IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Fresh & Easy, LLC,	)	Case No. 15-12220 (BLS)
	)	
Debtor.	)	
	)	
	)	
Guadalupe Cote,	)	Adv. No. 15-51906 (BLS)
	)	
Plaintiff,	)	Related to Adv. Docket Nos.
	)	1, 25, 26, 27, 28, 35, 38, and 39
v.	)	
	)	
Fresh & Easy, LLC, YFE Holdings, Inc., and The Yucaipa Companies, LLC,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM ORDER[1]

Upon consideration of the Motion to Compel Arbitration (the "Motion")[2] and accompanying memorandum of law[3] filed by Fresh & Easy, LLC (the "Debtor"); the opposition to the Motion[4] filed by Guadalupe Cote (the "Plaintiff"); and the Reply[5] filed by the Debtor; the Court hereby FINDS as follows:

Background

1. On October 30, 2015, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor operated a chain of grocery stores in the southwest United States. The Plaintiff worked as an administrative assistant in one of the

[1] This Memorandum Order constitutes the Court's findings of fact and conclusions of law as required by the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7052.
[2] D.I. 25.
[3] D.I. 26
[4] D.I. 35.
[5] D.I. 38.

Debtor's distribution centers before she was terminated on November 12, 2015. On November 22, 2015, the Plaintiff commenced this adversary proceeding by filing a complaint[6] (the "Complaint") on behalf of herself and a purported class of similarly situated former employees of the Debtor against YFE Holdings, Inc., the Yucaipa Companies, LLC, and the Debtor (collectively, the "Defendants"). The Plaintiff requests this action proceed as a class action under Federal Rule of Bankruptcy Procedure 7023 and for her to be designated as the class representative.

2. The Plaintiff's two-count Complaint seeks to recover damages on account of alleged violations of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2100-2109, and its California counterpart, California Labor Code §§ 1400-1408 (collectively, the "WARN Acts"). The Plaintiff alleges that the Defendants violated the WARN Acts by failing to give her and other similarly situated employees at least 60 days' advance notice of termination.[7] The Plaintiff asserts that the class of affected employees is entitled to recover from the Defendants 60 days' wages and certain benefits under the Employee Retirement Income Security Act.

3. On November 26, 2013, the Plaintiff entered into an arbitration agreement with the Debtor (the "Arbitration Agreement") that required her to submit to binding arbitration for all employment-related disputes.[8] At the outset, the Arbitration Agreement states that the parties "agree that any and all disputes or claims arising out of or relating to the Company/Employee employment relationship, including its termination . . . shall be

[6] D.I. 1.
[7] *See* 29 U.S.C. § 2102(a) ("An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order to each representative of the affected employees as of the time of the notice . . . ."); Cal. Lab. Code § 1401(a)(1) (same).
[8] D.I. 27, Ex. A.

resolved by final and binding arbitration by a single neutral arbitrator."[9] The Arbitration Agreement encompasses any dispute with the Debtor's employees, officers, directors, parents, subsidiaries, and affiliated entities. It further provides that "THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN THEIR RESPECTIVE INDIVIDUAL CAPACITIES AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS, REPRESENTATIVE OR COLLECTIVE ACTION."[10] The Arbitration Agreement states that it is enforceable under and subject to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA").

4. On January 11, 2016, this Court entered an order establishing a bar date of February 19, 2016 (the "Bar Date").[11] On the Bar Date, the Plaintiff filed a proof of claim in the amount of $6,679,942 on behalf of herself and similarly situated former employees of the Debtor (the "Purported Class Claim"); it seeks priority treatment under 11 U.S.C. § 507(a)(8) and notes that the basis for the claim is violation of the WARN Acts.[12] On the same date, the Plaintiff filed another proof of claim in her individual capacity for $7,808.22 (together with the Class Claim, the "Claims").[13]

5. On February 3, 2016, the Debtor filed the Motion and moved to compel arbitration of the Claims, expunge the Purported Class Claim, and to stay this adversary proceeding until completion of the arbitration. On February 17, 2016, the Plaintiff objected to sending this matter to arbitration, and on February 24, 2016, the Debtor filed a reply.[14]

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[9] *Id.*
[10] *Id.*
[11] D.I. 457.
[12] Claim No. 1101.
[13] Claim No. 1108.
[14] The Plaintiff also filed a Motion for Appointment of Interim Class Counsel Pursuant to Fed. R. Bankr. P. 7023(g) and Dismissal of the Chan Action [D.I. 43]. She also requested oral argument on Diana Chan's Motion to Adjourn Briefing on Plaintiff's Motion for Appointment of Interim Class Counsel [D.I. 53]. Because the Court is granting the Motion, these motions are rendered moot and will be denied.

6. The Court heard argument and took the matter under advisement. The matter has been fully briefed and is ripe for decision. For the reasons that follow, the Court will grant the Motion.

The Parties' Positions

7. The Debtor argues that this matter must be sent to arbitration under the terms of the Arbitration Agreement and the FAA: the Claims fit squarely within the scope of the Arbitration Agreement because they are directly related to the employment relationship between the Plaintiff and the Debtor. The FAA governs the agreement and requires the Claims be sent to arbitration. Relying on *Mintze v. Am. Gen. Fin. Serv.'s (In re Mintze)*, 434 F.3d 222 (3d Cir. 2006), the Debtor asserts that this Court lacks discretion to deny enforcement of the Arbitration Agreement because arbitrating the Claims does not inherently conflict with the Bankruptcy Code's underlying purposes. Generic non-core claims, such as causes of action under the WARN Acts, are not created by the Bankruptcy Code; therefore, enforcement of the Arbitration Agreement does not conflict with the Bankruptcy Code.

8. The Plaintiff urges this Court to exercise its discretion and deny the Debtor's demand for compulsory arbitration. The Plaintiff contends that this Court retains discretion to deny enforcement of the Arbitration Agreement because there is an inherent conflict between arbitrating the Claims and the Bankruptcy Code's underlying purposes. Specifically, compelling arbitration under these circumstances will cause delays, inefficiency, piecemeal litigation, increased costs, and thus undermine one of the chief goals of bankruptcy—centralization of disputes involving a debtor. Allowing the Debtor to serially arbitrate dozens of WARN Act claims in various arbitral fora will dramatically

increase expenses associated with disposing of these claims;[15] whereas the claims-allowance process offers a more cost-efficient mechanism to decide all matters in a single forum. The additional expense associated with multiple arbitrations will diminish funds available to creditors and is inconsistent with preserving estate resources for the benefit of all stakeholders. Finally, the Plaintiff contends that enforcing the Arbitration Agreement will set an unwelcome precedent by permitting debtors in chapter 11 cases to torpedo WARN Act class actions.

9. The Plaintiff also argues that the Debtor cannot compel arbitration of the Claims given the terms of the Arbitration Agreement. First, the Debtor was not a party to the Arbitration Agreement. The Arbitration Agreement only allows parties to bring claims in their "individual capacities"; the Debtor, as a debtor in possession, is acting as a trustee of a bankruptcy estate, and therefore is not the entity that signed the Arbitration Agreement. The Plaintiff asserts that the FAA supports this interpretation because it is not concerned with promoting the rights of fiduciary representatives, such as a bankruptcy trustee. Second, the Plaintiff contends that the FAA and the Arbitration Agreement bar the Debtor from proceeding to arbitration. The Debtor should be deemed "constructively in default" under the FAA because there is a high likelihood that the Debtor will be administratively insolvent and unable to pay all the anticipated arbitration fees. If the Debtor is in default, it cannot stay this adversary proceeding under the FAA.

10. The Debtor contends that the Plaintiff's recital of the financial consequences of enforcing the Arbitration Agreement is overstated, and more importantly,

[15] The Plaintiff submitted a declaration of Jack A. Raisner, the Plaintiff's counsel and a partner at Outten & Golden LLP [D.I. 35-1]. According to the declaration, the average fees collected by the American Arbitration Association for employee wage and hour claims range from $20,000 to $60,000.

irrelevant for the purpose of determining the enforceability of the Arbitration Agreement. The Debtor stresses that the Plaintiff engages in speculation regarding the resources that will be necessary to resolve the WARN Act claimants: there were only 47 WARN Act claims filed by the Bar Date and the Debtor is not necessarily going to arbitrate every WARN Act claim.[16]

Analysis

11. The FAA reflects a "federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and requires courts to "rigorously enforce" them, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). It provides that written agreements to arbitrate "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. Upon a timely request of a party, a federal court has the power to stay a proceeding if the cause of action falls within the scope of an arbitration clause. *Id.* § 3. The FAA ensures that arbitration agreements are treated the same as other contracts, and creates a federal presumption in favor of enforcing them. *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 178 (3d Cir. 1999).

12. Enforcement of an arbitration agreement under the FAA, however, may be overridden by a contrary congressional command. In *Shearson/American Exp., Inc. v. McMahon*, the Supreme Court held that the FAA's mandate may be overridden if a party can demonstrate that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." 482 U.S. 220, 227 (1987). Congressional intent to override the

[16] The Debtor further challenges the Plaintiff's estimation of the costs of arbitration. Many of the WARN Act claims may not go to arbitration and could be adjudicated and determined through the claims-allowance process.

FAA can be deduced from the statute's text, the statute's legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes. *Id.*

13. In *Mintze*, the Third Circuit examined *McMahon* and discussed the standard by which a bankruptcy court may deny enforcement of an otherwise applicable arbitration clause. In *Mintze*, a chapter 13 debtor was a party to a prepetition home equity loan agreement with a bank. *Mintze*, 434 F.3d at 226. The debtor filed a complaint against the bank, asserting several claims under federal and state consumer protection laws. The bank moved to compel arbitration under an arbitration clause contained in the loan agreement. The bankruptcy court, which treated the matter as a core proceeding, concluded that an inherent conflict existed between the Bankruptcy Code's underlying purposes and arbitration because the outcome of the adversary proceeding would influence the priority and amount of distributions to certain creditors. *Id.* at 231.

14. The Third Circuit disagreed that an inherent conflict existed and held that the bankruptcy court lacked the authority and discretion to deny enforcement of the arbitration provision. *Id.* at 231. The court began its analysis by accepting that the matter before it was "core" because the "core/non-core distinction does not . . . affect whether a bankruptcy court has the discretion to deny enforcement of an arbitration agreement." *Id.* at 229. Rather, the court found that the critical consideration is differentiating between claims created by the Bankruptcy Code and debtor-derivative claims. *Id.* at 230 (citing *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989)). A bankruptcy court lacks discretion to deny enforcement of an otherwise applicable arbitration clause unless "the party opposing arbitration can establish congressional intent, under the *McMahon* standard, to preclude waiver of judicial remedies for the statutory

rights at issue." *Id.* at 231. Finding no evidence of congressional intent in the statutory text or the legislative history to preclude waiver of judicial remedies, the court focused on whether there was an inherent conflict between arbitrating the debtor's claims and the Bankruptcy Code's underlying purposes.

15. The court determined that no inherent conflict existed because the debtor's claims "were [not] created by the Bankruptcy Code." *Id.* at 231. The *McMahon* standard requires a showing that Congress intended to "preclude a waiver of judicial remedies for the *statutory rights* at issue." *Id.* (quoting *McMahon*, 482 U.S. at 227) (emphasis in original). The statutory claims asserted by the debtor were based on federal and consumer protection laws. Because there was "no bankruptcy issue" to decide, the court concluded that the bankruptcy court lacked discretion to deny enforcement of the arbitration provision. *Id.* at 231-32.

16. The Plaintiff bears the burden to demonstrate that "Congress intended to preclude waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 229. She offers no evidence of such intent in either the statutory text or the legislative history of the Bankruptcy Code. Thus, the issue before the Court is whether the Plaintiff has shown that there is an inherent conflict between arbitrating the Claims and the Bankruptcy Code's underlying purposes.[17]

17. The Plaintiff argues that this Court should refuse to enforce the Arbitration Agreement because arbitration of the Claims frustrates many Bankruptcy Code objectives.

[17] The parties do not dispute the validity of the Arbitration Agreement, or that the Claims fit within the scope of the Arbitration Agreement. *See Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005) ("A motion to compel arbitration calls for a two-step inquiry into (1) whether a valid agreement to arbitrate exists and (2) whether the particular dispute falls within the scope of that agreement."). The Plaintiff does argue, however, that the Debtor cannot enforce the Arbitration Agreement against her because it was not a party. For the reasons that will be discussed, the Court disagrees.

The Plaintiff identifies several bedrock Bankruptcy Code objectives that may be undermined by enforcing the Arbitration Agreement. Arbitrating the Claims will (i) result in piecemeal litigation and undercut the efficiency of the claims-allowance process; (ii) treat similarly situated creditors in a disparate manner by having an arbitrator determine certain WARN Act claims while others may be determined by this Court; and (iii) diminish funds available for distribution to the creditor body by the Debtor paying for potentially numerous costly arbitration proceedings. The Plaintiff also raises a policy consideration here that is not present in the typical scenario where the FAA intersects with the Bankruptcy Code: the debtor, rather than a creditor, is seeking to enforce an arbitration clause. The Debtor seeks to arbitrate WARN Act claims asserted as a class action while leaving the other WARN Act claims to the claims-allowance process. In essence, the Plaintiff asserts that the Debtor is using the Arbitration Agreement against certain employees as a sword to bat down their class actions.

18. While these policy arguments are appealing, under *Mintze*, the Court does not reach whether one of the underlying purposes or objectives of the Bankruptcy Code would be adversely affected by enforcing the Arbitration Agreement unless one of the Claims arises under the Bankruptcy Code. In deciding whether arbitrating the Claims inherently conflicts with the Bankruptcy Code such that the Court may exercise discretion to deny enforcement of an arbitration clause, *Mintze* teaches that the threshold inquiry is whether the claims sought to be arbitrated were created by the Bankruptcy Code.[18] *See*,

[18] While courts agree that *McMahon* provides the basic framework for determining whether a bankruptcy court has the authority to deny the enforcement of an arbitration agreement, they disagree on what a party opposing arbitration must show to establish an "inherent conflict" between arbitration and the Bankruptcy Code. *See In re Brown*, 354 B.R. 591, 599 (D. R.I. 2006) (highlighting divergent conclusions regarding what constitutes an "inherent conflict"). In marked contrast to *Mintze*, at least two other circuit courts read *McMahon* as providing bankruptcy courts with the discretion to deny enforcement of an arbitration clause

e.g., *Mintze*, 434 F.3d at 229-31; *In re Fleming Companies, Inc.*, No. 03-10945 MFW, 2007 WL 788921, at *3 (D. Del. Mar. 16, 2007); *In re Pfeiffer*, No. Adv. 11-0421, 2011 WL 4005504, at *4-5 (Bankr. E.D. Pa. Sept. 8, 2011). Here, the Claims are based on alleged WARN Act violations. Because these are not statutory claims created by the Bankruptcy Code, under *Mintze*, there is no inherent conflict between arbitrating the Claims and the Bankruptcy Code. Accordingly, this Court lacks the discretion to deny enforcement of the Arbitration Agreement. *Mintze*, 434 F.3d at 230-31 (concluding that when there is not a "bankruptcy issue to be decided by the Bankruptcy Court," the court lacks discretion to deny enforcement of an otherwise applicable arbitration provision).

19. The Plaintiff's remaining arguments are unavailing. The Plaintiff asserts that the Debtor cannot compel arbitration because the Arbitration Agreement only permits the parties to bring claims in their "individual capacities." The Debtor is trying to enforce arbitration "in its capacity as the trustee of the estate," when it was "the private business entity that signed" the Arbitration Agreement.[19] It is well-settled that arbitration clauses survive the filing of a bankruptcy petition. *E.g.*, *In re Fleming Companies, Inc.*, 325 B.R. 687, 694 (Bankr. D. Del. 2005) (concluding that a debtor could enforce a prepetition agreement to arbitrate notwithstanding its bankruptcy filing). Prepetition, the Debtor and the Plaintiff expressly agreed to arbitrate any employment disputes. The Debtor may invoke the arbitration clause to the same extent it could have before bankruptcy. *Hays*, 885 F.2d at 1154 ("We also find support for our conclusion that arbitration agreements should be treated like other contractual commitments in those cases which have held that

where a claim is not based on a Bankruptcy Code provision. *See MBNA Am. Bank v. Hill (In re Hill)*, 436 F.3d 104, 108 (2d Cir. 2006); *In re White Mountain Mining Co., LLC*, 403 F.3d 164, 170 (4th Cir. 2005).

[19] D.I. 35, pg. 7.

a debtor-in-possession in a reorganization case is bound by a pre-petition agreement to arbitrate."); *In re Hagerstown Fiber Ltd. P'ship*, 277 B.R. 181, 206 (Bankr. S.D.N.Y. 2002) ("If the debtor agreed in a pre-petition contract to arbitrate a dispute, the trustee, suing as successor to the debtor, is likewise bound by the arbitration clause."). Importantly, this is not a situation where a trustee is bringing a cause of action on behalf of creditors which derives from the Bankruptcy Code. *Hays*, 885 F.2d at 1154 ("[T]here is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative from one who was a party to it.").

20. Further, the full text of the sentence where the phrase "individual capacities" is mentioned undercuts the Plaintiff's interpretation. *See generally United States v. Williams*, 553 U.S. 285, 294 (2008) ("[The canon of *noscitur a sociis*] counsels that a word is given more precise content by the neighboring words with which it is associated."); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (same). The relevant portion of the Arbitration Agreement provides that "the parties agree that each may bring claims against the other only in their respective individual capacities *and not as a plaintiff or class member in any purported class, representative or collective action.*"[20] (emphasis added). The Court reads the phrase "individual capacities" as emphasizing the type of procedural vehicle that can be used to bring claims that fit within the arbitration provision rather than limiting claims to the business entity that signed the agreement.

21. The Plaintiff also asserts that the Debtor may not compel arbitration because it is "constructively in default" under the FAA. Section 3 of the FAA provides that a court may stay any suit or proceeding if the "applicant for the stay is not in default in proceeding

[20] D.I. 27, Ex. A.

with such arbitration." 9 U.S.C. § 3. The record does not support a finding that the Debtor is currently in default in any of its arbitration proceedings, and the Debtor has represented that it is fully capable of funding all future arbitration fees.

22. For all these reasons, the Court holds that the Arbitration Agreement is enforceable.

Accordingly, it is hereby

ORDERED, that the Motion [D.I. 26] is GRANTED; and it is further

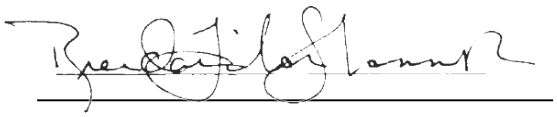
ORDERED, that Plaintiff's Motion for Appointment of Interim Class Counsel Pursuant to Fed. R. Bankr. P. 7023(g) and Dismissal of the Chan Action [D.I. 43] is DENIED; and it is further

ORDERED, that the Plaintiff's Request for Oral Argument on Diana Chan's Motion to Adjourn Briefing on Plaintiff's Motion for Appointment of Interim Class Counsel [D.I. 53] is DENIED; and it is further

ORDERED, that this adversary proceeding is stayed until such further order of the Court.

BY THE COURT:

Dated: June 2, 2016
Wilmington, Delaware



Brendan Linehan Shannon
Chief United States Bankruptcy Judge