 2015 to September 18, 2019.

Brayman v. KeyPoint Gov't Sols., Inc. (*Brayman II*), 595 F. Supp. 3d 983, 1002 (D. Colo. 2022) (internal quotation marks omitted).

Complaint, adding class-action claims under California law on behalf of KeyPoint's California investigators. The new claims are for breach of California laws regarding overtime pay and rest and meal breaks.[3] The purported class consists of the 63 California opt-in Plaintiffs and at least 400 California employees not part of the FLSA collective (the Rule 23 class).[4] All 214 of the FLSA opt-in Plaintiffs have answered KeyPoint's interrogatories, and the California opt-in Plaintiffs answered additional interrogatories. KeyPoint deposed the named Plaintiffs and 25 of the opt-in Plaintiffs, and Plaintiffs deposed over a dozen KeyPoint corporate representatives and Field Managers.

In response to the First Amended Complaint, KeyPoint moved to compel arbitration of the California-law clams for the 31 California opt-in Plaintiffs who signed the arbitration agreement before January 13, 2020, the date Plaintiffs moved to amend their complaint to add the California claims. The district court denied KeyPoint's motion to compel. *See Brayman v. Keypoint Gov't Sols., Inc.* (*Brayman I*), No. 18-cv-0550, 2021 WL 392599, at *5 (D. Colo. Feb. 4, 2021). KeyPoint moved

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[3] Plaintiffs also brought claims under California law for failure to provide an accurate wage statement, for failure to pay final wages, and for unfair competition and business practices. But these claims are derivative of the off-the-clock and meal- and rest-break claims, and they need not be separately addressed in this appeal.

[4] The Rule 23 class is defined as:

> All persons who worked as, or who were hired to be, a Field Investigator, Background Investigator, or another position with similar job duties in the State of California for Defendant KeyPoint Government Solutions Inc. at any time from March 8, 2014 to present and has not signed an arbitration agreement prior to March 8, 2018.

Brayman II, 595 F. Supp. 3d at 1002.

for "clarification" (or, as the district court understood it, reconsideration) of the court's denial of its motion to compel arbitration. Plaintiffs then moved for final certification of the FLSA collective and certification of the Rule 23 class, and KeyPoint moved to decertify the FLSA collective.

The district court granted final FLSA certification and certification of the Rule 23 class and denied reconsideration of its arbitration order. *See Brayman v. KeyPoint Gov't Sols., Inc. (Brayman II)*, 595 F. Supp. 3d 983, 1002 (D. Colo. 2022). KeyPoint filed an interlocutory appeal of the court's denial of its motion to compel arbitration under 9 U.S.C. § 16(a)(1)(C), which provides for an immediate appeal as of right from an order "denying an application . . . to compel arbitration," and also petitioned this court under Rule 23(f) for permission to appeal the district court's grant of class certification. We permitted the class-certification appeal and have consolidated KeyPoint's two interlocutory appeals.

II. DISCUSSION

KeyPoint contends on appeal that the district court erred in (1) declining to compel arbitration[5] and (2) granting class certification under Rule 23. We first consider arbitration.

[5] Plaintiffs contend that KeyPoint has waived its right to appeal whether the 31 California opt-in Plaintiffs must arbitrate their California-law claims. The waiver occurred, it says, when KeyPoint moved for reconsideration of aspects of the district court's denial of its motion to compel arbitration but did not seek reconsideration of whether the California opt-in Plaintiffs must arbitrate their California claims. Plaintiffs rely on the decision in *Comité Fiestas De La Calle San Sebastián, Inc. v. Soto*, 925 F.3d 528 (1st Cir. 2019). But in that case the notice of appeal was limited to denial of the motion for reconsideration, so the failure to raise an issue in the

A. Arbitrability

We review de novo a district court's decision to grant or deny a motion to compel arbitration. *See Reeves v. Enter. Prod. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021). We start with the fundamental proposition that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks omitted). A court addressing a motion to compel arbitration therefore must first determine whether there exists an enforceable agreement to arbitrate. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010).

It is then necessary to determine such matters as "who is bound by" the agreement, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009), and whether the "agreement covers a particular controversy," *Rent-A-Center*, 561 U.S. at 69; *see Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1280 (10th Cir. 2017). Because arbitration is a matter of contract, "parties can agree to arbitrate arbitrability." *Belnap*, 844 F.3d at 1280. But we "presume that the parties intend courts, not

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motion waived that issue for appeal. *See id.*at 531, 533. Here, in contrast, KeyPoint's notice of appeal references both the district court's order denying KeyPoint's motion to compel and its order denying reconsideration. Under Fed. R. App. P. 3(c)(1)(B), the notice of appeal "designate[s] the judgment—or the appealable order—from which the appeal is taken." And "we construe notices of appeal liberally in order to avoid denying review of issues that the parties clearly intended to appeal." *Averitt v. Southland Motor Inn of Okla.*, 720 F.2d 1178, 1180 (10th Cir. 1983). Because both orders are clearly designated in the notice of appeal, KeyPoint has properly appealed both orders.

arbitrators," to decide such issues. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014). Therefore, we will not decide that the parties have delegated arbitrability issues to the arbitrator "unless there is clear and unmistakable evidence that they did so." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (brackets and internal quotation marks omitted); *accord Belnap*, 844 F.3d at 1281. If that requirement is satisfied, "a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

The parties do not dispute that the arbitration agreement is valid and enforceable. (Indeed, some of the original opt-in Plaintiffs have withdrawn from the action and are pursuing their claims through arbitration.) At issue is whether certain Plaintiffs (the contested California Plaintiffs) are required to arbitrate their California-law claims. In particular, the parties dispute whether the Pending Litigation Exception applies to the contested California Plaintiffs, thereby exempting them from their obligation to arbitrate. But also at issue is the gateway question of who—the court or the arbitrator—decides whether the exception applies.

Plaintiffs contend that the Pending Litigation Exception does apply to the contested California Plaintiffs and that the district court properly determined that it was empowered to decide the issue. KeyPoint disagrees on both points. It contends that the district court erred in ruling that the exception applied and made a more

fundamental error in usurping the role of the arbitrator, who, it says, has been assigned by the parties the task of determining the application of the exception.

We agree with KeyPoint that the Arbitrator Decides Clause gives the arbitrator exclusive authority to answer this applicability (and therefore arbitrability) question. Consequently, we need not, and should not, ourselves decide whether the exception applies. As we said in *Belnap*:

> Given that parties can agree to arbitrate arbitrability, as well as other issues, questions of arbitrability encompass two types of disputes: (1) disputes about *whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement; and (2) threshold disputes about *who should have the primary power to decide* whether a dispute is arbitrable. . . . Importantly, courts must address the second type of dispute first. In other words, the question of *who* should decide arbitrability precedes the question of *whether* a dispute is arbitrable.

844 F.3d at 1280–81 (internal quotation marks and citations omitted). We now explain why we think the issue is in the hands of the arbitrator.

In *Rent-A-Center*, 561 U.S. 63, the Supreme Court considered an arbitration agreement with a delegation clause that used language essentially identical to the Arbitrator Decides Clause here.[6] At issue was whether the court or the arbitrator had the authority to decide whether the agreement as a whole was unenforceable because it was unconscionable. The Court determined that since the delegation clause gave

[6] The contract provision in *Rent-A-Center* stated: "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." 561 U.S. at 66 (brackets and internal quotation marks omitted).

the arbitrator the "exclusive authority to resolve any dispute relating to the enforceability" of the agreement, "any challenge to the validity of the Agreement as a whole" was left to the arbitrator. *Id.* at 71–72 (ellipsis and internal quotation marks omitted). Because the validity of the delegation clause was unchallenged, the arbitrability issue was for the arbitrator to decide. *See id.* at 72–73.

We must follow *Rent-A-Center* here. The Arbitrator Decides Clause states: "[T]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement." Aplt. App. at 325. *Rent-A-Center* held that this language granted the arbitrator the right to determine whether the arbitration contract itself was invalid because of unconscionability. Surely, the authority of the arbitrator encompasses the much less expansive issue of the meaning of a particular provision. Indeed, the almost precise match between the language here and the language in *Rent-A-Center* strongly implies that the drafters intended the broadest possible authority for the arbitrator. The Arbitrator Decides Clause is "clear and unmistakable evidence" that the parties intended an arbitrator to decide whether the agreement applies and the dispute is arbitrable. *First Options*, 514 U.S. at 944 (brackets and internal quotation marks omitted).

Plaintiffs nevertheless attempt to distinguish *Rent-A-Center*. They argue that the Pending Litigation Exception explicitly carves out an exception to the Arbitrator Decides Clause. The provision states in full:

> [N]otwithstanding any other language in this Agreement, this Agreement does not apply to any currently pending litigation between Employee and KeyPoint as of the date this Agreement is signed by Employee, and this Agreement does not apply to any class, collective, or other representative action proceeding that is currently pending and to which you are a current or purported class member as of the day this Agreement is signed by Employee.

Aplt. App. at 325. They point out that *Rent-A-Center* did not consider any clause like the "notwithstanding any other language in this Agreement" introduction to the Pending Litigation Exception.

To be sure, the purpose of *notwithstanding* language is to override contrary language in the document. *See, e.g.*, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("As we have noted previously in construing statutes, the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."). Here, for example, that language makes clear that the Pending Litigation Exception excludes certain disputes from arbitration despite the broad language in the agreement setting forth what disputes must be arbitrated. But nothing in the Exception says anything about *who* interprets the Exception. Nothing in the Exception is contrary to the Arbitrator Decides Clause. Nothing in the clause excludes arbitrability from the matters that can be arbitrated. The Exception leaves unsaid who is to interpret it, so one turns to the Arbitrator Decides Clause to learn who that is. The Exception provision is fully consistent with granting the arbitrator the authority to decide whether the Exception applies. It is worth noting that the

arbitrator may well decide that the Exception applies so that a particular dispute is not arbitrable and must be sent back to the court.

We are not persuaded by the district court's conclusion that if the applicability of the Exception needed to be decided by the arbitrator, "arbitration would be the necessary gateway to invoking the Pending Litigation Exception (effectively making the Exception a farce)." *Brayman I*, 2021 WL 392599, at *3 (internal quotation marks omitted). One could just as well say that if the Exception is a carveout, then the Arbitrator Decides provision is a farce. Properly understood, neither provision diminishes the other.

Our conclusion about the scope of the arbitrator's authority finds strong support in the second sentence of the Arbitrator Decides Clause. We quote both sentences of the Clause:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement. *However, the preceding sentence shall not apply to the "Class Action Waiver" described below*.

Aplt. App. at 325 (emphasis added). The second sentence is everything a carveout should be. It explicitly states that the arbitrator lacks exclusive authority to interpret the Class Action Waiver. Further, the Class Action Waiver itself repeats this point, saying: "Disputes regarding the validity or enforceability of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator." *Id.* at 327. Given how emphatically the arbitration agreement expresses this one exception to the Arbitrator Decides Clause, we must infer that no other

exception was intended. In drawing this inference, we follow California law, which governs the interpretation of this California contract. *See White v. W. Title Ins. Co.*, 710 P.2d 309, 314 n.4 (Cal. 1985) ("Under the familiar maxim of *expressio unius est exclusio alterius* it is well settled that, when a statute expresses certain exceptions to a general rule, other exceptions are necessarily excluded. This canon, based on common patterns of usage and drafting, is equally applicable to the construction of contracts." (citations and internal quotation marks omitted)); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018) (applying state-law rules of contract interpretation in determining whether parties delegated arbitrability to arbitrator).[7]

Plaintiffs' reliance on the Fifth Circuit's opinion in *Archer and White Sales v. Henry Schein*, 935 F.3d 274 (5th Cir. 2019), is misplaced. In that case the issue was the arbitrability of a complaint seeking injunctive relief. The placement of the carve-out language showed that it clearly applied to that particular arbitrability issue. The arbitration agreement stated that "[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American

[7] There is nothing peculiar to California law about this inference. The Supreme Court has explained that in the statutory context, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotation marks omitted). And the rule works in every form of communication between humans. *See* Antonin Scalia & Brian Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) ("[T]he principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression.").

Arbitration Association (AAA)." *Id.* at 277 (original brackets and internal quotation marks omitted). Ordinarily, the incorporation of the AAA rules is understood to delegate to the arbitrator all issues of arbitrability, so without the carve-out, arbitrability would be for the arbitrator to decide. But the Fifth Circuit said:

> [T]he placement of the carve-out here is dispositive. We cannot re-write the words of the contract. The most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules. The plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out. Given that carve-out, we cannot say that the Dealer Agreement evinces a "clear and unmistakable" intent to delegate arbitrability.

Id. at 281–82.

We have no trouble distinguishing that arbitration provision from the one in this case. To begin with, whereas the carve-out clause in *Archer* is in the same sentence as the arbitrator-decides language, here the Pending Litigation Exception and the Arbitrator Decides Clause are in separate sections of the agreement. The Arbitrator Decides Clause is in Section 1 ("How This Agreement Applies") and the Pending Litigation Exception is in Section 2 ("Limitations On How This Agreement Applies"). Aplt. App. at 325 (emphasis omitted). More importantly, although the Pending Litigation Exception begins with the "notwithstanding" phrase, the rest of that provision says nothing about who decides arbitrability, so it is in no way contrary to the Arbitrator Decides Clause. Further, and decisively, the Arbitrator Decides Clause is immediately followed by a sentence explicitly stating that it does not apply to questions regarding the Class Action Waiver provision later found in the

arbitration agreement (which itself states that disputes regarding the validity or enforceability of the Waiver must be resolved by a court), thereby implying there are no other carve-outs. But we need not get too pedantic. The natural reading of the two agreements strongly implies that one provides a carveout and the other does not.

The Arbitrator Decides Clause gives the arbitrator and not the courts the exclusive authority to resolve disputes about the applicability of the agreement, so the arbitrator and not the courts must decide whether the Pending Litigation Exception would apply to the challenged California Plaintiffs. The district court erred in denying KeyPoint's motion to compel arbitration.

B. Rule 23 Class Certification

1. Legal Standard

For a class to be certified under Rule 23, a party must show that the four threshold requirements of Rule 23(a) are satisfied and that one of the three provisions of Rule 23(b) is satisfied. The requirements of Rule 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable [numerosity];
>
> (2) there are questions of law or fact common to the class [commonality];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class [adequacy].

Fed. R. Civ. P. 23(a). As for the alternatives under Rule 23(b), "Rule 23(b)(1) addresses situations where 'incompatible standards of conduct for the party opposing the class' would arise without class treatment," *CGC Holding Co., LLC v. Broad &*

Cassel, 773 F.3d 1076, 1086 (10th Cir. 2014) (quoting Rule 23(b)(1)); and "Rule 23(b)(2) covers class actions for declaratory or injunctive relief where the party defending against the class 'has acted or refused to act on grounds that apply generally to the class,'" *id.* (quoting Rule 23(b)(2)). Neither of those alternatives applies here. The parties and the district court have agreed that because the class action seeks monetary damages, it is Rule 23(b)(3) that governs. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("we think it clear that individualized monetary claims belong in Rule 23(b)(3)"); *Brayman II*, 595 F. Supp. 3d at 996 (certifying the class under Rule 23(b)(3)). That provision states as follows:

> A class action may be maintained if Rule 23(a) is satisfied and if . . .
>
> the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3) (emphasis added). Thus, Rule 23(b)(3) requires a showing of predominance and superiority. *See CGC Holding*, 773 F.3d at 1086 ("[C]lass status is appropriate as long as plaintiffs can establish an aggregation of legal and factual

issues, the uniform treatment of which is superior to ordinary one-on-one litigation.").

We have said that we review de novo "the standard the district court used in making its Rule 23 determination," and we review for abuse of discretion "the merits of that determination." *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1217 (10th Cir. 2013) (internal quotation marks omitted). At times, however, it can be difficult to distinguish between using the wrong standard and misapplying the proper standard. In any event, making an error of law (such as using the wrong standard) is one form of abuse of discretion, *see CGC Holding*, 773 F.3d at 1085–86, so the distinction has little if any practical effect. Of course, we can also say that a court abused its discretion when we determine that it made a clearly erroneous finding of fact, *see id.*, or when "we have a definite and firm conviction that [it] made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances," *Thiessen v. General Electric Cap. Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001).

It is essential that courts keep in mind that "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores*, 564 U.S. at 350. Under this standard, "the district court has an independent obligation to conduct a 'rigorous analysis' before concluding that Rule 23's

requirements have been satisfied." *Roderick*, 725 F.3d at 1217 (quoting *Wal-Mart Stores*, 564 U.S. at 351).

2. Commonality and Predominance

KeyPoint challenges only the district court's findings of commonality and predominance. The Supreme Court has said that to satisfy the commonality requirement of Rule 23(a)(2), the class's claims "must depend upon a common contention" that "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores*, 564 U.S. at 350. "In other words, the focus of Rule 23(a)(2)'s commonality requirement is not so much on whether there exist common *questions*, but rather on 'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Naylor Farms, Inc. v. Chaparral Energy, LLC*, 923 F.3d 779, 789 (10th Cir. 2019) (quoting *Wal-Mart Stores*, 564 U.S. at 350). The existence of a single common question is sufficient to meet the commonality requirement. *See Wal-Mart Stores*, 564 U.S. at 359.

As for the *predominance* requirement of Rule 23(b)(3), it "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *CGC Holding Co.*, 773 F.3d at 1087 (internal quotation marks omitted). And like commonality, predominance must be satisfied "through evidentiary proof." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). "If anything, Rule 23(b)(3)'s predominance

criterion is even more demanding than Rule 23(a)." *Id.* at 34.

To satisfy the predominance requirement "a plaintiff must show that common questions subject to generalized, classwide proof *predominate* over individual questions." *Naylor Farms*, 923 F.3d at 789 (internal quotation marks omitted). Courts conduct a two-step analysis. First, for every issue related to the claim, the court must characterize it as common or individual. "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (brackets and internal quotation marks omitted). *Compare id.* at 454–60 (discussing whether and when representative or statistical evidence can support finding of commonality), *with Wal-Mart Stores* 564 U.S. at 353–61 (commonality not satisfied).

The court must then weigh the issues to determine whether the common issues predominate. *See CGC Holding*, 773 F.3d at 1087 (determining predominance "requires us to survey the elements of the class's . . . claims to consider (1) which of those elements are susceptible to generalized proof, and (2) whether those that are so susceptible predominate over those that are not."). It is not necessary for a plaintiff to show "that all of the elements of the claim entail questions of fact and law that are common to the class [or] that the answers to those common questions [are] dispositive." *Id.* "[S]o long as at least one common issue predominates, a plaintiff can

satisfy Rule 23(b)(3)—even if there remain individual issues, such as damages, that must be tried separately." *Naylor Farms*, 923 F.3d at 789.

Obviously, "Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 609 (1997). For the remainder of our analysis, we therefore focus on predominance.

KeyPoint argues that the district court abused its discretion by failing to conduct a proper predominance analysis. We agree.

a. Off-the-Clock Claims

Under California law, to prove an off-the-clock claim a plaintiff must show that the employee performed work without compensation and that the employer knew, or should have known, that the employee performed work that was not compensated. *See Brinker Rest. Corp. v. Superior Ct.*, 273 P.3d 513, 544 (Cal. 2012).

Here, the district court "conclude[d] that Plaintiffs have adequately established that their claims depend upon common contentions that are of such a nature that they are capable of classwide resolution, and that such issues predominate over individual inquiries. After all, the proposed class members' claims arise from the same alleged course of conduct, and raise common issues of law and fact." *Brayman II*, 595 F. Supp. 3d at 998. The court's discussion of the factual basis for that conclusion is contained in the following paragraph of the predominance discussion:

> Plaintiffs argue that their unpaid overtime, meal and rest break, waiting time penalty, itemized wage statement, and unfair competition claims are common to the class and will be proved through common evidence. For example [citing to pages of Plaintiffs' amended motion for class certification that reference interrogatory answers by class members[8]], Plaintiffs contend that
>
> > whether the class worked unpaid overtime as a result of KeyPoint's over-assignment of work and minimum performance expectations will be established through the testimony of representative Plaintiffs and their common evidence of hours worked in KeyPoint's software systems; whether KeyPoint knew or should have known about this unpaid overtime will be established through common evidence of Plaintiffs' complaints to [Field Managers] and Human Resources and the company's intentional over-assignment of work; and Plaintiffs[] will prove that KeyPoint stood idly by and through common evidence that it did not compensate Plaintiffs for their unrecorded overtime hours.
>
> Plaintiffs likewise contend that they will establish their itemized wage statement claims and meal and rest break claims through KeyPoint's uniform wage statements and Plaintiffs' testimony, respectively. Additionally, Plaintiffs argue these common issues predominate over individual issues because KeyPoint's purported unlawful policies are common to the class as a whole.

Id. at 997 (further citations omitted).

A rigorous analysis requires more. The district court should carefully examine what facts are required to prove Plaintiffs' claims and then determine whether Plaintiffs have shown that they could establish those facts through common evidence. It would be inappropriate for us to conduct that analysis in the first instance. But we can suggest with greater specificity what the analysis would entail.

[8] This citation shows that the court, contrary to KeyPoint's appellate brief, did consider more than just the allegations in the First Amended Complaint in reaching its certification decision.

We begin by describing the components of what each field investigator needs to prove. First, the field investigator must establish that he or she worked uncompensated overtime. The interrogatory answers from class members show that each is prepared to testify to an approximate number of hours per week of uncompensated overtime. Thus, the question of how much uncompensated overtime a particular field investigator worked appears to be an individual issue. Perhaps, as in *Tyson Foods*, Plaintiffs can show this to be a common issue through expert testimony, statistical data, or representative evidence; but nothing of that nature in the record has been brought to our attention. *See Tyson*, 577 U.S. at 450 (on issue whether employees worked more than 40 hours per week after considering unreported time donning and doffing protective equipment, statistical analysis and expert testimony used to make classwide showing of time spent donning and doffing). It is important for the court to keep in mind, however, that even if damages can only be calculated on an individual basis, a class action may still properly proceed. *See* 2 *Newberg and Rubenstein on Class Actions* § 4:54, at 274–75 ("[T]he black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations."); *but see Comcast*, 569 U.S. at 34 ("Questions of individual damage calculations will [in the case before the Court] inevitably overwhelm questions common to the class.").

Then the field investigator must establish that KeyPoint (through an agent) knew of this overtime work. The interrogatory answers of every California opt-in Plaintiff asserts that KeyPoint managers knew or should have known that the Plaintiff was working uncompensated overtime; but most answers are weak on specifics. Some of the interrogatory answers indicate that the field manager of the field investigator altered timecards to remove overtime hours that had been worked. Other California opt-in Plaintiffs stated that they were "encouraged and pressured" by their supervisors "to work unrecorded overtime hours in order to keep up with KeyPoint's production expectations and job requirements or risk being demoted or terminated." Aplt. App. at 4312. And some said that they were instructed to underreport their overtime hours. We question, however, whether this evidence would be admissible to prove that every field manager insisted on uncompensated overtime. Was it sufficiently specific and representative to be "common" evidence that would be admissible in each Plaintiff's individual case? (We note that among the six opt-in Plaintiffs who were deposed, Ponce testified that no one at KeyPoint ever told her that she "should work hours and not record them," *id.* at 904, and another class member testified that she never told "anyone at KeyPoint that [she was] working hours [she was not] recording," *id.* at 1211.) The district court's opinion does not analyze these questions.

Alternatively, Plaintiffs may have intended to prove KeyPoint's knowledge by showing that it would be impossible for a field investigator to perform the required work in the required time, so if management did not know about uncompensated

overtime, it certainly should have known of it.[9] Again, unelaborated statements in interrogatory answers asserted excessive work demands. But, again, the district court did not analyze whether Plaintiffs could prove the impossible workload through common evidence. Are the opt-in plaintiffs simply the least-productive employees, who work uncompensated overtime to avoid being demoted or discharged? And what exactly do the interrogatory answers establish? Some field investigators said they could not perform the required number of source units each week, but their reasons were not uniform: Some said that the problem was too much drive time (which created no source units); but some said it was the amount of administrative paperwork (which created no source units); and some new employees said it was time needed for studying training materials (which created no source units). Others said they could perform the required number of source units but could not finish tasks in the required time without working uncompensated overtime. And what about employees who had been promoted above level one? Although they, too, complained that they could not perform the required number of source units without uncompensated overtime, for some a simple calculation shows that without the overtime they would perform at an acceptable rate for field investigators at a lower

[9] In reviewing Plaintiffs' briefs it is easy to lose sight of their cause of action. There is no illegality in setting very high (perhaps unrealistic) productivity requirements. Those requirements might lead to dismissal of many, perhaps even a large majority, of those hired. But as long as they are paid what they are due, they have no complaint under the California law that they invoke. The issue here is a knowing failure to pay for overtime work. The problem arises if KeyPoint is pressing employees to work off the clock, knowing that they are working off the clock, and failing to pay them the wages due.

level. Does this show that it might actually *be* possible for employees to do the job in the allotted time, at least so long as one was not promoted beyond one's level of competence? Finally, we note that Plaintiffs did not present expert testimony or statistical evidence.

These are just some of the questions that the district court would need to consider when determining what issues in the class action were common issues, what issues were individual issues, and which predominate.

b. Meal- and Rest-Break Claims

Under California law an employer must provide a meal break of at least 30 minutes (during which the employee has no work duties) for each work period exceeding five hours. *See Brinker*, 273 P.3d at 536. This means only that the employer made the duty-free meal available; "[t]he employer is not required to police meal periods to make sure no work is performed." *Donohue v. AMN Servs., LLC*, 481 P.3d 661, 675 (Cal. 2021). "There is no meal period violation if an employee voluntarily chooses to work during a meal period after the employer has relieved the employee of all duty." *Id.* at 668.

An employer must also provide a 10-minute rest break for every four hours worked (20 minutes total for an eight-hour workday). *See Brinker*, 273 P.3d at 528. Like meal breaks, rest breaks must be duty free, meaning that they are "free from labor, work, or any other employment-related duties." *Augustus v. ABM Sec. Servs., Inc.*, 385 P.3d 823, 832 (Cal. 2016).

The district court did not distinguish Plaintiffs' meal- and rest-break claims from Plaintiffs' off-the-clock claims. It analyzed only KeyPoint's allegedly unlawful policy and assumed that the policy could "prohibit[] Plaintiffs from taking required meal and rest breaks." *Brayman II*, 595 F. Supp. at 998. This was insufficient. It is one thing to say that because of the workload, the employee was pressured to put in uncompensated overtime. It is an entirely different thing to say that the employee would feel pressured to eliminate rest breaks and meal breaks to get the work done—particularly when employees have autonomy on when they schedule their meal and rest breaks. The district court needed to consider whether individual evidence would be required to show that Plaintiffs actually missed meal breaks and that the missed breaks were not voluntary, and needed to consider whether employee rest breaks were duty free under KeyPoint's policies.[10] The court abused its discretion in failing to perform claim-specific analysis. We vacate the district court's Rule 23 class certification so that the district court can properly consider predominance.[11]

III. CONCLUSION

We **REVERSE** the district court's denial of Defendant KeyPoint's motion to compel arbitration of California state-law claims and **VACATE** the district court's

[10] Although one employee complained that his rest breaks counted as "production time" and required source units, Aplt. App. at 3785 (emphasis omitted), Plaintiffs did not argue, and the district court did not consider, whether KeyPoint's rest breaks, even if taken, were duty free.

[11] As a result of possible changes in the putative class caused by our ruling on arbitrability, the district court may also need to reconsider other class-action issues, such as numerosity.

certification of the Rule 23 class. We **REMAND** for further proceedings consistent with this opinion.