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22 **UNITED STATES OF AMERICA**
23 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**
24 **REGION 31**

25 COUNTRYWIDE FINANCIAL
26 CORPORATION, COUNTRYWIDE HOME
27 LOANS, INC., AND BANKOF AMERICA
28 CORPORATION

and

JOSHUA D. BUCK and MARK THIERMAN,
THIERMAN LAW FIRM

and

PAUL CULLEN, THE CULLEN LAW FIRM

Consolidated Cases No.
31-CA-072916 and 31-CA-072918

CHARGING PARTIES' OPPOSITION
TO RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT AND
COUNTER MOTION FOR SUMMARY
JUDGMENT

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1 Charging Parties JOSHUA D. BUCK and MARK THIERMAN of the THIERMAN
2 LAW FIRM and PAUL CULLEN of THE CULLEN LAW FIRM, on behalf of their clients
3 Dominique Whitaker and John White and all other similarly situated and aggrieved employees
4 of the Respondents, hereby oppose Respondents' November 12, 2012 Motion for Summary
5 Judgment. Unless there is a contrary ruling by the Board or the United States Supreme Court,
6 the Administrative Law Judge is bound to follow the National Labor Relations Board's decision
7 in *D. R. Horton*, 2012 NLRB LEXIS 11 (N.L.R.B. Jan. 3, 2012) and its progeny regardless of
8 any pending appeals to the Circuit Courts of Appeals.

9 In addition to opposing Respondents' Motion for Summary Judgment, the Charging
10 Parties hereby moves for Summary Judgment on its own right. This Motion is based upon the
11 same set of facts and proof relied upon by Respondents and, more specifically, upon
12 Respondents' ongoing conduct of attempting to enforce a collective, class and representative
13 action waiver.

14 In support of both the opposition to Respondents' Motion and in support of its own
15 Counter-Motion, Charging Party submits this consolidated memorandum of Points and
16 Authorities, the Exhibits attached hereto, all the pleadings and papers on file in the related
17 litigation in California state and federal court, and any and all documents already on file with
18 the Board. Charging Parties request that the Administrative Law Judge issue a decision
19 denying Respondents' Motion for Summary Judgment and granting Charging Parties' Counter-
20 Motion instead.

21 Dated: November 19, 2012

Respectfully submitted:

22
23 /s/Mark R. Thierman
24 Mark R. Thierman
25 On behalf of all Charging Parties
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This case involves the legal question of whether an employer’s insistence that
4 employees cease seeking redress of wage-hour claims on a group basis because they
5 purportedly agreed to do so by an implied group action waiver provision embedded within an
6 arbitration clause violates the National Labor Relations Act (the “Act”). The issue is not
7 whether the waiver was voluntary (although one could argue the economic duress of
8 employment makes any such waiver involuntary per se), nor whether the procedural forum
9 selection choice in favor of arbitration protected by federal law. Rather, the Board is asked to
10 answer the following question: Does an implied waiver of group action embedded within an
11 otherwise neutral forum selection clause requiring arbitration of employment disputes, and the
12 insistence on enforcing that waiver by demanding individual arbitration, interfere with the
13 substantive rights guaranteed to workers under Section 7 of the Act? Based on prior Board
14 precedent, the answer must be emphatically: *Yes*.

15 In this case, Respondent’s Motion for Summary Judgment (hereinafter “Respondents’
16 Motion”) is based in large part upon the lack of an express class action waiver provision in the
17 arbitration section of the employment agreement. But in 2009, when the employees filed their
18 class, representative and collective action wage-hour complaints, Respondents did not move to
19 compel arbitration because at that time Respondents thought the arbitration would have to
20 include the possibility of class action relief. Respondents’ position rapidly changed following
21 the two Supreme Court Decisions: *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct.
22 1758 (U.S. 2010) (holding that an agreement to arbitrate did not empower the arbitrator to
23 award classwide relief unless the written document stated otherwise and *AT&T Mobility LLC v.*
24 *Concepcion*, 131 S.Ct. 1740 (2011) (holding that an arbitration agreement that prohibited class
25 actions was not unconscionable in the commercial context). Therefore, like so many other
26 employers, Respondents rushed to assert an arbitration provision that did not specifically permit
27 class arbitration as a total bar to obtaining any class, representative or collective relief.
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1 Even though Respondents' arbitration agreement does not contain any explicit class
2 action waiver, Respondents insist that the employees must abandon their claims for classwide
3 relief because of the rulings in the two aforementioned Supreme Court cases and because the
4 agreement does not specifically grant the arbitrator authority to grant classwide, representative
5 or collective relief. As a result of this position, Respondents filed motions to compel arbitration
6 against Plaintiff/Employee/Claimants Dominique Whitaker and John White. Ever since then,
7 Respondents have been demanding and continue to demand that by agreeing to an arbitration
8 provision that does not explicitly contain a provision allowing for class relief, Whitaker, White,
9 and any other employee, have all waived any and all form of group action, and further demand
10 that all present and/or former employees of Respondents cease and desist pursuing class,
11 representative and collective relief. This legal position, and the associated conduct, violates
12 employees' Section 7 rights.

13 **II. STATEMENT OF FACTS**

14 The procedural facts at issue in this proceeding are not in dispute.

15 **A. The Whitaker and White Actions.**

16 On or about June 16, 2009, Charging Parties Mark R. Thierman filed class action
17 lawsuit on behalf of plaintiff Dominique Whitaker and all other similarly situated and aggrieved
18 employees against her employer, Countrywide Financial Corporation and Bank of America
19 Corporation, for various wage and hour violations under federal and California law.¹ Plaintiff
20 Whitaker filed her action both individually and on behalf of a collective group of employees of
21

22 ¹ The case was filed originally in state court but removed to federal court within 30 days. The
23 removal papers filed in the United States District Court contain a true and correct copy of the
24 state court. To the extent necessary to have a complete record, Charging Parties ask the
25 Administrative Law Judge to take Judicial Notice pursuant to Federal Rules of Evidence Rule
26 201 of all the pleadings, papers and declarations filed by Respondents in the case of *Whitaker v.*
27 *Countrywide Financial Corporation*, case number CV 09-5898 CAS (PJWx) in the United States
28 District Court for the Central District of California and Docket Nos. 11-73146 and 12-73549 in
the United States Court of Appeals for the Ninth Circuit, which are available on line (All parties,
including the Board, have electronic access to the federal court filings in the underlying case via
the ECF-Pacer system.)

1 Respondents. Procedurally, plaintiff Whitaker sought to pursue her employment grievances
2 collectively via three legal mechanisms: (1) as an opt-out class action pursuant to Fed. R. Civ.
3 P. 23, (2) as an opt-in collective action pursuant to section 16(b) of the Fair Labor Standards
4 Act (“FLSA”), and (3) as representative action pursuant to the California Labor Code Private
5 Attorney General Act (“PAGA”). (Case No. 56-2009-00347462—CU-OE-VTA)

6 Shortly after the initial filing, Respondents removed the action to federal court. *See*
7 Resp. Brief, at 6 (“On June 16, 2009, Claimants initiated their lawsuit against Respondents in
8 Ventura County Superior Court, Case No. 56-2009-00347462-CU-OE-VTA. On August 12,
9 2009, Respondents removed the case to federal district court, Case No. VC 09-5898 CAS
10 (PJWx)”)²

11 A few weeks before the *Whitaker* action was filed, Charging Party Attorney Paul Cullen
12 filed a similar group action against Respondents on behalf of Debra Foley in a different state
13 court venue on May 26, 2009. That action was similarly removed to federal court.

14 The *Foley* and *Whitaker* actions were ultimately consolidated by stipulation on June 30,
15 2010.

16 Almost one year later on June 27, 2011, the parties agreed to substitute new plaintiff
17 John White in for plaintiff Foley. On that same day, Plaintiffs Whitaker and White filed the
18 operative Third Amended Complaint (“TAC”). Generally, Claimants alleged that Respondents
19 failed to compensate California call center employees to work off-the-clock when booting up
20 their computers and connecting to Countrywide’s telephone system at the beginning of the day
21 and when shutting down their computers and logging off the telephone system at the end of the
22 day. Specifically, they alleged the following seven causes of action: (1) failure to pay overtime
23 in violation of California Labor Code sections 510 and 1194 and IWC Wage Order No. 4-200
24 I; (2) waiting time penalties under Labor Code section 203; (3) failure to provide an accurate
25 itemized wage statement in violation of California Labor Code section 226; (4) failure to pay
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27 ² Respondents refer to the Plaintiff employees in the underlying litigation as “Claimants” since
28 their attorneys were listed as “Charging Parties” by the Board in this case.

1 minimum wage in violation of California Labor Code section 1194 and IWC Wage Order No.
2 4-2001; (5) failure to pay minimum and overtime wages in violation of the Fair Labor
3 Standards Act (FLSA); (6) unfair competition pursuant to Business & Professions Code
4 sections 17200, et seq.; and (7) failure to provide meal periods and rest breaks.³

5 **B. Respondents Seek to Compel Individual Arbitration.**

6 The case was litigated for approximately two years in federal court before Respondents
7 raised the issue of waiver of class, representative or collective actions by operation of the
8 arbitration provisions of the employment agreement. It is no coincidence that Respondents
9 raised this defense just a few months after the Supreme Court decision in *AT&T Mobility LLC*
10 *v. Concepcion*, 131 S.Ct. 1740 (2011). As Respondents state in their motion for summary
11 judgment in this case, on July 6, 2011, Respondents' counsel made a formal demand on
12 Plaintiffs' counsel that Plaintiffs immediately proceed to arbitration of Plaintiffs' ***individual***
13 claims and with the selection of an arbitrator pursuant to the Arbitration Agreement. *See*
14 Mandel Decl., Exh. C. That letter constitutes a "stand-alone" violation of the Section 8(a)(1) of
15 the National Labor Relations Act, 29 U.S.C. §158(a)(1), and the arbitration agreement is now a
16 "code word" for the employer's demand that he employees relinquish their attempt to engage in
17 any class, representative, or collective action. On July 18, 2011, Respondents filed their Answer
18 to the TAC, and specifically asserted as its Third Affirmative Defense that Plaintiffs' group
19 claims were barred by the Arbitration Agreement:

20 Plaintiffs' claims are barred in whole or in part because they entered into valid,
21 binding and enforceable arbitration agreements under which they agreed and are
22 required to resolve any dispute with the Defendants by way of individual
arbitration.

23 *Id.* at 14:8-11.

24 On August 22, 2011, Respondents filed two identical motions to dismiss in favor of
25 arbitration. *See* Case No. 2:09-cv-05898-CAS-PJW, Docket Nos. 62 ("Defendants' Motion To
26 Compel Individual Arbitration Of Plaintiff Dominique Whitaker's Claims, Order Appointment
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28 ³ As indicated by their Motion, Respondents' agree with these procedural facts. *See* Resp. Brief,
at 6-7.

1 Of Arbitrator, And Stay Action”) and 63 (“Defendants’ Motion To Compel Individual
2 Arbitration Of Plaintiff John White’s Claims, Order Appointment Of Arbitrator, And Stay
3 Action.”), copies of these documents are attached to the request for judicial notice filed
4 herewith as exhibits A and B, respectively. In each motion, Respondents make clear that they
5 seek arbitration solely on an individual basis, because either the employees had agreed to such a
6 waiver, or the law would infer that they had so agreed, because there was no explicit mention of
7 classwide relief in the arbitration agreement. Tellingly, Respondents’ motion argued that,

8 **PLAINTIFF’S ARBITRATION AGREEMENT CONTAINS NO**
9 **PROVISIONS PERMITTING CLASS OR COLLECTIVE ARBITRATION,**
10 **AND SPEAKS SOLELY IN TERMS OF ARBITRATING INDIVIDUAL**
11 **CLAIMS.**

12 Id. at 4. Nowhere in Plaintiffs’ Arbitration Agreement is there any provision authorizing any
13 type of class or collective arbitration proceeding. To the contrary, through the use of only the
14 singular form of the defined term “Employee,” the provisions speak solely to the arbitration of
15 Plaintiffs’ (referred to as “Employee” therein) individual Covered Claims against Defendants
16 (referred to as “Company” therein):

- 17 • “In recognition of the fact that differences may arise between the Company ...
18 and the undersigned (“Employee”) which are related to Employee’s
19 employment ...” Id., Exh. A, preamble ¶¶ (emph. added).
- 20 • “...the Company and the Employee have entered into this [Arbitration
21 Agreement]...” Id. (emph. added).
- 22 • “...the Company and the Employee hereby consent to the resolution by
23 arbitration of all claims ... associated with Employee’s employment ... that
24 the Employee may have ...” Id., Exh. A, ¶ 1 (emph. added).
- 25 • “...Arbitration hearings covered by this Agreement are to be held within the
26 Federal Judicial District in which the Employee was last employed with the
27 Company....” Id., Exh. A, ¶ 5 (emph. added).
- 28 • “...nor shall this Agreement be construed in any way to change the status of
the Employee from at-will.” Id., Exh. A, ¶ 12 (emph. added).

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- “This Agreement shall survive the employer-employee relationship between the Company and the Employee and shall apply ... after termination of the Employee’s employment. Id., Exh. A, ¶ 13 (emph. added).
- “...the Company and Employee each knowingly and voluntarily waive... trial before a jury.” Id., Exh. A, ¶ 16 (emph. added).

Respondents are not naïve, and devote a considerable portion of their August 22, 2011, motion to compel arbitration to an argument that the net effect of the interplay between the Supreme Court’s rulings in *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (U.S. 2010) and *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) is to effectuate a class action waiver by compelling arbitration. Of course, Respondents insist that said arbitration must be on an individual basis unless otherwise agreed in writing. Indeed, Respondents vigorously advocated this position in their Motion:

C. PLAINTIFF MUST BE COMPELLED TO ARBITRATE ON AN INDIVIDUAL BASIS BECAUSE THE PARTIES HAVE NOT AGREED TO CLASS OR COLLECTIVE ARBITRATION

Plaintiff must be compelled to arbitrate his claims on an individual basis, and not be permitted to arbitrate on a class or collective basis, because “[a] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1775 (2010) (emphasis in original).

Case No. 2:09-cv-05898-CAS-PJW, Docket Nos. 62 and 63, at pp. 9-13.

Respondents then argue at length that whenever the agreement to arbitrate is silent on the issue of class wide arbitration, which is the case here, then classwide, representative and/or collective relief is not available for the reasons stated in *Stolt-Nielsen*. See *id.* at p. 11-12 (“Plaintiff’s Arbitration Agreement, like the one at issue in *Stolt-Nielsen*, does not expressly state whether or not the parties agreed to class or collective arbitration. But the only fair reading of it is that the parties contemplated only *individual* arbitration.” (Emphasis in original)).

Respondents also argue that just because the net result is a waiver of class, representative or collective action rights, it does not make the agreement unconscionable according to the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*.

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Plaintiffs Whitaker and White opposed Respondent’s motion and argued that the Court lacked jurisdiction to order arbitration because, in addition to the waiver arguments, such individual arbitration would deny the employees their rights to engage in collective, concerted activity:

Just as representation of employees by the named Plaintiffs in a class action against an employer for wages and adherence to the labor code may duplicate and/or supplant many of the benefits of representation by a union, any agreement that inhibits an employee from engaging in that class action lawsuit over wages and working conditions, whether it be as a class member or a leader (named Plaintiff) is just as unlawful as an agreement not to join a labor organization, a so-called “yellow dog” contract. If the term “other mutual aid or protection” in Section 2 of the Norris-LaGuardia Act has the same meaning as it has in Section 7 of the National Labor Relations Act, and if that phrase is not a mere redundancy coming after the terms union activity and collective bargaining, then federal courts, and maybe state courts as well, are constitutionally powerless to give any effect to the class action arbitration provisions of an employment agreement and lack jurisdiction to compel arbitration of group employee disputes against their employer.

Case No. 2:09-cv-05898-CAS-PJW, Docket No. 65 (“Plaintiff’s Joint Opposition To Defendant Countrywide’s Motions To Compel Individual Arbitration”) at pp. 15-16.

In their Reply, Respondents again argued vociferously that Plaintiffs White and Whitaker must be compelled to *individual* arbitration. See Case No. 2:09-cv-05898-CAS-PJW, Docket No. 67 (“Defendants’ Consolidated Reply In Support Of Motions to Compel Individual Arbitrations Of Plaintiffs Dominique Whitaker’s And John White’s Claims, Order Appointment Of Arbitrators, And Stay Action”). By just looking at the headings, it is clear that Respondents have always asserted that Plaintiffs can never assert anything other than individual claims in any forum:

**III. SUPREME COURT PRECEDENT REQUIRES THAT
PLAINTIFFS’ CLAIMS BE COMPELLED TO INDIVIDUAL
ARBITRATIONS**

**A. INDIVIDUAL ARBITRATION MUST BE COMPELLED
BECAUSE, UNDER THE UNDISPUTED FACTS PRESENTED, AN**

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**ARBITRATOR WILL HAVE NO AUTHORITY TO PRESIDE
OVER A CLASS ARBITRATION
B. THE NORRIS-LA GUARDIA ACT DOES NOT APPLY TO THIS
CASE, MUCH LESS PRECLUDE COMPELLING INDIVIDUAL
ARBITRATION**

**C. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT A CLASS-
ACTION WAIVER—DE FACTO OR DE JURE—IS
UNENFORCEABLE HERE**

Id. at pp. 13-17.

**C. United States District Court Judge Christina A. Snyder Orders the
Whitaker and White Actions to Arbitration.**

On September 19, 2011, Judge Christina A. Snyder of the United States District Court granted the Respondents’ motion to send the case to arbitration. *See* Case No. 2:09-cv-05898-CAS-PJW, Docket No. 68 (“Order”), a copy of this document is attached as exhibit C to the request to take judicial notice filed herewith. Although “Countrywide has unequivocally expressed its intent to compel individual, and not class, arbitration in this case[,]” Judge Snyder did not resolve the issue of whether the action could or would proceed as a group action on an individual basis: “the question of whether plaintiffs are subject to individual or class arbitration depends on the parties’ intent and is a question for the arbitrator to decide.” *Id.*, at pp. 6, n.2, and 8.

D. Plaintiffs’ Writ Petition.

Following the District Court’s Order, the Charging Parties (upon behalf of the Plaintiffs), filed a writ of mandamus with the Ninth Circuit Court of Appeals, a copy of this document is attached as exhibit D to the request to take judicial notice filed herewith. Case: 11-73146 (Dkt Entry: 1-2) (“Petition For Writ Of Mandamus Compelling The Court To Confine Its Rulings To The Lawful Exercise Of Its Prescribed Jurisdiction”). Essentially, Charging Parties argued that under the provisions of the Norris LaGuardia Act, 29 U.S.C. §102, the United States District Court did not have jurisdiction to order the parties to arbitration where even a potential result would be denial of class, representative or collective relief based solely upon the agreement of the employees.

1 Respondents answered the petition by mostly arguing that the matter was not ripe for
2 appellate review but confirmed that the purpose of their motion was to compel employees to
3 forgo any and all class, representative or collective relief. Case: 11-73146 (Dkt Entry: 7-1)
4 (“Answer to Petition for Writ of Mandamus”), a copy of this document is attached as exhibit E
5 to the request to take judicial notice filed herewith (repeating that “Defendants filed their
6 Motion, seeking to compel Petitioners to submit their claims to *individual* arbitration in light of
7 the fact that the Arbitration Agreement was silent with regard to class arbitration.” (citing *Stolt-*
8 *Nielsen v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1775 (2010))).

9 Following Charging Parties’ reply, *see* Case: 11-73146 (Dkt Entry: 8) (“Reply to
10 Opposition to Petition for Writ of Mandamus”), the Court of Appeals issued its Order denying
11 the writ, simply stating that “petitioners have not demonstrated that this case warrants the
12 intervention of this court by means of the extraordinary remedy of mandamus.” *See* Case No.
13 2:09-cv-05898-CAS-PJW, Docket No. 71 (“Order”).

14 **E. Respondents’ Writ Petition.**

15 Most recently, Respondents filed their own writ of mandamus with the Ninth Circuit
16 Court of Appeals complaining that the trial court should have decided that as a matter of law,
17 the arbitration agreements preclude class, representative or collective relief, and that the trial
18 judge should not have left the issue for the arbitrator to decide. Case: 12-73549 (Dkt Entry: 1-
19 2) (“Petition For Writ of Mandamus To Modify Order Compelling Arbitration To Require
20 Individual Arbitrations”), a copy of this document is attached as exhibit F to the request for
21 judicial notice filed herewith.

22 As evidenced by the two competing writ petitions, both parties agree that the District
23 Court should have addressed the class action waiver issue as a matter of law but each side
24 advocates for the exact opposite result.

25 **III. ARGUMENT**

26 **A. BY INSISTING ON THE FORFITURE OF COLLECTIVE ACTION,**
27 **RESPONDENTS HAVE VIOLATED THE ACT WHETHER OR NOT**
28 **THEY ARE THE CURRENT EMPLOYERS OF THESE EMPLOYEES.**

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1 First, Section 2(3) of the National Labor relations Act, 29 U.S.C. 152(3), covers the
2 participants in this lawsuit—i.e., the “Claimants”. Specifically, section 2(3) says:

3 The term 'employee' shall include any employee, and shall not be limited to the
4 employees of a particular employer, unless this subchapter explicitly states
5 otherwise, and shall include any individual whose work has ceased as a
6 consequence of, or in connection with, any current labor dispute or because of any
7 unfair labor practice, and who has not obtained any other regular and substantially
8 equivalent employment, but shall not include any individual employed as an
9 agricultural laborer, or in the domestic service of any family or person at his
10 home, or any individual employed by his parent or spouse, or any individual
11 having the status of an independent contractor, or any individual employed as a
12 supervisor, or any individual employed by an employer subject to the Railway
13 Labor Act, as amended from time to time, or by any other person who is not an
14 employer as herein defined.

15 The broad definition of an employee applies to anyone who was an employee at the time
16 the grievance arose or who subsequently became an employee at any relevant time. *See,*
17 *Convergys Corp.*, 2012 NLRB LEXIS 742 (N.L.R.B. Oct. 25, 2012) (noting that applicants for
18 employment are employees within the meaning of section 2(3) of the NLRA); *Phelps Dodge*
19 *Corporation v NLRB*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1944); *NLRB v. Town &*
20 *Country Electric, Inc.*, 516 U.S. 85, 88, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995).

21 In the case of *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (U.S. 1978), the United States
22 Supreme Court held that claimants need not be employees of Respondents in an unfair labor
23 practice case in order to be engaged in protected concerted activity by filing litigation on behalf
24 of Respondents’ employees as a group. As the Supreme Court stated:

25 We believe that petitioner misconceives the reach of the "mutual aid or
26 protection" clause. The "employees" who may engage in concerted activities for
27 "mutual aid or protection" are defined by § 2 (3) of the Act, 29 U. S. C. § 152 (3),
28 to "include any employee, and shall not be limited to the employees of a particular
employer, unless this subchapter explicitly states otherwise" This definition
was intended to protect employees when they engage in otherwise proper
concerted activities in support of employees of employers other than their own.
In recognition of this intent, the Board and the courts long have held that the
"mutual aid or protection" clause encompasses such activity.

Second, there can be little doubt that Section 7 applies to Claimants seeking to protect
the rights of employees even if they are employed elsewhere. The United States Supreme Court

1 in *NLRB v. Town & Country Elec.*, 516 U.S. 85, 91-92 (U.S. 1995) affirmed the Board's broad
2 reading the term employee to include paid union organizers working as "salts" for a company at
3 the same time they were working for the union. In upholding that the Act covers
4 undocumented aliens in the case of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) the
5 Supreme Court noted that the "breadth of § 2(3)'s definition is striking: the Act squarely applies
6 to 'any employee.'" 467 U.S. at 891. The only limitations are specific exemptions for
7 agricultural laborers, domestic workers, individuals employed by their spouses or parents,
8 individuals employed as independent contractors or supervisors, and individuals employed by a
9 person who is not an employer under the NLRA. See *NLRB v. Hendricks County Rural Elec.*
10 *Membership Corp.*, 454 U.S. 170, 189-190, 70 L. Ed. 2d 323, 102 S. Ct. 216 (1981) (certain
11 "confidential employees" fall within the definition of "employees"); *Phelps Dodge Corp. v.*
12 *NLRB*, 313 U.S. at 185-186 (job applicants are "employees").

13 There certainly are NLRB cases protecting former employees who file legal actions
14 against retaliation by former employers. In *Federal Security, Inc.*, 336 N.L.R.B. 703, (October
15 1, 2001) affirmed on remand at *Fed. Sec., Inc.*, 2012 NLRB LEXIS 710 (N.L.R.B. Sept. 28,
16 2012), the Board held that the Respondents violated Section 8(a)(1) of the Act by filing and
17 maintaining a State-court lawsuit alleging that 17 former employees engaged in malicious
18 prosecution and an abuse of process by filing an unfair labor practice charges and providing
19 supporting evidence to the Board. When the employer argued that the former employees were
20 not protected by Section 7 of the Act, Administrative Law Judge Robert A. Giannasi wrote:

21 Respondent's second argument is equally unpersuasive. It asserts that the former
22 employees -- the defendants in the state court action -- are no longer employees of
23 Federal Security or employees under the Act. To the extent that this is a variant of
24 its first argument, it must fail for the same reason as set forth above. But to the
25 extent that it focuses on employee status alone, I do not understand the argument.
26 Board jurisdiction turns on employer status, not employee status. Not only
27 employees, but any person may file an unfair labor practice charge. See *Apex*
28 *Investigation & Security Co.*, 302 NLRB 815, 818 (1991). As discussed more
fully below, free access to the Board's processes is vital to enforcement of
employee rights under the Act, irrespective of the identity of those filing unfair
labor practice charges. In any event, the defendants were sued in state court for
actions taken as employees in the earlier unfair labor practice case. I find,

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therefore, that, for the purposes of this case, the defendants in the state court lawsuit are employees within the meaning of the Act, as they were in the earlier case.

Third, if Respondents are acting as assignees or agents of the employer to enforce the agreement to arbitrate then they must stand in the shoes of the employer whose rights they seek to enforce. Respondents cannot claim the perceived benefits of an agreement between and employer and employee to force the employee into arbitrating wage claims and at the same time say it is not an employer or agent of an employer subject to the Act. The Third Amended Complaint alleges a class of the employees of Respondents,⁴ and the subject matter of the arbitration is the employment claims of those employees. Just like the former employees of *Federal Security, Inc.*, even if the Plaintiffs were not the employees of the Respondents, their claims arose out of the employment relationship, and Respondents are each an employer engaged in commerce. Under established Board policy, where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. *See Coca-Cola Bottling Company of New York, Inc.*, 133 NLRB 762; *Mound City Yellow Cab Company*, 132 NLRB 484. If Respondents want to hide behind an implied class action waiver within an arbitration clause in an employment agreement, then they are certainly affecting the terms and conditions of employment of these employees sufficiently to be covered by the rulings of the NLRB in this case.

B. THE ALJ IS BOUND TO FOLLOW *D.R. HORTON* BECAUSE THE FACTS ARE NOT MATERIALLY DIFFERENT IN THIS CASE AND

⁴ Paragraph 10 of the Third Amended Complaint, states:

The central allegation to this complaint is that Plaintiffs and all others similarly situated, who are or were employed by Defendants during the Relevant Time Period were required to boot up their computers and connect to Defendants’ telephone system prior to clocking in each day. Defendants similarly required Plaintiffs and all others similarly situated to shut their computers down and disconnect from Defendants’ telephone system after clocking out each day. This off the clock time worked by Plaintiffs and all others similarly situated, was systematic and continuous.”

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On August 22, 2011 Defendants filed their Motion, seeking to compel Petitioners to submit their claims to individual arbitration in light of the fact that the Arbitration Agreement was silent with regard to class arbitration. See, e.g., *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1775 (2010) (“[a] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”)

Mere silence in the agreement is not enough to distinguish this case from *D.R. Horton*, because the conduct prohibited in *D.R.Horton* is the result Respondents seek here—a class, collective, and group action waiver. Under the Board’s precedent, Respondents’ conduct is impermissible.

Indeed, in *D.R. Horton* the Board unambiguously held that an employer who maintained or enforced an arbitration agreement containing a class action waiver provisions violated the rights of employees to freely associate and combine for “other mutual aid and protection” under the NLRA. It doesn’t matter whether the waiver language is expressed or implied by law; it is still unlawful to insist on the waiver:

The Norris-LaGuardia Act, in sum, protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer. Consistent with the terms and policy of the Norris-LaGuardia Act, an arbitration agreement imposed upon individual employees as a condition of employment cannot be held to prohibit employees from pursuing an employment related class, collective, or joint action in a Federal or State court. Such a lawsuit would involve a "labor dispute" under Section 13 of the Norris-LaGuardia Act: a "controversy concerning terms or conditions of employment." The arbitration agreement, insofar as it sought to prohibit a "lawful means [of] aiding any person participating or interested in" the lawsuit (Sec. 4) such as pursuing or joining a putative class action-- would be an "undertaking or promise in conflict with the public policy" of the statute (Sec. 3).

Further, the language of Section 8(a)(1) of the NLRA should be read broadly to prohibit seeking to enforce any agreement, express or implied, in such a way as to force employees to give up their section 7 rights. Traditionally, a yellow dog contract was a promise not to engage in union activity, or a promise not to join an employee organization opposed to the employer. There is no practical difference between an agreement not to join a union and an agreement not to join a litigation class. And the listing of two types of yellow dog contracts in section 3(a) and (b) of the NLGA begins with the phrase “including. . .” thus indicating these are not the only

1 type of yellow dog contracts prohibited by the statute. Thus, the NLRB statement in *D.R.*
2 *Horton* about section 7 of the NLRA applies as well to Section 2 and 3 of the NLGA: “Any
3 contention that the Section 7 right to bring a class or collective action is merely "procedural"
4 must fail. The right to engage in collective action--including collective legal action--is the core
5 substantive right protected by the NLRA and is the foundation on which the Act and Federal
6 labor policy rest.”

7 Clearly, an attempt by any employer to prohibit employees from pursuing class,
8 representative or collective relief is an unfair labor practice. *Harco Trucking, LLC*, 344
9 N.L.R.B. 478, 482 (N.L.R.B. 2005) (ALJ Pollack: “Respondent does not deny that Wood was
10 engaged in protected concerted activities in filing and maintaining the class action lawsuit
11 against Harco Company.”); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980),
12 enfd. 677 F.2d 421 (6th Cir. 1982) (class-action lawsuit alleging that employer failed to provide
13 rest periods required by state statute was protected concerted activity); *see also* Ann C. Hodges,
14 “Can Compulsory Arbitration Be Reconciled with Section 7 Rights?”, 38 Wake Forest L. Rev.
15 173, 187-200 (2003) (tracing doctrinal developments). The Board's position has been uniformly
16 upheld by the courts of appeals. *See, e.g., Brady v. National Football League*, 644 F.3d 661,
17 673 (8th Cir. 2011) ("a lawsuit filed in good faith by a group of employees to achieve more
18 favorable terms or conditions of employment is 'concerted activity' under § 7 of the National
19 Labor Relations Act") (emphasis in original); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d
20 1183, 1188, 340 U.S. App. D.C. 391 (D.C. Cir. 2000) (petition for injunction supported by
21 fellow employees and co-signed by a coworker was protected concerted activity).⁵

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23 ⁵ Footnote 4 of *D.R. Horton* contains a veritable laundry list of federal district and appellate court
24 rulings affirming the Board's position that the filing of a civil action as well as a class action is a
25 protected, concerted activity under the NLRA. In footnote 18 of *D.R. Horton*, the NLRB
26 distinguishes two district court opinions holding that class action waivers do not violate the
27 NLRA. In addition to the reasons given by the NLRB, there is another reason to disregard such
28 opinions: district courts do not have jurisdiction to decide unfair labor practice charges, that
privilege being delegated to the NLRB. Review by the Court of Appeals for any Circuit is not
binding on the board, except in that case alone. Only the Board itself, or the United States
Supreme Court, can change the Board’s position on waiver of class action rights embedded
within an arbitration agreement.

1 As set forth in the factual section above, the language of the motion to compel
2 individual arbitration makes clear that the Respondents seek to enforce a waiver of the right to
3 engage in protected concerted activity of class, representative and collective actions. And the
4 content of their opposition to the writ, and their filing of a second writ, all shows that
5 Respondents seek solely to deprive employees of the right to file a class, representative or
6 collective action. As the NLRB said in *D.R. Horton*, “In fact, the provisions of the Norris-
7 LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts,
8 including agreements comparable to that at issue here.”

9 **C. THIS IS NOT A MERE FORUM SELECTION PROVISION—**
10 **RESPONDENTS ADMIT THAT THEY ARE SEEKING TO ENFORCE A**
11 **CLASS, REPRESENTATIVE AND COLLECTIVE ACTION WAIVER**
12 **AGAINST EMPLOYEES CLAIMING WAGE LAW VIOLATIONS**

13 In this case, Respondents are not seeking the mere change of forum; Respondents are
14 demanding that the forum hear claims only on an individual basis, because that is what the
15 employees ostensibly have allegedly agreed to by legal implication from not including class
16 remedies in the arbitration agreement. Respondents have asserted that “Plaintiff should not
17 only be ordered to submit his[/her] claims to arbitration, but to do so on an individual basis,
18 because class or collective arbitration would be patently incompatible with the parties’
19 agreement to arbitrate.” Respondents further assert that “the only fair reading of ... [the
20 arbitration agreement] is that the parties contemplated only *individual* arbitration.” If the
21 language of the arbitration clause didn’t prohibit class actions at the time of signing, it does
22 now. Unless the Respondents are forced to abandon their claims that the employees have
23 waived by agreement their rights to class action treatment, which Respondents do not, then the
24 insistence of arbitration is merely code for an enforcement of a class action waiver.

25 **D. MERELY SEEKING TO DISMISS A LAWSUIT BECAUSE OF A CLASS**
26 **ACTION WAIVER IS ITSELF AN UNFAIR LABOR PRACTICE**

27 In the case of *Convergys Corp.*, 2012 NLRB LEXIS 742 (2012), Administrative Law
28 Judge Arthur J. Amchan wrote that the Board's discussion at page 6 of the *D.R. Horton*
demonstrates that an employer violates the Act in seeking dismissal of the class action suit on

1 the basis of a waiver. In *D.R. Horton*, the Board explicitly rejected the rationale of a General
2 Counsel memo which indicated that while employees are free to bring employment-related
3 class action lawsuits, the employer may seek to have the suit dismissed on the ground that the
4 employees executed a valid waiver. Just like an agreement barred by Section 8(e) of the Act,
5 the very act of enforcing a waiver is the same as coercing a re-entering into one.

6 **E. THERE IS NO ‘FREE WILL’ EXCEPTION TO SECTION 7 OF THE**
7 **NLRA**

8 Respondents impliedly argue that workers ought to be able to voluntarily waive the right
9 to bring a class action lawsuit as a matter of free will. Just as a person may not voluntarily
10 indenture himself into slavery, social policy prohibits any employee from agreeing to waive his
11 Section 7 rights. In *24 Hour Fitness USA, Inc.*, 2012 NLRB LEXIS 761 (N.L.R.B. Nov. 6,
12 2012), the arbitration provision had an “opt out” provision, which the Administrative Law
13 Judge considered merely illusionary, because the vast majority of employees would not opt out,
14 and therefore, the employees who did opt out were precluded from engaging in concerted
15 activity with those who did. In the words of the opinion:

16 Respondent's arbitration policy unlawfully requires its employees to surrender core
17 Section 7 rights by imposing significant restraints on concerted action regardless of
18 whether the employee opts to be covered by it or not. For the purposes of worker rights
19 protected by Section 7, the opt-out process designed by the Respondent is an illusion.
20 The requirement that employees must affirmatively act to preserve rights already
21 protected by Section 7 rights through the opt-out process is, as the Acting General
22 Counsel argues, an unlawful burden on the right of employees to engage in collective
23 litigation that may arise in the future. Board precedent establishes that employees may
24 not be required to prospectively trade away their statutory rights. *Ishikawa Gasket*
25 *American, Inc.*, 337 NLRB 175, 175-176 (2001).

26 Regardless of the outcome on appeal of *D.R. Horton*, as Judge William L. Schmidt
27 noted in his opinion in *24 Hour Fitness USA, Inc.*, 2012 NLRB LEXIS 761, 36-41 (N.L.R.B.
28 Nov. 6, 2012), there is a seventy year history against agreements with employees to waive
collective rights, such as the right to bring class, representative or collective actions in court.
The right to engage in collective action is not a mere procedural right, it is at the heart of the
nation’s current labor policies, and no legislation has changed that focus. A yellow dog
contract is simply an agreement between an employer and its employees not to engage in

1 collective action. For many employees, statutory wage hour laws offer the protections once
2 available only through union contracts. Likewise, in recent years, the mechanism of a class,
3 representative or collective action has replaced, or supplemented, the union grievance
4 mechanism as a method of enforcement of those statutory rights as union membership in the
5 private sector declines. The arbitration agreement in this case is nothing more than a modern
6 day yellow dog contract, because within an arbitration forum selection provision of the
7 employment agreement employees give up their ability to enforce those statutory wage rights
8 on a group basis. As Judge Schmidt states:

9 Employer devised agreements that seek to restrict employees from acting in
10 concert with each other are the *raison d'etre* for both the Norris-LaGuardia Act
11 and Section 7 of the NLRA. The congressional findings giving rise to NLRA and
12 Norris-LaGuardia plainly state that these statutes were intended to correct the
13 massive imbalance in bargaining power between the individual worker and his
14 employer. To correct this imbalance, Congress empowered workers to act
15 concertedly for their mutual aid and benefit in the workplace. Thus, the public
16 policy declaration in Section 2 of the Norris-LaGuardia Act passed in 1932 states:

17 Whereas under prevailing economic conditions, developed with the aid of
18 governmental authority for owners of property to organize in the corporate
19 and other forms of ownership association, the individual unorganized
20 worker is commonly helpless to exercise actual liberty of contract and to
21 protect his freedom of labor, and thereby to obtain acceptable terms and
22 conditions of employment, wherefore, though he should be free to decline
23 to associate with his fellows, it is necessary that he have full freedom of
24 association, self-organization, and designation of representatives of his
25 own choosing, to negotiate the terms and conditions of his employment,
26 and that he shall be free from the interference, restraint, or coercion of
27 employers of labor, or their agents, in the designation of such
28 representatives or in self-organization or in other concerted activities for
the purpose of collective bargaining or other mutual aid or protection . . .
29 USC § 102. (Emphasis added)

Similarly, Section 1 of the NLRA states in part:

The inequality of bargaining power between employees who do not possess full
freedom of association or actual liberty of contract and employers who are
organized in the corporate or other forms of ownership association substantially
burdens and affects the flow of commerce, and tends to aggravate recurrent
business depressions, by depressing wage rates and the purchasing power of

1 wage earners in industry and by preventing the stabilization of competitive wage
2 rates and working conditions within and between industries. 29 USC § 151.

3 In the 1930's, nothing could be more destructive of the right to engage in concerted
4 activity for mutual aid and protection as an agreement by the employees to refrain from union
5 membership, i.e. a traditional yellow dog contract. And in the year 2012, nothing can be more
6 destructive of the right to engage in concerted activity for mutual aid and protection as an
7 agreement by the employees to refrain from participating in a class, representative or collective
8 action in litigation. The mere insistence on such a provision is and has always been prohibited
9 by the Act.

10 **IV. CONCLUSION**

11 As can be clearly seen from the court records, Respondents are now insisting that
12 Respondents' employees and former employees must proceed to arbitration on an individual
13 basis and must therefore abandon their class, representative and collective claims by virtue of
14 an embedded waiver provision in the arbitration agreement. Whether the arbitrator will agree
15 that there has been an effective waiver is irrelevant, since the very act of demanding
16 enforcement of an alleged waiver violates Section 7 of the Act under *D.R. Horton* and its
17 progeny. Whether federal district courts feel compelled to follow *D.R. Horton* on the issue of
18 their own jurisdiction under the Norris LaGuardia Act is irrelevant. None of those courts have
19 jurisdiction to decide unfair labor practices under the National Labor Relations Act, except for
20 denying enforcement in the court of appeals limited to a particular case. The Administrative
21 Law Judge must follow *D.R. Horton* until and unless the Board reverses itself, or is reversed by
22 the United States Supreme Court.

23 The Board's decision in *D.R. Horton* must be followed here because the case is not
24 significantly different the Board's decision. The employer in *D.R. Horton* put the class action
25 waiver explicitly in the arbitration agreement; whereas, here the Respondents assert the class
26 action waiver appears by operation of law. The difference of the mechanism by which the class
27 action waiver manifests itself in the agreement (i.e. explicitly or implicitly) is not relevant. In
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both cases, the insistence that employees forgo their Section 7 rights to engage in class, representative or collective litigation is the unfair labor practice.

For the reasons stated above, the Administrative Law Judge should issue an order dismissing the Respondents' Motion for Summary Judgment and granting Charging Parties' Counter-Motion for Summary Judgment based upon the undeniable records of Respondents' own insistence in the District Court and Court of Appeal that the employees be compelled to engage in arbitration only on an individual basis rather than in a class, representative and/or collective action.

DATED: November 19, 2012

THIERMAN LAW FIRM

By: /s/Mark R. Thierman
Mark R. Thierman
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **CHARGING PARTIES' OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND COUNTER MOTION FOR SUMMARY JUDGMENT** on the parties listed below on the 19th day of November, 2012.

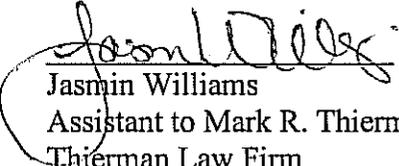
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