**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 21-1460**

---

DARLENE STINGER; SHARON BUSH; TIA NEWTON,

Plaintiffs - Appellants,

v.

FORT LINCOLN CEMETERY, LLC; SERVICE CORPORATION INTERNATIONAL,

Defendants - Appellees.

---

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:20-cv-01052-TDC)

---

Submitted: June 27, 2022 Decided: July 12, 2022

---

Before MOTZ and KING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

---

Affirmed by unpublished per curiam opinion.

---

**ON BRIEF:** Jack Jarrett, ALAN LESCHT AND ASSOCIATES, PC, Washington, D.C., for Appellants. Lonnie J. Williams, Jr., STINSON LLP, Phoenix, Arizona; Brandon R. Nagy, STINSON LLP, Washington, D.C., for Appellees.

---

PER CURIAM:

Darlene Stinger, Sharon Bush, and Tia Newton (collectively, "Plaintiffs") brought this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219, against their employer, Fort Lincoln Cemetery, LLC ("Fort Lincoln"), and a related holding company, Service Corporation International ("SCI"). Invoking the arbitration agreement that each Plaintiff had signed, Fort Lincoln and SCI (collectively, "Defendants") moved to dismiss for improper venue. In response, Plaintiffs argued, among other things, that the arbitration agreement was substantively unconscionable. The district court disagreed and granted Defendants' motion. Plaintiffs appeal, and we affirm.

We review de novo a decision granting a Fed. R. Civ. P. 12(b)(3) motion to dismiss for improper venue. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006). Likewise, we "review a district court's determination regarding the arbitrability of a dispute de novo." *Lyons v. PNC Bank, Nat'l Ass'n*, 26 F.4th 180, 185 (4th Cir. 2022). We consider the validity of an arbitration agreement by reference to the governing state law. *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288 (4th Cir. 2022). Here, the parties agree that Maryland law controls.

In Maryland, "an arbitration agreement may be challenged on grounds of unconscionability." *Walther v. Sovereign Bank*, 872 A.2d 735, 743 (Md. 2005). To prevail in this defense, a party must show that the agreement is "extreme[ly] unfair[], which is made evident by (1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party." *Id.* (internal quotation marks omitted). The latter concerns the element of substantive unconscionability, which might manifest in "terms that

attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, provisions that seek to negate the reasonable expectations of the nondrafting party, and terms unreasonably and unexpectedly harsh having nothing to do with central aspects of the transaction." *Stewart v. Stewart*, 76 A.3d 1221, 1232 (Md. Ct. Spec. App. 2013) (cleaned up) (citing *Walther*, 872 A.2d at 744).

As to the rules governing arbitration, the parties' arbitration agreement adopted the Employment and Arbitration Rules and Procedure of JAMS ("JAMS Rules"), with one notable deletion. Specifically, the agreement omitted JAMS Rule 21, which allows a party to request, without need for a subpoena, another party to produce all witnesses in its employ or under its control for the arbitration hearing. JAMS Rule 21 also authorizes the arbitrator to issue subpoenas to facilitate document discovery and the attendance of witnesses at the hearing.

In Plaintiffs' view, the removal of JAMS Rule 21 renders the arbitration agreement substantively unconscionable. Specifically, Plaintiffs worry that, without live testimony or third-party document discovery, they will be unable to show the number of hours they worked or the willfulness of the FLSA violations they allege.

As we have recognized, "[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement." *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007). Rather, Plaintiffs must "show[] that the terms of the arbitration agreement would preclude them from effectively vindicating their statutory rights." *Id.* Critically, "[t]his burden is a substantial one and cannot be satisfied by a mere listing of ways that the

arbitration proceeding will differ from a court proceeding, or by speculation about difficulties that *might* arise in arbitration." *Id.* at 286-87.

Here, we conclude that Plaintiffs have failed to discharge their substantial burden of demonstrating that the omission of JAMS Rule 21 precludes them from vindicating their statutory rights. JAMS Rule 17(a), for example, requires that parties to the arbitration engage in good faith, voluntary exchange of relevant, nonprivileged evidence, which presumably would include payroll records indicating how many hours Plaintiffs worked. And JAMS Rule 17(b) allows Plaintiffs to depose at least one opposing witness, thus providing them an opportunity to probe the willfulness of the alleged FLSA violations. At bottom, we find that Plaintiffs have failed to establish that the arbitration agreement is substantively unconscionable.[*]

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

[*] Plaintiffs also contend that, at a hearing before the district court, Defendants "blue-penciled" the arbitration agreement by making certain concessions that, in effect, softened the effect of JAMS Rule 21's removal. Not only is Plaintiffs' argument severely undeveloped, but also Plaintiffs have failed to include the hearing transcript in the record on appeal. Thus, we consider this argument waived. *See Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)).