

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SHANE NICHOLSON,

Plaintiffs,

v.

CASE NO. 8:17-cv-529-T-26TGW

NPC INTERNATIONAL, INC.
d/b/a Pizza Hut,

Defendant.

ORDER

UPON DUE AND CAREFUL CONSIDERATION of the Defendant's submissions, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's Motion to Dismiss (Dkt. 4) is **denied**. Even if this Court ultimately concludes that Plaintiff's claim is subject to mandatory and binding arbitration, it would commit error by dismissing the complaint. See Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992). The proper procedure would be to stay the case pending arbitration rather than dismissing it. Id.¹

2) Defendant's Motions to Compel Arbitration and to Stay Proceedings (Dkt. 4) are **denied** for failure to comply with the conferral requirements of Local Rule 3.01(g).

¹ To the extent that Bender conflicts with Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005) and Lambert v. Austin Ind., 544 F.3d 1192 (11th Cir. 2008), Bender controls because it is the earlier decided case. See United States v. Ohayon, 483 F. 3d 1281, 1289 (11th Cir. 2007); Robinson v. Tanner, 798 F.2d 1378, 1383 (11th Cir. 1986).

3) Counsel for the parties shall confer *personally* within seven (7) days of the entry of this order in a good faith effort to resolve the merits of the motion without Court intervention.

DONE AND ORDERED at Tampa, Florida, on March 9, 2017.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record