IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MARK T. EDDINGSTON, ET AL.	)(	CIVIL DOCKET NO. 2:12-CV-422-JRG-RSP
VS.	)(	MARSHALL, TEXAS
UBS FINANCIAL SERVICES, INC.	)(	FEBRUARY 4, 2013 1:30 P.M.
BILL HENDRICKS, ET AL.	)(	CIVIL DOCKET NO. 2:12-CV-606-JRG-RSP
VS.	)(	MARSHALL, TEXAS
UBS FINANCIAL SERVICES, INC.	)(	FEBRUARY 4, 2013 1:30 P.M.

MOTION HEARING

BEFORE THE HONORABLE JUDGE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: (See attached sign-in sheet.)

FOR THE DEFENDANT: (See attached sign-in sheet.)

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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

I N D E X

February 4, 2013

LAW CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

For the record, we're here for the hearing on the motion to compel arbitration and the scheduling conference in the -- two cases of Eddingston versus UBS and Hendricks versus UBS, which are 2:12-422 and 2:12-606, respectively.

Would counsel state their appearances for the record?

MR. BAXTER: Good afternoon, Your Honor. Sam Baxter with McKool Smith for the Plaintiff. And with me today I have Mr. Goodman from Kilgore & Kilgore, Mr. Stris from California, Mr. Bro from California, and Mr. Anderson from Dallas at Kilgore & Kilgore, Your Honor, and we're ready.

THE COURT: All right. Thank you, Mr. Baxter.

MR. PHILLIPS: Your Honor, good afternoon. Larry Phillips from the Siebman Burg Phillips & Smith law firm today, and I have with us from the Morgan Lewis firm -- I've got Deborah Davidson here and Samuel Shaul -- Shaulson here with me, and they're going to be speaking today on our behalf.

THE COURT: All right. Thank you very much,

Mr. Phillips.

MR. PHILLIPS: Thank you.

THE COURT: I want to take up the motion to compel arbitration first, and I -- and I guess I would like to hear from the movant -- whoever wants to speak for UBS at this point. Mr. Shaulson.

MR. SHAULSON: Yes, good afternoon. Is this good for the microphone?

THE COURT: Yes, that would be great. And let -- let me -- I've got some questions that I'd like you to focus your argument, and I'll give the Plaintiffs a chance to respond to, but I -- I have spent some time going through the briefs on this. And the way I see it, some of the argument -- at least a lot of the argument from the Defendants has been about whether or not the FAA overrides NASD, FINRA, that sort of thing.

I -- the way I understand the Plaintiff's argument is that the -- the PartnerPlus or UBS pension plan, I don't know, what -- what is your preferred way to refer to that document?

MR. SHAULSON: It's the PartnerPlus Plan.

THE COURT: I'll call it the PartnerPlus Plan, then.

They contend the PartnerPlus Plan

arbitration clause adopts the arbitration rules of NASD and FINRA, depending on the time period involved. And, therefore, the intent of the FAA, which is that arbitration clauses be interpreted or applied according to their terms, is fulfilled by incorporating the provisions of NASD and FINRA which don't allow for arbitration of class claims.

I did not see a response from your side directly to that. What -- what do you say to that?

MR. SHAULSON: Sure, Your Honor. First of all, as I understand the Plaintiffs' argument, they're trying to say that only the PartnerPlus arbitration provision is applicable. That incorporates FINRA or NASD rules, and FINRA rules, therefore, allow or don't prohibit a class action.

Let me explain why UBS believes that to be a baseless argument.

THE COURT: Okay.

MR. SHAULSON: First of all, the PartnerPlus arbitration provision is expressly subject to exhaustion of the claims procedure set forth in the PartnerPlus Plan. Therefore, it basically says, subject to exhaustion of Section 10.1, or whatever the applicable provision is that has a claims procedure.

Now, the Plaintiffs argue that they're not

bringing a claim for benefits under the terms of PartnerPlus. They're bringing a statutory claim under ERISA.

Now, if they're bringing a statutory claim under ERISA, they argue, we don't have to exhaust our administrative remedies. But this is not a statutory issue. This is not a question of whether ERISA requires exhaustion. The contract, according to its terms, requires exhaustion before you even get to arbitration under the PartnerPlus Plan. That's number one. So the PartnerPlus arbitration provision is not applicable here at all.

Number two, the partnership plan arbitration provision also is not applicable here, doesn't even come into play because that arbitration provision is specifically limited to claims that arise out of the PartnerPlus Plan. Now --

THE COURT: Right. Just so I'll understand, what you're -- you're not disputing, then, that the PartnerPlus arbitration clause does not provide for arbitration of class claims?

MR. SHAULSON: The PartnerPlus -- absolutely. The PartnerPlus Plan does not specifically preclude an individual from bringing a class claim, and it references FINRA, which I'm going to get to in just

30 seconds, but I want to cover this point about why the PartnerPlus arbitration provision doesn't apply at all.

THE COURT: Well, I understand we're going to get to that.

MR. SHAULSON: Yeah.

THE COURT: But first I want to make sure that you are in agreement with the Plaintiffs that UBS cannot compel arbitration of class claims under the PartnerPlus arbitration clause.

MR. SHAULSON: I think it can because it incorporates the FINRA rules, and the FINRA rules specifically allow other agreements to co-exist with the FINRA rules and another agreement. And there are other arbitration agreements which Plaintiffs signed which they agreed to arbitrate only on a non-class basis.

THE COURT: Well, then, you'd be compelling arbitration under those arbitration clauses.

MR. SHAULSON: Reading both arbitration provisions in harmony, correct.

THE COURT: So absent some other agreement that provides for arbitration of class claims, UBS does not try to get there under the PartnerPlus arbitration clause?

MR. SHAULSON: I think that's generally true, Your Honor. I think that's true.

THE COURT: Okay.

MR. SHAULSON: We're not -- we are -- we are telling the Court that you should compel arbitration under other arbitration agreements, not the PartnerPlus arbitration agreement.

THE COURT: Direct me to the other arbitration agreement that you're relying on.

MR. SHAULSON: Okay. So, for example, the last arbitration agreement that was -- went into effect for each individual Plaintiff contained an express class action waiver. So, for example, Mr. Eddingston and Mr. Hendricks are bound by the 2008 compensation plan.

THE COURT: And which exhibit to your motion is that?

MR. SHAULSON: So if you look at the Ferreira declaration, Paragraphs 15 and 21, and Exhibits 13, 21, and 22.

THE COURT: Do you have the exhibit?

MR. SHAULSON: Do you want me to use the ELMO, Your Honor, or --

THE COURT: I -- I have your motion, so if you can tell me what exhibit it is, I can find it, I

think.

MR. SHAULSON: So the Eddingston motion, Exhibit 7, is the Financial Advisor Compensation Plan.

THE COURT: That -- that one, just by coincidence, only prints out the headings of the paragraphs when you print the copy that was filed. I think it may have something to do with the colors, so you can go ahead and use the ELMO.

I -- the other exhibits around it, the one before it, the 2007 and the one after it, the 2009, did print out, but would -- would it hurt your argument to go with the exhibits, the one for 2007, Exhibit 6, or the one for 2009? Is there something different about 2008?

MR. SHAULSON: We can go with 2009.

Which one is the 2009 one?

THE COURT: Okay.

MR. SHAULSON: Exhibit 8, Your Honor.

THE COURT: Yes, I've got that.

MR. SHAULSON: So Exhibit 8, Page 19, is the arbitration provision.

THE COURT: Now, is -- is this document, this Exhibit 8, an actual plan document, or is this a summary?

MR. SHAULSON: No. What this is, Your

Honor, and I think counsel is trying to be consistent with the local rule of not providing you with pages upon pages on pages that's not relevant. This is part of an overall Financial Advisor Compensation Plan, which I'm happy to hand up and you can see the entire plan.

The Financial Advisor Compensation Plan is a -- you know, a document which basically sets forth the terms and conditions of compensation for the financial advisor. On one page, as you can see, that we've -- actually two pages, it summaries the PartnerPlus Plan, but it's a self-contained Financial Advisor Compensation Plan which is acknowledged by the financial advisor, and then there's a separate arbitration provision that goes with the financial advisor plan, and that's what you see on Page 19.

THE COURT: Well, what I see on Page 19 is not part of the summary that starts on Page 14, then?

MR. SHAULSON: Correct. Those are just pages from the Financial Advisor Compensation Plan.

THE COURT: Well, then I --

MR. SHAULSON: Should I hand this up to you and -- and you can see what the full document is?

THE COURT: I think I do need to see the full document. Have you -- does the Plaintiff has --

have that, as well?

MR. STRIS: Yes, Your Honor.

THE COURT: Okay. Now, Mr. Shaulson, this arbitration clause on Page 19, which I guess is also included in the Exhibit 8, also says it will be conducted under the rules of FINRA; is that right?

MR. SHAULSON: Correct, Your Honor. And FINRA rules -- specifically FINRA Rule 13204 expressly permits the use of other arbitration agreements, and the Courts have universally held that other agreements can override the standard FINRA rules, including specifically in the context of a class action waiver where courts have repeatedly held, including the exact plan we're looking at, the Financial Advisor Compensation Plan at UBS.

The LaVoice Court, the Cohen Court, the Lewis Court all have concluded that the incorporation of FINRA rules does not mean that you can bring your claims on a class action basis. Where you have a separate agreement that confines claims that are subject to arbitration to individual non-class claims, the individual agreement trumps the standard FINRA rules.

THE COURT: Now, it was difficult to tell from Lewis and LaVoice that they were dealing with this

same plan, or at least they -- they didn't reference the PartnerPlus Plan that I could tell, but...

MR. SHAULSON: That's correct, Your Honor, they were not dealing with the PartnerPlus Plan. They were dealing with the Financial Advisor Compensation Plan, and they enforced arbitration pursuant to that plan. But, Your Honor, it was exactly the same argument, whether it was PartnerPlus or the U4, the standard uniform application for securities dealers, it was the same argument that the -- that the FINRA rules were incorporated therein, and, therefore, you couldn't have class claims.

THE COURT: Well, the difference was that the PartnerPlus Plan doesn't waive class action, that I could tell.

MR. SHAULSON: But just because it's incorporating FINRA rules, but that's true of the U4, as well.

THE COURT: I mean, it does not have an express class action waiver in it like what you're citing to me now, this Financial Advisor Compensation Plan does.

MR. SHAULSON: Prior to 2011, that's true, Your Honor.

THE COURT: And your contention is that 2011

is not at issue here?

MR. SHAULSON: The 2011 plan is at issue for two of the named Plaintiffs, Mr. Ellspermann and Mr. Roccisano. They both signed both the 2011 PartnerPlus Plan and the 2011 compensation plans. But for the other individuals who worked prior to 2011, the arbitration agreement found in the latest agreement applicable to them had a class action waiver in it.

THE COURT: So your contention with respect to the pre-2011 agreements is that the class action waiver in this Financial Advisor Compensation Plan also waives class actions under the PartnerPlus --

MR. SHAULSON: Absolutely, Your Honor.

THE COURT: -- Plan?

MR. SHAULSON: And -- and before you even get to this issue, we have to analyze what is arbitrable under the PartnerPlus arbitration provision. I mentioned, as a contractual matter, Plaintiffs never exhausted the remedies under the plan, and, therefore, the PartnerPlus arbitration provision never becomes applicable at all.

Secondly, the arbitration provision in PartnerPlus specifically only covers claims that arise out of the PartnerPlus Plan. Plaintiffs in this case

are taking the position that their claims don't arise out of the PartnerPlus Plan. And the reason they're making that argument is they're arguing that under ERISA, they don't have a statutory obligation to exhaust their administrative remedies under the plan, so they're saying our claims don't arise out of the plan.

And I'll refer the Court to the IDEA Corporation case, 545 F.Supp. 2d 600, from the Western District of Texas, where the Court looked at what is the scope of an arbitration agreement, a broad versus a narrow arbitration agreement?

And what the Court said is that arising out of a contract, when the -- when the parties use the word, quote, arising out of a contract, end quote, that's to be given a narrow construction to claims that arise solely under the contract.

In contrast to the Financial Advisor Compensation Plan and the Branch Manager Compensation Plan, for example, where there's an express class waiver, those contracts cover any disputes between the parties at all, whether they're employment disputes, compensation disputes, benefit disputes, and specifically disputes arising under the very statute Plaintiffs are trying to bring their claim, ERISA.

So the IDEA Court case said that we are going to compel arbitration under the broader arbitration provision contained in another agreement, not under the narrow arbitration agreement that said disputes arising out of the plan.

THE COURT: All right.

MR. SHAULSON: And I also refer the Court to Brandl versus ACE USA, 2011 Westlaw 12 --

THE COURT: Let me just interrupt you.

MR. SHAULSON: Sure.

THE COURT: I -- I can only hold so many thoughts in my head at once, and what I'd like to do is to hear from the Plaintiffs on the -- these first couple of points that we've addressed so I can figure out where -- where the dispute really is. But I promise, I will hear more from you. Thank you, Mr. Shaulson.

MR. SHAULSON: Okay. Thank you, Your Honor.

THE COURT: And let me see, you are?

MR. STRIS: Mr. Stris -- Peter Stris.

THE COURT: Stris. All right. Thank you. I -- I know you've been introduced once, I'm just -- I need to remember better.

MR. STRIS: I understand.

THE COURT: Mr. Stris, a couple of things. First off, in the briefs, Plaintiffs spent a while

talking about how what we had on the FA -- the Financial Advisor Compensation Plan was just a summary plan document which looked like a good argument when all I had was those pages. But in view of the larger agreement, the more complete copy of that that's been made available to me now, it does not look like that arbitration clause at the end of that and the -- which includes the class action waiver, was part of the summary part of the document but rather part of the -- the plan itself.

What -- what do you say to that?

MR. STRIS: Yeah, let -- let me address that directly because I think that's a critical issue that I can clear up.

THE COURT: Okay.

MR. STRIS: And I think here's how I'd like to go about it. If you take the document that was just handed to you that is now in total 25 pages, and on the cover it -- it says, Financial Advisor Compensation Plan, so that we're looking at the same thing --

THE COURT: Yes.

MR. STRIS: -- this is what we refer to in our papers repeatedly as a summary brochure.

Let me walk through how it works so that we're all on the same page. If you look at the table of

contents on Page -- it's before Page 1, there's 10 sections. The first one is called Production Payout. Do you see that, Your Honor?

THE COURT: Yes.

MR. STRIS: Some of these sections are stand-alone. In other words, we mentioned this in a footnote in -- in our papers. This document describes different ways our clients could get money. The only section of this document, however, that's relevant to this case at all is Section 5. It begins on Page 14, and in the table of contents, it's labeled UBS PartnerPlus/UBS Financial Advisor Deferred Award Plan. Do -- do you see that?

THE COURT: Yes.

MR. STRIS: Okay. So if you turn to that, that section, it couldn't be clearer that this section is a summary. And I would -- I would refer you to Page 15 --

THE COURT: I -- I would agree that this section is a summary of the PartnerPlus Plan.

MR. STRIS: Okay. And -- and let me explain why that matters. On Page 15 -- and I'm going to quote what it says here. It says, if there is any difference, any difference, between this summary and the plan document, the plan document will govern.

Now, here's why this matters for purposes of arbitration. The PartnerPlus Plan document has an arbitration provision in it. And I'd like to, if you'd indulge me in a minute, tell you why we unquestionably win under that provision. Because this document here says, if there's any conflict, the plan governs, what that means as a simple matter of contract law is that the only arbitration language that this Court can look at is the arbitration language in the PartnerPlus Plan.

THE COURT: Now, that -- that's assuming that the claims are all made under the PartnerPlus Plan and also I think assuming that -- that this other arbitration clause doesn't apply to it.

MR. STRIS: Yes. And so could -- could I speak to that for a moment?

THE COURT: Well, first off, just so we're clear, the -- when it says, in the event of a conflict between the summary of the plans set forth in this document, that's referring to the two-page summary of the PartnerPlus Plan, which is 14 and 15, and maybe -- maybe a summary of some other plan that could be elsewhere. But it's not saying if there's any conflict between what's on Page 19, which is the arbitration clause of the Financial Advisor Compensation Plan.

MR. STRIS: Well, I -- I wouldn't read it

that way, and I could tell you that if this is governed by ERISA, taking into account the recent Supreme Court Amara decision and a history of law that spans virtually every circuit on the difference between a plan document and summaries, there's no way that any page in this document could trump the plan.

Now, I -- I submit it's a closer question --

THE COURT: Well, this document is a separate plan, isn't it?

MR. STRIS: Oh, certainly not.

THE COURT: This -- the Financial Advisor Compensation Plan, you're saying is not --

MR. STRIS: It -- it would not meet any of ERISA's requirements, nor -- let me be clear. UBS is not taking the position that this is an ERISA plan. In fact, they claim that neither of the documents are an ERISA plan. Under ERISA, in order for something to constitute a plan document, there's a list of rigorous requirements that need to be met, and they clearly are not met here.

THE COURT: I guess I'm not trying to make a finding that this is a plan document under ERISA, but this is -- this is the Financial Advisor Compensation Plan.

MR. STRIS: That's what --

THE COURT: This is not a summary of it? This is the plan itself?

MR. STRIS: Well, let me take a step back and sort of at least explain to you what our argument is.

THE COURT: Okay.

MR. STRIS: Our argument is that the PartnerPlus Plan is an ERISA plan.

THE COURT: Okay.

MR. STRIS: And I think as a procedural matter, that needs to be accepted as true because either what you're faced with is a motion to dismiss, in which case you have to accept our allegations as pled, and we plead that it's an ERISA plan, or this comes to you as a summary judgment motion, in which case, as we say in our brief, the law is pretty clear, whether something constitutes an ERISA plan is based on the totality of the facts and circumstances.

THE COURT: I -- I don't have a problem with at this point assuming that the PartnerPlus Plan is an ERISA plan --

MR. STRIS: Okay. So can I tell you what --

THE COURT: -- for purposes of this motion. Yes.

MR. STRIS: So I just want to tell you what

flows from that so that you sort of see what our position is.

THE COURT: Okay.

MR. STRIS: If we -- if we all accept that for purposes of this motion the PartnerPlus Plan is an ERISA plan, then we're stuck with the law of ERISA. And the law of ERISA says that any peripheral document, it doesn't matter if you label it a plan, a contract, an omnibus document, you could put whatever label you want on it, if it's not the formal plan document, it can't trump the plan.

So if -- if we accept, for purposes of this motion, that the PartnerPlus Plan is governed by ERISA -- and that's why UBS throughout their papers tries to resist that characterization because they understand what flows from that -- none of this is relevant. And we don't need to parse the language of whether the conflict or the difference has to be only Pages 14 and 15 or if it also includes the final page on arbitration.

THE COURT: It -- all right. You're saying that your position is that if -- or because the PartnerPlus Plan is governed by ERISA, no separate arbitration agreement or class action waiver can cover it.

MR. STRIS: Unless it complies with 29 U.S.C. 1024, which sets -- and it's a piece of ERISA. I apologize, I know this is boring. But it's a piece of ERISA that explains the rigorous requirements that need to be met if you want to modify a term of the plan itself.

THE COURT: So -- and are you relying solely on the PartnerPlus Plan for your claims in this case?

MR. STRIS: No. But -- and I'm happy to move on to why I didn't think we win even under this document, if that's what you'd like, but I -- I -- I don't want to move on unless we're on the same page about what our argument is under the PartnerPlus Plan.

THE COURT: Okay. Well, I think I understand your argument is that -- you were saying unless it complies with section, what, now of ERISA?

MR. STRIS: 29 U.S.C. 1024 says that any time you want to modify -- make a material modification to a plan document --

THE COURT: Section 524 of ERISA, is that the --

MR. STRIS: Oh, I actually don't know what the -- I know the U.S. Code cite.

THE COURT: Okay.

MR. STRIS: I don't know which sub provision

it is at ERISA.

THE COURT: All right.

MR. STRIS: And -- and that's critically important because -- and you started your questioning of my colleagues on this point. We're -- we're taking the position that the arbitration provision in PartnerPlus adopts the FINRA rules. We're not arguing that FINRA trumps anything.

THE COURT: No, I understand that.

MR. STRIS: Okay.

THE COURT: The -- do you have authority that you can cite, just something specific, that no arbitration clause or waiver in a separate document can govern a claim under an ERISA plan?

MR. STRIS: I would point you to the section of our opposition, and I believe it's -- it's argument Section 3(b). It cites the statute, 29 U.S.C. 1024, and it also cites the enabling regulations. And if you look at those regulations and the statute, I'm not sure I've ever seen a case where someone attempted to do what you're describing, but I think the regulations and the -- and the statute will speak for themselves.

THE COURT: Well, unfortunately, they don't talk to me. So have you got access to them now?

MR. STRIS: Yeah, I can grab them.

THE COURT: Okay.

MR. STRIS: Okay. Let me -- I'm sorry. Your Honor, let me -- let me point you -- you're -- point you in two directions. The first, before I get to the statute, is we cite the -- the seminal Amara case from the Supreme Court. This is on Page 17 of our motion. It's a 2011 Supreme Court ERISA case, 131 S. Ct. 1866. And so you really don't need to even go any further than that Supreme Court case. It says, summary documents, important as -- as they are, do not themselves constitute the terms of the plan.

THE COURT: Right. That -- that's not controversial. I understand that.

MR. STRIS: Okay. And we cite a series of cases from throughout the country after that that explain that it's not just a summary plan description, any peripheral document, if it has terms that are less favorable than the plan, they can't be enforced.

THE COURT: These are almost all talking about documents generated by the company, as opposed to an agreement signed by the employee and that --

MR. STRIS: Well, I don't know -- I would say that the agreement that was signed by the employee here was generated by the company, and I'm not sure -- and I'm not sure that that distinction, for purposes of

ERISA, would matter. But if you don't accept that, let me point you to the statutory warrants.

THE COURT: I just am looking for a case, and if you don't have one, there's no shame in saying, I don't have one, but I'm -- if -- if you do, it would be helpful, and that is a case that says that an agreement outside of the ERISA plan can't -- cannot bind the employee regarding arbitration or -- or class action waiver.

MR. STRIS: I don't, because I've never seen anyone attempt to do this --

THE COURT: Okay.

MR. STRIS: -- frankly. And maybe that's a good segue into two of the things that I wanted to talk about, most importantly these other cases, you know, what I like to talk about the UBS success stories, the LaVoice case and the Lewis case. They really provide perfect evidence of -- of why our position is right.

Let's take LaVoice for a minute. LaVo -- first of all, none of these cases involve the PartnerPlus Plan, which is not a big surprise because none of them involved pension claims.

So let's take LaVoice. It didn't involve the PartnerPlus Plan, so the relevant arbitration provision that we keep talking about wasn't present.

Number two, it didn't involve a class action, so the relevant exception to arbitration in the plan document wasn't at issue.

And number three, it didn't involve an asserted claim for injunctive relief.

So I guess one of the reasons perhaps I'm struggling to find a case to point to you to say, hey, UBS can't do what it's trying to do here is because I haven't seen attempts to do this. I haven't seen attempts to circumvent a clear arbitration provision in a pension plan in a pension case by looking at some sort of peripheral document.

And for -- for good reason we cited the -- the Nielsen case, this is the 1995 Seventh Circuit case. The -- the language is almost identical to a word, Your Honor. To a word, the contractual language is the same.

And what typically happens in these cases -- and I have a feeling that it didn't happen here because we're talking about a very large class action of potentially over a hundred million dollars. You don't typically see an attempt to use the wrong arbitration provision.

And -- and let me be clear, the arbitration provision in the pension plan would require everything

but a class action to go to arbitration.

THE COURT: Well, now, you -- you've said you're not making just claims under the pension plan; is that right?

MR. STRIS: I -- I want to be careful about how I put this. All of our claims arise out of the pension plan. They may not be -- they may not be for benefits under the plan, but this new argument that I heard from my colleague, you know, a few minutes ago was actually very surprising to me. He says, well, under the provision in the PartnerPlus Plan, you only arbitrate claims arising out of the plan. And he cited a few cases that admittedly are -- are new. I'm not familiar with them. But he says, they stand for the proposition that it has to be a claim that is solely under the contract.

That's precisely what our claims are. We wouldn't have claims but for the existence of the contract. Our whole point is that we're not being -- UBS is attempting to enforce provisions in the PartnerPlus Plan that are illegal.

So there's a difference between us seeking benefits under the plan, which we admittedly are not doing, and us seeking a remedy that's totally apart from the plan. Every one of our claims arises out of the

plan.

THE COURT: The only claims you're asserting deal with your right to pension benefits?

MR. STRIS: That's correct.

THE COURT: Okay. Now -- so your -- your answer to the effort to apply the broader arbitration clause in the Financial Advisor Compensation Plan is that since it does not meet the requirements of ERISA, it cannot modify the pension plan arbitration clause?

MR. STRIS: That's correct. And I'm happy to defend our position, even if the Financial Advisor Compensation Plan arbitration provision were the governing one. I don't think it is. But, frankly, I don't think that it would change the outcome in this case because there's an explicit carve-out for injunctive claims.

And we know -- this is Page 13 of our opposition. We explained at length how the -- the very essence of our complaint in this case is one seeking injunctive relief. Section 5 -- Section 29 U.S.C. 1132(a)(3) allows you to seek an injunction whenever there's something that -- in a plan that violates the statute.

THE COURT: Yeah, but how can you say the very essence of your case is seeking injunctive relief

when damages is -- is what your clients are after, is it not?

MR. STRIS: Well, I -- I wouldn't agree with that characterization because there's --

THE COURT: Do you want damages?

MR. STRIS: We want -- we want money, but damages, the Supreme Court has made very clear, under ERISA is -- is a different species.

I -- I think where -- I'd point you to the Johnson case -- this was recently litigated in the -- in the Seventh Circuit -- where this exact same issue came up. And, in fact, the same counsel that represents UBS here today made this argument in that case. And Judge Posner rejected it as silly. He basically said, just because the consequence of the injunction is money doesn't mean that you're not seeking injunctive relief.

UBS responds in a footnote by saying they respectfully disagree with that decision, but that decision used years of -- of U.S. Supreme Court precedent under the meaning of equitable relief in that statutory provision. It's weird. I -- look, I admit the -- the way the Supreme Court has interpreted -- interpreted that provision is strange, but that's what we're stuck with.

THE COURT: Well, Judge Posner is not your

best resource in this Court, but I --

MR. STRIS: Well, I -- as a Plaintiff's lawyer, I very rarely find myself agreeing with Judge Posner, but when he comes down not only on the side of Plaintiffs but forcefully so, I think it says something sort of about the -- the strength of -- of the argument that's coming from the -- the pension Defendant.

And what he essentially did was reject the notion that this kind of claim, even though it's -- ultimately it hopes to resolve itself by an award of money, he rejected the notion that that's not one for -- for injunctive relief under the statute.

That's the whole point of the CIGNA case. You can -- you can seek an injunction, you can seek reformation. These are all equitable remedies, but, yeah, they end up getting you money, that's true.

THE COURT: And the -- but in any event, getting back to your argument about this carve-out, you're -- you're suggesting that the -- that opening clause covers everything else in the paragraph?

MR. STRIS: That's our position. I mean, I -- I -- and I would say I think it's pretty clear because as I understand UBS's argument, and maybe I don't, but as I understand it, they seem to be focusing on the fact that because the -- the provision

specifically references ERISA, oh, well, it can't apply to ERISA claims.

But if that's true, it would negate everything. The -- the way the provision reads, it says, with the exception of claims for injunctive relief, everything else is arbitrable. And it lists all these different statutes.

So the -- the fact that it's listing specific statutes, all that means is that if it's not a claim for injunctive relief, you have to arbitrate causes of action under those statutes.

THE COURT: It actually says, with the exception of claims for injunctive relief for the denial of benefits under the firm's disability or medical plan.

MR. STRIS: It depends on -- it depends on the version we're looking at. Some versions say that, that's true. But I don't think that really affects our argument.

THE COURT: Well, it depends on where you take a breath, but I -- I do have a hard time saying that that sentence that starts midway down the second column, by agreeing to the terms of this compensation plan, that that somehow is falling under the -- with the exception of claims for injunctive relief.

MR. STRIS: That's an interest -- that's an interesting point. I have -- if you would permit me, I have -- I have some thoughts on that.

THE COURT: Okay.

MR. STRIS: I -- I think for -- for perhaps a counterintuitive reason, it has to include that, and -- and let me tell you why.

THE COURT: All right.

MR. STRIS: There's -- this -- this provision, it's no accident that it's all under one heading called Arbitration. And the reason why is if you put a class action waiver in a contract that is not linked to arbitration -- let's say you just decide you want to have a contract that says, you waive your right to a class action, the FAA doesn't apply, and if -- and if that were the case here, I would like new briefing.

I'd get up and I'd argue under -- I don't care if it's Texas law, New Jersey, New York, I'd argue it's unconscionable. I'd have all these defenses to the class action waiver.

UBS doesn't want me to make those arguments. They want to -- they want to cloak themselves in the protection of the Federal Arbitration Act, and I don't blame them. And the way they did that is by linking the class action waiver to the arbitration provision. They

can't have it both ways. Once they link the two and get us into the world of the FAA, which is what they want, I get to argue -- and I think with no real persuasive response -- that this carve-out for injunctive relief applies to everything. And the class action waiver is only a waiver to the arbitrable claims.

Now, if you end up disagreeing, I would -- I would ask permission for us to brief the -- the permissibility of the class action waiver, but this is never -- this isn't the posture with which it's come to this Court.

THE COURT: All right. Well, let -- what I'd like to do is to hear the response from the defense to what you've said about all of your claims rising under the PartnerPlus Plan and its arbitration clause.

MR. SHAULSON: Thank you, Your Honor.

THE COURT: Mr. Shaulson, if -- first off, just with the argument that all the claims arise under the PartnerPlus pension plan, what can you point me to that shows that that's not the case?

MR. SHAULSON: Sure. Just look at the Hendricks opposition, Note 13.

THE COURT: Let's see, can we work from the Eddingston? That just happens to be the one that I -- they appear to me to be largely the same, so I've

concentrated on one book. Since that was the older case, I picked it. But -- so if it's the same note, then that's great.

MR. SHAULSON: Can you give me just one minute, Your Honor?

THE COURT: Sure.

MR. SHAULSON: So, Your Honor, on Page -- on Page 16, Note 14 --

THE COURT: All right.

MR. SHAULSON: So, basically, what they're saying here is that UBS Pension Plan -- really the PartnerPlus Plan, but -- only requires administrative exhaustion when an individual is seeking benefits under the plan. And then they specifically say they're not seeking benefits under the plan, they're seeking at the end of the note to invalidate an illegal plan term need not first present their case to the party charged with imposing the illegal term.

So notwithstanding what counsel just argued to try to fit within the PartnerPlus arbitration provision, they have taken the position in both briefs that this is not a claim that arises under the PartnerPlus Plan, it arises --

THE COURT: Well, now --

MR. SHAULSON: -- under ERISA.

THE COURT: They're not saying that the claim doesn't arise out of the -- the pension plan. They're saying they're not seeking benefits, isn't that what --

MR. SHAULSON: Well, I think the -- well, I think the import of what they're arguing is that our claim is a statutory claim and solely a statutory claim and that it doesn't arise out of the plan. In fact, they want to amend the plan. They want to reform the plan.

THE COURT: Where do they say that it doesn't arise out of the plan? Because there's a difference between that and --

MR. SHAULSON: Well, it may -- if it arose out of the plan, then they would have to exhaust their administrative remedies.

THE COURT: Well, they're -- they're saying that it's only if it's a claim for benefits that they have to exhaust remedies.

MR. SHAULSON: Correct. But I --

THE COURT: And are they making a claim for benefits, in your opinion?

MR. SHAULSON: I think they are seeking -- they want money under the plan. They want the benefits under the plan.

And here -- here's the thing, Your Honor. It doesn't matter which way -- which way they go here. Either they're seeking benefits under the plan, in which case they had an obligation -- contractual obligation to exhaust, and they can't invoke the PartnerPlus arbitration provision because they didn't exhaust. And it says, subject to exhaustion under Section 10.2, and then it proceeds to arbitration. If they want to bring a claim for benefits under the plan, they had to exhaust. If they don't want to bring a claim for benefits under the plan and they're taking the position that this doesn't arise out of the plan -- let -- let me -- let me address your question this way because I -- I understand your point.

It doesn't even matter what they're arguing. What matters is the case law. And the case law that I cited to you before, the Western District of Texas case, talked about what does language mean when it says, arise out of a contract? When it arises out of a contract, it's limited to claims --

THE COURT: You know, I --

MR. SHAULSON: -- for benefits under the contract.

THE COURT: Have you got something better than a district court case on that? That's -- I mean,

if we're talking black letter law, there should be some -- something from on high, but in any event --

MR. SHAULSON: Well, that -- that case, Your Honor, I could pull it, but that case does survey other cases making the same point.

THE COURT: That --

MR. SHAULSON: I can't tell you whether it looks to a Fifth Circuit case or not, but it does refer to other cases making exactly the same point.

And with respect to counsel's argument that we've never seen this before, you know, Your Honor observed that the arbitration clause contained in the FA compensation plan -- the FA compensation plan is a separate agreement. It stands alone. And that arbitration agreement, of course, can be enforced, notwithstanding the PartnerPlus Plan. And I'll refer the Court to --

THE COURT: Are you saying it can be enforced against claims arising under the -- the ERISA plan?

MR. SHAULSON: Absolutely. And, in fact, the Supreme Court has -- I'm sorry, the Third Circuit, the Second Circuit have enforced arbitration agreements in a collective bargaining agreement trumping an ERISA plan or -- or an SPD, United States versus DuPont.

THE COURT: This is not a collective bargaining agreement. That --

MR. SHAULSON: But it's -- it doesn't matter. These are contractual principles.

THE COURT: I -- I just know collective bargaining agreements have their own great set of -- of statutory law surrounding them.

MR. SHAULSON: Well, Your Honor, so does the FAA, but counsel told you that nothing can trump an ERISA plan. That's what he told you. Nothing can trump an ERISA plan, and the claims procedure in the ERISA plan has to prevail.

We know that not to be true because of the cases DuPont, 388 Federal Appendix 209, Third Circuit, and United States Steel versus DuPont, 565 F.3d.

THE COURT: And those are both --

MR. SHAULSON: '99.

THE COURT: -- collective bargaining agreement cases?

MR. SHAULSON: Correct. I'll give you another case, Your Honor, which is not a collective bargaining agreement.

THE COURT: Okay.

MR. SHAULSON: And that is Brandl, B-r-a-n-d-l, versus Ace USA, 2011 Westlaw 129422,

Eastern District of Pennsylvania case that compelled arbitration of ERISA claims under a broad, quote, employment dispute resolution policy, end quote, not the ERISA plan document that had no arbitration contract in it.

The reality is, Your Honor, ERISA claims are compelled to arbitration all the time under employment policy handbooks, employment agreements. It doesn't need to be in an actual plan document.

What -- what counsel is arguing is a standard provision that no one is debating, that in terms of modifying a pension plan under ERISA, you can't modify it through a summary plan description. Counsel has not provided to you, because he can't provide to you, case law which says that an arbitration provision in a separate non-ERISA document can't have a valid arbitration agreement over claims for benefits or claims for benefits under an ERISA plan or ERISA statutory claims --

THE COURT: Okay.

MR. SHAULSON: -- because it's just not true.

Now, counsel argues that you should just accept the fact that this is an ERISA-governed plan. UBS wholly disagrees with that. The issue of whether

this is an ERISA plan is a dispute between the parties that is subject to arbitration. And under the Federal Arbitration Act, it's for the arbitrator to decide whether this is an ERISA plan, not for the Court to decide.

THE COURT: And you cite what case for that proposition?

MR. SHAULSON: My colleague is just grabbing that.

THE COURT: Okay.

MR. SHAULSON: So just one case, Your Honor, you can refer to BP -- it's a Fifth Circuit decision, 2012.

THE COURT: I like that.

MR. SHAULSON: Makes it easy. BP Explo -- sorry, BP Exploration Libya Limited versus ExxonMobil Libya Limited. The cite is 689 F.3d 481, 5th Circuit 2012. And it says, in no way are Courts to consider the merits of a claim. And the merits here is a disputed issue about whether this is an ERISA-governed plan or not.

Another point that Plaintiffs made in argument is that the LaVoice decision -- LaVoice versus UBS -- did not involve a class action claim. That's just not true. If Your Honor takes a look at that

decision, it will be clear that the Plaintiffs were seeking to bring a class action on behalf of a class of financial advisors seeking overtime pay. And the Court said, as it did in Cohen versus UBS, also a class action, that the FINRA rules -- under well-settled law, circuit law and district court case law, that FINRA rules can be overridden by a separate agreement per the terms of the FINRA rules themselves.

Now, Plaintiffs' counsel keeps referring to in their briefs and at argument this Nielsen case. The Nielsen case is totally different. It didn't involve a separate agreement with a class action waiver. It was a standard formulation of a U4 agreement incorporating -- I don't know if it was FINRA or NASD rules, but the securities -- security exchange rules. That case has no application here whatsoever because there was no separate agreement to agree to arbitrate claims on a non-class basis.

THE COURT: And what -- going back to your separate agreement, that's the -- the Financial Advisor Compensation Plan, and --

MR. SHAULSON: So it's different for different people because you have branch managers and financial advisors, but it's basically the same provision.

THE COURT: And you're saying that this document, the 25-page document that you've handed up, or one very much like it, would be signed by each employee, or at least each of the financial advisors who would be Plaintiffs in this case?

MR. SHAULSON: Correct. Each Plaintiff signed at least one arbitration provision with a class action waiver. Roccisano signed it five times. Bollich Cox, and Ellsper -- Ellspermann signed three times. Eddingston and Galanis signed two times. Davis and Hendricks signed one time.

And the last agreement -- the last agreement that went into effect for each one of the individuals also contained a class action waiver. And I'll tell you which agreements those are. For Eddingston and -- and Hendricks, it's the 2008 Compensation Plan. Davis and Galanis, the 2009 Compensation Plan. Bollich, the January 2nd, 2009, FA Account Reassignment Agreement. Cox, the 2010 Compensation Plan. Ellspermann and Roccisano, the 2011 Compensation Plan, as well as the 2011 PartnerPlus Plan.

So I just wanted to ask my colleague, Your Honor -- I'll certainly ask -- answer any other questions you have. I wanted to ask my colleague to address the questions about the injunctive relief

argument that Plaintiffs have made.

THE COURT: All right.

MS. DAVIDSON: Good afternoon, Your Honor. Deborah Davidson, also on behalf of UBS.

THE COURT: All right.

MS. DAVIDSON: So the starting point in looking at this question of the injunctive relief carve-out is the very basic premise that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. And that's under both Supreme Court and Fifth Circuit case law.

And as you point -- and as Your Honor pointed out when Mr. Stris was referring to the injunctive relief carve-out that appeared in the 2007 FA Compensation Agreement, there's actually different language that appears in the various versions of the comp plans.

And so, for example, between 2008 and 2010, the comp agreements provided for -- with the exception of claims for injunctive relief or the denial of benefits under the firm's disability or medical plans. Similar language appeared in the account reassignment agreements for 2009. Other agreements frame the carve-out as injunctive relief under this letter of understanding. That's for the LOUs signed by Plaintiff

Roccisano and Plaintiff Hendricks. And then still others frame the carve-out as injunctive relief under this agreement, and that is the Account Reassignment Agreement signed by Mr. Bollich.

So it's clear that there are different ways that the Court could look at what exactly is meant by this carve-out for injunctive relief. One interpretation would be that -- that this carve-out applies only to claims either under this agreement with respect to the account reassignment and the LOU agreements, or for the 2008 going forward comp plans that it would only be with respect to claims involving medical or disability benefits.

THE COURT: Can you articulate any reason why it would have been limited to medical or disability benefits? I mean, is there some reason why that would be a reasonable interpretation of the agreement?

MS. DAVIDSON: Well, simply in -- in -- in looking at how it -- how it's phrased.

THE COURT: Well, I -- I see the words. I'm just wondering if -- if there's something about the medical and disability plans that would make it more logical to carve out a claim for injunctive relief.

MS. DAVIDSON: Yeah, well -- well -- and, Your Honor, I can't -- I can't answer that off the top

of my head without going back and -- and actually reviewing the terms of the medical and disability benefit plans that were in effect over time.

But even setting that aside, going back again to this all doubts in favor of arbitration kind of starting point, the carve-out for injunctive relief, how -- you know, whichever of these phrasings you choose, it's only a carve-out for claims for injunctive relief.

But the arbitration agreement is actually much broader than that. It applies to any and all disputes relating to employment, compensation, benefits, whether statutory or otherwise, including under ERISA. And as -- and as my -- my colleague, Mr. Shaulson, explained, this is clearly a dispute involving benefits compensation under the statute of ERISA, which is a question for the arbitrator to decide.

What -- before you even get to the point of what type of relief might ultimately be available if the Plaintiffs were to prevail, there has to be a number of findings made as to whether the plan was, in fact, covered by ERISA, if it was, did it violate ERISA's vesting and forfeiture provisions. And then at the end of the day, finally, there would be a determination as to what the appropriate remedy would be.

And you have to take a step back and -- and look at the -- look at the language in context. You know, especially considering the -- the any and all language here -- excuse me. You know, this is the type of language that other Courts have found does not override an otherwise very broad agreement to arbitrate any and all claims like we have here, and I can give you a few examples.

So, for example, in a Fifth Circuit decision, Personal Security & Safety Systems versus Motorola, it's 297 F.3d 388. In that case, there was a broad arbitration provision that covered an entire contractual arrangement, but then there was also language that gave -- that gave Texas courts exclusive jurisdiction over any suit or proceeding. And so the Court had to look at whether that exclusive jurisdiction language trumped the arbitration agreement, and it found that it didn't. It said, standing alone, one could plausibly read the forum selection clause to mean that Texas courts had the exclusive power to resolve all disputes arising under the stock purchase agreement. But the forum selection clause does not stand alone. And the Court went on to go ahead and -- and find that the claims were arbitrable.

And there is similar reasoning in the Comedy

Club case that we cited in the briefing. In that case, the arbitration agreement said that all disputes had to be resolved by arbitration, but then there was also a carve-out for equitable remedies, again, that would be subject to the exclusive jurisdiction of Courts. And the Courts said, well, the exclusive jurisdiction for this equitable relief carve-out can't trump this otherwise very broad arbitration agreement because the Court has to resolve all doubts in favor of arbitration.

THE COURT: And is this the same case that you're talking about that you started on, or is this a different case that says that? The -- the one you're saying --

MS. DAVIDSON: Oh, this is the -- the Comedy Club case is cited in our -- yeah, it's a different case than the Fifth Circuit case.

THE COURT: All right. And -- and what's the cite on it?

MS. DAVIDSON: It's 553 F.3d. 1277, and that's a Ninth Circuit decision.

THE COURT: Too bad.

MS. DAVIDSON: That's why we cited the Fifth Circuit case first, that's true.

You know, but also, Your Honor, if -- if

you -- if you go with Plaintiffs' interpretation and -- and find that simply dropping the word "injunction" in a complaint is enough to take an -- an otherwise arbitrable claim completely out of the scope of the arbitration agreement, then the exception ends up swallowing the rule. And it would mean that anybody who's filing suit would simply say, I want an injunction. I want an injunction to get a promotion. I want an injunction not to be discriminated against. I want an injunction to keep my job during a reduction in force. I want an injunction against offering certain types of investments in my 401(k) plan. I mean, you -- you get my drift.

Here, it's become very clear that what the Plaintiffs are seeking to recover is the money. It's all about the money. And the fact that they say that they want an injunction -- first of all, as -- as I mentioned earlier, you don't even get there because the issues as to whether they can even establish that the plan was governed by ERISA and that there was any ERISA violation and that they would even be in a position to seek any kind of relief, those are all questions for the arbitrator.

But what they've also made clear is that what they -- they -- what they want to happen is for the

plan document to be reformed so that they could be in a position to get more money. That's not an injunction, Your Honor. An injunction is something that is forward looking to prevent against future harm. These are individuals who have all left UBS. They've taken complete distributions of their benefits under PartnerPlus. So the only way that they can be made whole is to get a check for money. That's not an injunction.

THE COURT: All right. Ms. Davidson -- or Mr. Shaulson, let me hear from -- from Plaintiffs' counsel briefly, a response on that before we move on to anything else.

Mr. Stris, why shouldn't the scope of that arbitration clause and whether or not the -- the first clause relating to injunctive relief affects the rest of the clause, why shouldn't that be referred to an arbitrator if the Court finds that this clause is the effective clause?

MR. STRIS: Well, I -- I guess the best way I would answer that is that's just another way of asking the question who gets to decide if ERISA applies? And I think the starting point is -- and we addressed this at Page 4 to 5 of our opposition in Footnote 3. We're either dealing with a motion to dismiss here or we're

dealing with something that has a summary judgment standard. So let me -- let me walk through the procedures.

If what we're dealing with is a motion to dismiss, we cite the Monarch Flight case and the Taylor case for the fact that you -- you accept our allegation that this is an ERISA plan.

THE COURT: Well, we're not really dealing with a motion to dismiss or a motion for summary judgment. We're dealing with a motion to compel arbitration.

MR. STRIS: But there has to be a procedural standard by which we determine who has the burden of proof, who gets to decide what.

So let me go directly to the issue of who gets to decide, the Court or the arbitrator. My colleagues cite you to this Fifth Circuit case, the -- the Libya case. Well, I would point more directly to another case they cite. It's a 1986 Supreme Court case, the AT&T case. It's on Page 16 of 29 of their papers.

THE COURT: Uh-huh.

MR. STRIS: It makes very clear that a question such as is this an ERISA-governed plan, that needs to be decided by the Court. That's not -- that's

not an issue of the merits, and you really need to look no further than the seminal Granite Rock case, another Supreme Court case, 2010, we cite it on Page 14 of our agreement. And, basically, what the Court held there is that --

THE COURT: I'm not really on whether or not this is an ERISA-governed plan because this arbitration clause that we're talking about now that's in the Financial Advisor Compensation Plan, nobody contends is in an ERISA plan, right?

MR. STRIS: That's right.

THE COURT: It's just a question of does it govern the claims that you're asserting here.

MR. STRIS: Well, we -- I would submit that we only get there if you've rejected our earlier argument that under ERISA, we have to look at the -- the language in the PartnerPlus Plan.

THE COURT: Well, you've not been able to cite me any case that -- that addresses whether a general arbitration agreement by an employee can affect that. I understand because you don't believe it's ever been tried before.

MR. STRIS: I was hoping to speak to that issue because I think it's going to be critical in resolving this -- the -- this issue.

THE COURT: Are you familiar with this Brandl case?

MR. STRIS: I -- I am sufficiently familiar with the cases cited and the argument made by my colleagues that I -- I think I have a very direct response which is this.

THE COURT: Okay.

MR. STRIS: The question is, when do separate agreements trump an ERISA plan? That's the question. And I want to be very clear here. My argument is not that you can have -- you can't have a separate agreement to arbitrate. That is not my -- my position.

My position is that this is a unique case where the pension plan has an arbitration provision. If you accept my argument that that provision governs, then you're in black letter ERISA law. And under black letter ERISA law -- this comes right out of the statute, 29 U.S.C. 1024 -- you cannot materially modify any provision in the ERISA plan. It doesn't matter if it's arbitration, if it's the way you calculate your benefit, unless you comply with specific rules.

So every case that UBS has cited to you is irrelevant. In fact, they -- they told you the one case that they -- they most heavily relied on, there was no

arbitration provision in the pension plan. That's not this case. See, I feel like it's partially my fault. We're getting away from sort of what the core -- in my view, what the core issue is here.

We have a pension case. We have a dispute about a pension plan. The pension plan has an arbitration provision that UBS can't get up here and credibly argue applies to this case because it carves out class actions. So we've spent a lot of time today talking about other issues, but really at the end of the day, we only get to those issues if for some reason we're not interpreting the arbitration provision in the pension plan in a pension case.

And I don't think any argument about how, well, there's a -- there's a -- you need to err on the side of -- of favoring arbitration --

THE COURT: I think the concise answer to my question would be you say the Brandl case is distinguishable because the pension plan in that case did not have an arbitration agreement.

MR. STRIS: Yes, I --

THE COURT: Okay.

MR. STRIS: I -- and I would -- I would go a step further. I'll try and be concise. I believe UBS has not cited a single case where there is a pension

plan that had an arbitration provision that permitted the case to proceed in court that was then trumped by an outside agreement.

And that's critical because my argument only kicks in when you're trying to use an external document to change the pension plan.

THE COURT: Okay.

MR. STRIS: And that's why I can't give you a case because I wasn't trying to be -- be -- you know, slick. I've never seen a situation, and I've never -- I read a lot of cases. I've never read a case where someone has tried to use another document to get around the pension plan.

That's the point I was trying to make about LaVoice and Cohen and Lewis in -- not -- UBS has not responded to the fact that in none of those cases was the -- was the PartnerPlus Plan involved. In none of those cases was the arbitration provision that we rely on put before the Court. In none of those cases did the Plaintiff argue, hey, we get to proceed with our class action because there's a provision here that exempts class actions.

And there's a simple reason for that. There was no provision that exempted class actions in those cases because they weren't pension cases.

THE COURT: Okay. Well, then let me hear from them on that. Thank you. You've helped focus my understanding of your argument.

MR. SHAULSON: Your Honor, first of all, these are two separate agreements, as we've gone over, and you can have an agreement to arbitrate ERISA and pension plan claims outside of an ERISA plan.

THE COURT: Well, but the question is, can it modify the arbitration provision within the ERISA plan?

MR. SHAULSON: Right. Now, let me -- let me answer that. The -- according to the Courts, arbitration agreements need to be read harmoniously with one another. Let me just get you a -- let me just get -- I'm going to --

THE COURT: I think that's true of all agreements, but --

MR. SHAULSON: Right. So now you have a PartnerPlus Plan, and let -- I'll indulge counsel for a second in saying, assume it's an ERISA plan, which, again, I think is an issue for the arbitrator to decide. It goes to the merits. The issue about summary judgment, motion to dismiss, those are disputed issues of fact. This is a question of -- of law, a dispute of law. The arbitrator is to decide disputed issues of law

when the parties have agreed to arbitrate.

In any event, the arbitration agreement contained in the PartnerPlus Plan, there's no dispute that it incorporates FINRA rules. The FINRA rules specifically allow a separate agreement. So there is no conflict between the -- what they'll say is an ERISA-governed plan, the PartnerPlus, and the FA Compensation Plan, because the PartnerPlus Plan specifically incorporates a rule that says can have a separate agreement. And the PartnerPlus Plan doesn't say you can bring a class action. It absolutely doesn't say that. All it says is we're going to incorporate FINRA rules.

Now, what do FINRA rules say? FINRA rules say, ordinarily -- ordinarily, we're not going to hear class claims, and, ordinarily, you may have a right to go to Court to bring a class claim, but you can have a separate agreement in which you agree not to have class claims.

THE COURT: Now, we're not here on the question of whether or not their class claim should be dismissed.

MR. SHAULSON: Correct.

THE COURT: And that -- that's a matter that you could bring up by whatever means you want. We're

just here on the matter of should their claims be compelled to arbitration and on -- so the -- the meaning of that arbitration clause which incorporates FINRA is what I'm looking at.

MR. SHAULSON: Right.

THE COURT: And that arbitration clause, if it incorporates FINRA, doesn't extend to class claims, right?

MR. SHAULSON: No, it says -- specifically with respect to class claims, Rule 13204. It has a savings provision, and the savings provision specifically says that you can have a separate arbitration agreement.

THE COURT: Throw -- throw that 13204 up on the ELMO --

MR. SHAULSON: Sure.

THE COURT: -- and let's -- let's look at that.

MR. SHAULSON: Sure, Your Honor.

So just -- just -- am I doing this wrong here? There we go.

So, basically, in A, it says, class claims may not be arbitrated under the code. And then it said -- you know, talks about what a class claim is. But the key provision is on the next page. You tell me

when you want me --

THE COURT: Go ahead.

MR. SHAULSON: -- to flip it. So this is your savings clause at the end -- sorry, I did it again. I underlined it. These par -- these subparagraphs, being the subparagraphs of 13204, do not otherwise affect the enforceability of any rights under the code or any other agreement.

Now, there's also another provision here, and I'll -- I'm just going to go back to -- it says in 4, 13204(a)(4), and it talks about how you can't enforce an arbitration agreement until -- and then on the next page it says, the last bullet -- the member of the certified or putative class elects not to participate in the class.

So we're not writing on a blank slate here, Your Honor. We've had multiple Courts opine on this very issue, including three with respect to UBS's FA Comp Plan. And in each case, the Court has said that what this clause means is that you can have a separate agreement in addition to the FINRA rules, and that that agreement is enforceable.

And so the Cohen, the LaVoice Courts, the Lewis Court have all concluded that notwithstanding an agreement to incorporate FINRA rules, it is entirely

consistent with that other agreement and consistent with the FINRA rules to have an arbitration agreement which has a class action waiver in it.

And so even if you accept Plaintiffs' counsel's argument, there is no conflict between the SPD, which doesn't expressly preclude class actions, and the FA Compensation Plan.

THE COURT: Well, what about Nielsen and the Citigroup case?

MR. SHAULSON: Sure, Your Honor. First of all, Citigroup is a case about waiver. It's a case in which the Defendant, I believe, didn't move to compel arbitration until 18 months after the litigation began, after class certification had already been granted, and the Court simply considered whether Citigroup had waived the right to compel arbitration and concluded that it had.

The Nielsen case is a case in which they incorporate the security industry rules, and there's no separate agreement to waive class action claims. That is completely unlike Lewis, Cohen, LaVoice, the Suschil case from the Northern District of Ohio. It's completely unlike the Second Circuit's decision in Merrill Lynch versus Georgiadis, Credit Suisse versus Pitofsky, the Chanchani case from the Southern District

of New York. Every case that has ever considered this issue has said that when you consider an incorporation of FINRA rules in one agreement, if you have another agreement that says you're going to have a class action waiver or otherwise modify FINRA rules, it's entirely enforceable, because that's what the rules say.

THE COURT: Well, the -- it's hard for me to go with your analysis of that Citigroup case. While admittedly the case is about waiver, it goes on to say that under the NASD rules, claims submitted for -- as a class action shall not be eligible for arbitration, nor may a member enforce agreement, neither Lomas himself or those class members subject to NASD rules could be compelled to arbitrate.

MR. SHAULSON: Right. But that -- again, there's no separate agreement to arbitrate on a non-class basis.

THE COURT: Well --

MR. SHAULSON: And by the way, I'm -- I'm very familiar with that Citigroup Plan. The Citigroup Plan basically says -- which was not at issue because they have a different plan that specifically says you can't bring class action claims. This was before the amendment of that plan. That is completely distinguishable for the same reason that Nielsen is

distinguishable. There was no separate agreement to arbitrate on a non-class basis, which is the case here.

And if we look at the -- if you looked at the Cohen decision, you know, the -- the Court goes through it in painstaking detail. It says, number one -- and it actually says it this way. Number one, this Court has to recognize that you can enter into additional arbitration agreements beyond the scope of the code, meaning the industry code in the -- in the FINRA rules. Then it says, number two, the code is not affected by the enforceability of these additional contracts. Moreover, the -- it -- it says the financial advisors elected not to participate in a class action. Once you elect not to participate in a class action, as they did here -- as the Plaintiffs did here by agreeing to arbitrate on a non-class basis, you can go to FINRA on an individual basis and 13204 is no barred.

And by the way, this isn't -- this isn't -- not only is the case law universal, Plaintiffs in the Hendricks brief -- and I could find you the cite in the Eddingston brief, as well, but on Page 16 of the Hendricks opposition, Plaintiffs specifically say, you can do this. In fact, they say, it's not hard for UBS to do this. All they have to do is draft a provision with a class action waiver. Well, that's exactly what

UBS did.

THE COURT: I see what you're talking about --

MR. SHAULSON: Your Honor, just --

THE COURT: -- in the ERISA plan, but...

MR. SHAULSON: Yeah, but, again -- again, their -- their argument -- if you accept their argument, and we do not because, number one, it's not an ERISA plan. It's a question for the arbitrator as to whether it is an ERISA plan. Number two, they're making the argument about modifying an ERISA plan. No one is arguing -- there is no argument by UBS that we are modifying an ERISA plan. These are two separate stand-alone agreements, as Your Honor indicated before, two separate stand-alone agreements that can stand by themselves. And there's no prohibition on an individual agreement to arbitrate -- to arbitrate claims for benefits or ERISA claims.

Number three, Your Honor, even if their argument were correct -- even if their argument were correct that ERISA has some rule that would prevent you from having a separate arbitration agreement, we're not writing on simply a blank slate of ERISA claims. We also have the Federal Arbitration Act to contend with here, too. And the Federal Arbitration Act trumps

ERISA. The Federal Arbitration Act says that you have to enforce the arbitration agreement according to its terms.

Moreover, Your Honor, the Fifth Circuit, picking up on Supreme Court authority, very well settled Supreme Court authority, said in the Webb versus Investacorp case -- and I'll get you the cite for that -- in Webb versus Investacorp, Inc., 89 F.3d 252, 1996 decision from the Fifth Circuit, said, if it's been established that there is an arbitration agreement -- which there clearly has, there's no dispute that there's an arbitration agreement at play here -- any ambiguities -- any ambiguities on the scope of the arbitration clause, quote, must be resolved in favor of arbitration, end quote.

And the standard here is that unless it can be said with positive assurance that the agreements are not susceptible to an interpretation favoring an arbitration, then the arbitration agreement needs to be enforced, favoring arbitration. And it's Plaintiffs' burden to prove that there's not positive assurance.

THE COURT: What is the gist of your argument that the PartnerPlus agreement is not covered by ERISA?

MS. DAVIDSON: And, again, Your Honor, I say

this with the -- the starting point that we believe this is an issue for the arbitrator to decide, but the question that the arbitrator will face is -- is this a pension plan or is it another type of plan that doesn't fall within the bucket of pension plan under ERISA. So to be a pension plan under ERISA, it has to be a plan that is designed to provide retirement income.

A PartnerPlus Plan is not designed to provide retirement income. It's a deferred compensation plan to reward financial -- excuse me -- to reward financial advisors and branch managers in terms of compensation. It's deferred, but it's not deferred until retirement.

And, in fact, over time, the plan has required that participants begin taking distributions of their benefits while still employed. And that's very different from a pension plan where the benefits by their very design do not even kick in until someone is terminating employment and getting to retirement age. So that's the gist of it. It's -- it's a bonus plan. It is not a retirement plan. It's not designed to provide retirement income.

THE COURT: And has its status, as covered by ERISA or not, been litigated before other Courts?

MS. DAVIDSON: No.

THE COURT: Has it been subjected to arbitration?

MS. DAVIDSON: There are other claims involving PartnerPlus that are pending, but there -- there's been no decision.

(Discussion off the record between Defense counsel.)

MS. DAVIDSON: Oh, that's true. Well, the Thaning case, Thaning versus PaineWebber UBS, that also involved the PartnerPlus Plan, and that's a -- a claim that was compelled to arbitration.

THE COURT: And was there any decision about whether or not it was an ERISA plan?

MS. DAVIDSON: Not by the Court, and I -- I'm not aware of what, if any, decisions were made by the arbitration panel, but that -- that claim did not challenge the plan as an ERISA plan.

THE COURT: All right. Thank you.

What do you say, Mr. Stris, to the argument that the execution by your clients of the -- I'll call it waiver of class action participation, but in any event, the language in that Financial Advisor Compensation Plan that we've talked about, what do you say to the argument that that kicks in this provision of FINRA that the member has elected not to participate in

a class action?

MR. STRIS: Yeah. So I think now we're getting to sort of the heart of -- of where I was trying to start earlier because I think this issue stops us from being ships -- us and UBS from being ships passing in the night. Here's how -- here's how I would conceive of it.

UBS tells you, you can have a separate agreement that overrides FINRA for these various reasons you just mentioned. They also tell you, and I don't disagree, you can have a separate agreement that changes a pension plan. Neither of those things are relevant here because the separate agreement has to be valid. It has to be binding.

And so my answer to your question is very straightforward, and this is why I focus so much on why this is an ERISA case. Under ERISA, if you start with a pension plan, like the PartnerPlus Plan, that says, we are incorporating FINRA's rules. You are permitted to bring a class in court. And let's be clear, that's what the Niel -- the Nielsen case and the -- the First Circuit case say. The language is almost exactly the same, and the Seventh Circuit said, it expressly prohibited the Defendants from getting that class action out of court.

If that's your starting point, and we submit it is, then it takes a heck of a lot to contract around that. And if you're dealing with an ERISA plan, and I still haven't heard a response from my -- from my colleagues here, that means you're trying to modify the plan. And I've heard nothing. 29 U.S.C. 1024 says, when you modify a plan, you must comply with strict requirements. They haven't even gotten up here and said they've complied with those requirements. So FINRA doesn't get you around the ERISA problem.

Now, if you --

THE COURT: All right. Let me -- let me just -- I don't know that you really addressed this.

MR. STRIS: Okay.

THE COURT: If -- if FINRA says, class claims can be submitted to arbitration once the member elects not to participate --

MR. STRIS: I see where you're going.

THE COURT: -- then how does it violate the PartnerPlus arbitration clause --

MR. STRIS: Yeah.

THE COURT: -- to submit this to arbitration?

MR. STRIS: Here's why. The -- all of our clients and all members of the class were parties to the

PartnerPlus Plan. And they were told, including in the summary document, hey, go look at the plan documents. They're available on the extranet. Check them out. They govern.

If anyone, myself, any of my clients went and looked at that agreement, they would see language that says, essentially, you have to arbitrate everything, except for a class action. And they thought that that's what governed, just like in the Nielsen case.

So when they executed this separate document, it was not their intent -- especially when the document says if there's any conflict, the plan governs -- to give up those rights.

Now, you don't have to take my word for it, and you don't have to indulge in presumptions because ERISA provides very specific requirements to protect against this very thing from happening. It says, if you want to change what you've told people are their rights in the pension plan, you need to -- you need to do it in writing, you need to do it in a way that an average person can understand --

THE COURT: Well, let me -- I'm familiar with that jurisprudence. But the PartnerPlus Plan doesn't say anything about class actions in the

arbitration clause.

MR. STRIS: Well, I --

THE COURT: It just incorporates FINRA, right?

MR. STRIS: Yeah, but I don't think I would agree with that characterization because -- can I look at -- can I -- can I walk -- walk you through the language?

THE COURT: Sure.

MR. STRIS: What it says, and I'm going to quote, is claims, quote, shall be resolved before an NASD arbitration panel in accordance with the arbitration rules of the NASD.

Now -- and it was later changed to FINRA. Now, if we look at the FINRA rules, they say two things. They say, FINRA won't permit an arbitration of claims when a class action is pending. And, secondly, and more importantly, they say, a party isn't able to enforce an arbitration provision that relates to pending class claims.

THE COURT: And it goes on to say, until, right?

MR. STRIS: That's right.

THE COURT: Until the member elects not to participate.

MR. STRIS: And so now we get to the $64 million question, which is, did my clients elect not to participate by -- and I guess UBS's argument would be signing the -- what I call the summary brochure.

And I think there's a simple answer, which is under ERISA, that can't count. That's not good enough. The whole jurisprudence of waiver is under ERISA, and ERISA is very protective. It says, if you're going to waive rights that you have in the plan document, it has to be done in a very specific way.

So I don't care what FINRA says. FINRA can say, this doesn't eclipse other agreements, but if I hold a gun to someone's head and say, sign this agreement, obviously, that's an agreement that's -- that's procured under duress. UBS couldn't come into Court and say, oh, but FINRA says, this doesn't affect -- this is eclipsed by other agreements. It has to be another valid and binding agreement.

So, essentially, their -- they -- their argument begs the question, it totally fails to respond to -- to our critical position, which is that agreement isn't an enforceable agreement. And that's why they make such a big deal of the fact that this is not an ERISA case and that the arbitrator has to decide. And so --

MR. GOODMAN: Your Honor, may I call Mr. Stris' attention to one thing?

THE COURT: Go ahead.

MR. GOODMAN: Your Honor, with respect to the specific language that you've referred to, the member of the certified or putative class elects not to participate, that clearly relates to an opt-out because it involves judicial involvement. It says, which elects not to participate in the class or withdraws from the class according to conditions set by the Court. It is not a reference to any separate agreement. By its very terms, they reference to an opt-out subject to conditions set by the Court, which is certainly what the Court has authority to impose under Rule 23 when a class action goes forward.

And so this claim language simply does not allow for enforcement of a separate agreement distinct from the argument that the -- there's a -- a governing plan that doesn't permit enforcement of any contrary document. That language does not do it. It's -- it's incorporation, if anything, of Rule 23, opt-out provisions.

THE COURT: All right. Is -- it -- it was my understanding that UBS is contending that some Courts have relied upon that as an answer to the limitation of

the arbitration clause to FINRA rules. Is -- is that -- am I understanding that -- your position right, Mr. Shaulson?

MR. SHAULSON: Yes, Your Honor.

THE COURT: And which case would that be that you would point to, or cases?

MR. SHAULSON: Sure. So there's several, Your Honor. There's the U -- there's the LaVoice versus UBS case.

(Discussion off the record.)

MR. SHAULSON: There's the LaVoice versus UBS case. There's the Cohen versus UBS case.

THE COURT: And -- and do those specifically refer to this provision of FINRA adopting a -- a waiver of class action claims?

MR. SHAULSON: The -- the Cohen case, I'm sure, does. That's the case that I referred to earlier that went through the one and the two. So the Cohen case both referred to the savings clause at the end, doesn't affect the enforceability of rights under the code or any other agreement, and also referred to the election. So -- I forget your -- your name, sir.

MR. GOODMAN: Goodman.

MR. SHAULSON: Goodman.

So Mr. Goodman referred to the election

provision, but didn't address the savings provision at the end about a separate agreement. I'll also add that the Suschil court from the Northern District of Ohio also specifically addressed that savings provision in the context of a class action waiver.

And I believe Lewis -- Lewis versus UBS also enforced the class action waiver notwithstanding the U4 rules.

Now, with respect to the election language that Mr. Goodman referred to, it says, the member of the certified or putative class elects not to participate in the class, which is different than withdraw from the class according to conditions set by the Court.

So you can make an election. If -- if that only meant withdrawn according to conditions by the Court, opting out, then they wouldn't need to say both of those things. Those are two different things. One is withdrawing from the class according to conditions by the Court, i.e., opting out. The first is electing not to participate.

If I tell a Court -- if I tell the Court, Judge, I'm not participate -- a purported class action such as this is filed, no certification decision or what have you, if I'm a class member and I say to the Court, I'm -- I'm not participating in this. I already signed

an agreement electing not to participate. That's an election not to participate. You don't need conditions by the Court or what have you. No one can be compelled to, you know, participate in the class action.

The other thing that -- the other thing that -- that I want to address is we're not just looking at -- we're not just looking at contractual provisions. We're looking at contractual provisions against the backdrop of the Federal Arbitration Act. So we need to look at the FAA and the embodiment of a policy in favor of arbitration so that all doubts get resolved in favor of arbitration.

What counsel was arguing is a very circular argument that you've incorporated FINRA rules. We're going to ignore FINRA rules. And you can't -- you can't have the FINRA rules because the SP -- because the PartnerPlus Plan says something else. I don't get it. The PartnerPlus arbitration provision says, we're incorporating FINRA rules.

Now, if the financial advisor or branch manager went to the arbitration provision of the PartnerPlus Plan, they would see that it says, subject to exhaustion -- we'll put that aside -- in the event of any dispute, claim, or controversy involving a claimant -- and I'll put this on the screen so Your

Honor can see it -- I'm sorry, were you -- were you done looking at that?

THE COURT: No, go ahead. That's fine.

MR. SHAULSON: Sorry. So it says, in the event of any dispute, claim, or controversy involving a claimant and the plan and the sponsor, involving a claimant, if anybody read that language, they would presume that that is an individual claim by the claimant and the plan.

Now, if you went -- if the person actually went to the incorporated FINRA rules, they would see what we saw before. Number one, there are exceptions to the rule, when you make an election and other agreements are enforceable.

Now, I'll point out -- this is not a retail clerk that we're talking about here or, you know, some -- some person who hasn't -- hasn't, you know, advised clients about millions and millions of dollars of investable income. These are people who made hundreds and hundreds and hundreds, some of them $800,000.00 a year, they made from UBS. These are not unsophisticated individuals.

As Marsh versus Prudential pointed out, the New York Court of Appeal, financial advisors are very sophisticated individuals. And there's a slew of case

law -- I can't cite it to you today, but there's a slew of case law that contracts, that incorporate by reference are valid and enforceable and individuals are presumed to know the agreements that they agreed to.

THE COURT: All right. We're going to take a brief recess now, and we'll be back in 15 minutes, 3:30. Thank you.

MR. SHAULSON: Thank you, Your Honor.

(Recess.)

LAW CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

Having carefully considered the briefs and exhibits filed in this matter and the extensive oral argument that we've heard today and being mindful of the policy of the Federal Arbitration Act in favor of arbitration, that only where the terms of the arbitration clause call for it, I find that the arbitration clause in the PartnerPlus Plan clearly does not extend to arbitration of class claims.

I further find that the language of the FINRA rule, which I believe is 13240, which has language accepting class claims where the member elects not to participate, does not apply here. Pre-suit waiver clause, such as that relied upon in the Financial

Advisor Compensation Plan does not fall within the language of that FINRA rule which contemplates election not to participate in or withdrawal from a pending certified or putative class action claim.

Therefore, I find that the PartnerPlus arbitration clause does not provide for arbitration of the claims that the Plaintiffs are making in this case.

The Court will accept the PartnerPlus Plan as a covered ERISA plan at this time, based upon the allegations of the complaint and the first amended complaint and also based on the fact that it appears, based on a reading of those plans, to meet the definition of a pension plan or a deferred compensation plan that would be covered by ERISA.

Whether or not it actually is such a plan is a matter that will have to be determined at a later date. But because the Court accepts it as such at this time, as I believe the Court has to on this record, the separate arbitration agreement in the Financial Advisor Compensation Plan will not be allowed to modify the arbitration clause in the PartnerPlus Plan under ERISA. And to give it the effect that the Defendant, UBS, is arguing for in this case would be to modify that plan.

Accordingly, the Court will proceed with the

case to the stage involving class certification. The Defendant may at the same time present the motion for summary judgment, if it believes it can support one, on the matter of ERISA coverage, which, if successful, could result in a reconsideration of this ruling.

Also, obviously, if the class is not certified, then the FINRA rules would allow for compelling arbitration of the individual claims through the PartnerPlus Plan.

I'll -- I will accordingly proceed to the question of the schedule which has been addressed by both sides in their Rule 26(f) submissions. At this point, my intention is simply to schedule the matter through a class certification hearing. If the class is certified, then we'll take up the timeline to trial of the class claims. If it's not certified, then we'll proceed along a different route.

I think it's incumbent upon the Plaintiffs to file a motion for class certification as soon as possible, and I -- in the submission, the joint submission, the suggestion was made that the motion itself could not be filed until -- let's see, 120 days from now.

Is there any reason why such a lengthy delay is necessary to file the motion for class

certification?

MR. GOODMAN: Your Honor, the only reason could be the necessity for some class discovery, and what -- what may make sense is for the parties to confer about a period not longer than that and see if we can come to a joint recommendation in the next few days to the Court about a set of deadlines that relates to class certification and discovery and if there are expert witnesses for that on class certification and such, in other words, try to restate the class certification-related deadlines for the Court's consideration. That's one approach.

I think that we'd probably like to discuss among ourselves what scope of class discovery is appropriate, which would, to me, be the only condition that would bear on whether we could do it sooner than 120 days.

THE COURT: What sort of discovery are you planning on seeking before the certification hearing?

MR. GOODMAN: Your Honor, if the issue of -- for example, of whether it's an ERISA plan and it's certainly a unitary plan and the contention is that its provisions are illegal as to hundreds if not thousands of individuals, if there is a question about ERISA

coverage -- that under the applicable law, in fact, under the statute is very clearly -- has some facts bearing on it. To the extent there are contentions that there is any individualized treatment necessary, notwithstanding this one plan, one set of provisions, one claim of illegality, then there may be a need to test that opposition by some limited discovery depositions of human resource representative, et cetera. Those are the kinds of questions, I think, that would bear on the certification issue.

THE COURT: Well, that in my mind is all the more reason to get your motion filed early. That -- what the points of dispute are between the parties as to Rule 23 won't really be focused until you've filed your motion and they've filed their response. And if there are fact issues that need to be resolved to present those disputes to the Court at the certification hearing, then -- then at least we'd know why discovery was needed. But until they see your motion and you see their response, I don't understand how you're going to go about determining what's in dispute.

MR. GOODMAN: I -- I appreciate what the Court has said, and it may be that the motion could be filed, the opposition could be filed, and the Court can

permit discovery prior to the final hearing with supplemental papers to be filed based on any discovery document or otherwise that's taken. That's -- that certainly seems sensible. I agree with the Court that that will be the best way to -- to flag any issues that exist.

Counsel at this table can confer for a few minutes and perhaps say more, but I certainly don't have a problem with the Court's suggestion that some final hearing would await whatever appropriate identification of issues in discovery occurred for some period of 30, 60, 90 days, that kind of thing.

THE COURT: Well, I -- what I'll do is I'm -- I'll take another break in a minute and let y'all confer, but what -- what I think needs to be established is a date as soon as possible for you to file your motion, 30 days or so for the Defendants to file their response, a date for both sides to provide lists of witnesses and experts who they intend to call at a hearing, and -- and then a hearing date. And I would think that it can be done with a minimum of discovery. I mean, these issues are not supposed to be on the merits.

MR. GOODMAN: Your Honor, you may be -- it may end up being perfectly true that there are very

limited or -- or no issues that are -- that require that kind of discovery, but we'll confer about that and come up with something that probably looks very much like what you just suggested.

THE COURT: All right. And --

MR. GOODMAN: We'll confer with the other side, as well.

THE COURT: And I understand -- I'll just note for the record, I understand that Defendant's participation in this scheduling effort is by no means a waiver of your rights to object to the ruling on the motion to compel arbitration.

But we'll take a brief recess to allow you to confer about a schedule. Thank you.

MR. GOODMAN: Thank you.

LAW CLERK: All rise.

(Recess.)

LAW CLERK: All rise.

THE COURT: Thank you. Please be seated.

I understand that counsel have had a chance to confer about a schedule for the certification hearing which would involve the filing of the Plaintiffs' motion for certification within 30 days --

MR. GOODMAN: Yes.

THE COURT: -- from today? And the

Defendant's response after a like period, 60 days from today; is that right?

MS. DAVIDSON: Actually, Your Honor -- well, first, you know, just as -- as you've explained that we're not waiving any objections that we may have to your ruling by participating in -- in this conference, we do intend to file a written motion to stated proceedings so that we may object to the ruling, seek an appeal, if necessary, so that the parties not only get the benefit of the bargain to arbitrate, but that we're not impending upon the right of the arbitrators to decide these disputes.

That said, in terms of the scheduling, we -- we would like 60 days following the Plaintiffs' motion for certification to respond because we'll need to take the depositions of all eight Plaintiffs who are scattered all over the country. And as a practical matter, that's not something that we'll be able to accomplish within less than 30 days.

THE COURT: Well, I -- I don't think there's any requirement that you depose all of the named Plaintiffs before a certification hearing.

MS. DAVIDSON: Well, Your Honor, we -- we would like to get their testimony so that we can determine whether we have a basis to challenge their

adequacy as class representatives and whether there may be issues with respect to the typicality of their claims compared to the claims of the class members they purport to -- purport to represent.

THE COURT: Yeah, I'm -- I'm familiar with the process. But in any event, that would -- there's no reason you can't start scheduling their depositions now, is there?

MS. DAVIDSON: We can start scheduling them, but we need to see what their motion --

THE COURT: Sure.

MS. DAVIDSON: -- says.

THE COURT: Scheduling them to be done after their motion is filed within 30 days, so that you can accomplish the eight depositions, if you want all eight, within the next 30 days after that?

MR. GOODMAN: Your Honor, we obviously think that -- that the time period for them to -- to respond is -- is -- should be tied to the date of the filing of the motion, not to some date from today. If we get it in in 18 days, they should answer on Day 48.

THE COURT: Well, I -- I don't mind giving them, you know, a longer period. I -- if I thought there was a serious chance you'd get your motion in ahead of the deadline, then I'd spend more time on that

issue. I just -- I've never seen it happen. I know it can. I've just never seen it. So not from you, I'm not -- that's -- that's --

MR. GOODMAN: Who knows, we may surprise you, Your Honor.

THE COURT: I look forward to it. I hope you will.

But in any event, my original concern, I simply -- I understand that the parties want the opportunity to file sort of updated responses just before the hearing. I think if you discover anything about the Plaintiffs that you didn't know at the time you filed your opposition, then you can include that in your supplemental brief, but I don't want to delay your opposition that far out.

So, you know, I'll give you 60 days from today to file your -- your opposition to their motion. We've -- I think we've cleared a date of June 4. Both sides are available that day, as I understand it. Plaintiffs and --

MR. GOODMAN: Your Honor, we don't have a great computer calendar system right now. I think we can confirm that within a day, certainly in the morning, but we're going to make time. We're going to make it happen, so -- it's hard to actually confirm it right

now.

THE COURT: The adequacy of representation issue, you know, the ability to know what your calendar is, is something that you need to be ready to show the Court.

MR. GOODMAN: Your Honor, we had -- we had a glitch. I understand. Thanks.

THE COURT: All right. Well, I'm -- I'm -- that was said in jest.

MR. GOODMAN: I understand.

THE COURT: And I apologize for that.

But UBS is available on the 4th?

MS. DAVIDSON: Yes.

THE COURT: All right. Then I'll show the matter as set for June 4 at 9:00 o'clock. If you discover that you have a serious conflict there, bring it to my attention tomorrow and we'll try to deal with it.

Did you discuss when you would propose to exchange witness and exhibit lists before the certification hearing?

MS. DAVIDSON: No.

THE COURT: Okay. Frankly, that -- I think --

MR. GOODMAN: I might suggest the middle of

May for that, Your Honor. We're going to be doing final briefing presumably -- discovery before that and final briefing after that for the hearing.

MS. DAVIDSON: How about May 17th?

THE COURT: All right. If that's what both sides want, I'll be happy to --

MR. GOODMAN: Monday, Friday?

MS. DAVIDSON: It's Friday.

MR. GOODMAN: Okay. That's fine.

THE COURT: May 17 for witness and exhibit lists.

Do you want to have expert reports exchanged before that date in the event that you're going to have experts?

MS. DAVIDSON: Your Honor, we -- we'd like to have 60 days following Plaintiffs' experts' reports for -- for Defendants to submit its -- an expert report.

MR. GOODMAN: That is not going to work under any --

THE COURT: Do you expect to call experts at the class certification hearing?

MR. GOODMAN: Your Honor, I can't -- I can't say right now. Honestly, I'm not sure we will, but I -- I do need some -- some time to think about that. We can certainly confer with counsel, but we will endeavor to

get any expert report we think we need as early as possible. But if you give them 60 days to respond, we're going to be so close to the end of this 120-day period, that we'd have no time to depose.

MS. DAVIDSON: And, Your Honor, we would request then that if -- if Plaintiffs do intend to identify an expert that it be done at the same time that the motion for class certification is filed.

THE COURT: Do the Defendants intend to call expert witnesses whether or not the Plaintiffs do, but only -- or only in response to experts by the Plaintiff?

MS. DAVIDSON: Well, we haven't made that determination yet, Your Honor.

THE COURT: Well, in that case, I guess what I'll do is just -- if you don't know the answer to that, then my inclination would be to have simultaneous expert reports exchanged.

If you're only going to offer them if they do, then I don't mind having theirs go first, but if -- if -- absent that agreement, then we'll just do it simultaneously.

MS. DAVIDSON: Could you give us a moment to confer?

THE COURT: Yes.

MR. GOODMAN: Your Honor, we -- we -- we did confer, and it makes sense to us that we would have some period of time after their response to -- to finalize the expert reports so the expert could address any issues raised by Defendant.

15 days is what we were -- what we're inclined to recommend, 15 days after the response to designate ours and maybe 30 days after that for their -- them to designate theirs.

THE COURT: All right.

MR. GOODMAN: Certainly no longer.

THE COURT: That may work.

Yes, ma'am?

MS. DAVIDSON: Your Honor, we would propose that Plaintiffs disclose any experts they -- they plan to rely on at the same time as their motion for class certification. We will disclose any expert we plan to rely on at the same time we file our response, and then the parties can exchange rebuttal reports within 15 days after.

THE COURT: So are you -- when you say disclose, you're talking about just identify or provide a report?

MS. DAVIDSON: Providing the report.

MR. GOODMAN: Your Honor, we -- we can't --

we can't provide a report that addresses issues that can't be anticipated that they raise.

MR. SHAULSON: We didn't ask. We said if you had rebuttal, if you had -- you -- you asked that you be given 15 days after our response. We're giving you the 15 days.

MR. GOODMAN: And -- and your -- your -- the question is --

THE COURT: Do y'all want to confer again or --

MR. GOODMAN: Your Honor, it seems to me the question is whether the rebuttal is -- is only from the same designated witness or whether if there was some other witness whose testimony was made relevant by their opposition that we would be able to designate somebody else. That's the only procedural problem I see with -- with that that's obvious.

THE COURT: Okay. Well, I tell you what, I'll -- I appreciate your arguments on it, and I'll issue an order that sets out the expert disclosure dates, along with the order that confirms the rest of these dates.

MR. GOODMAN: All right. Thank you.

THE COURT: All right.

MR. GOODMAN: All right. Good. Thank you.

MR. SHAULSON: Thank you, Your Honor.

LAW CLERK: All rise.

(Recess.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

SHELLY HOLMES Date
Deputy Official Reporter
State of Texas No.: 7804
Expiration Date: 12/31/14