

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

In the Matter of:	:	
	:	
	:	
	:	
CONVERGYS CORPORATION,	:	Cases 14-CA-075249 and
	:	14-CA-083936
	:	
And	:	
	:	
HOPE GRANT, An Individual.	:	

**CONVERGYS CORPORATION'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Raymond D. Neusch
George E. Yund
Adam R. Hanley
FROST BROWN TODD LLC
3300 Great American Tower
301 E. Fourth Street
Cincinnati, OH 45202
(513) 651-6704
(513) 651-6824
(513) 651-6981 facsimile
rneusch@fbtlaw.com
gyund@fbtlaw.com
ahanley@fbtlaw.com

Attorneys for Convergys Corporation

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I. STATEMENT OF THE CASE AND EXCEPTIONS

Convergys Corporation (“Convergys,” the “Company,” or the “Respondent”) submits this brief in support of its Exceptions to the Decision of Administrative Law Judge Arthur J. Amchan (the “ALJ”) in this matter. The Consolidated Complaint (“the Complaint”) alleges, in essence, that Convergys violated Section 8(a)(1) of the National Labor Relations Act (the “NLRA” or the “Act”) by requiring applicants for employment to agree not to pursue claims against Convergys as members of a class and by seeking to enforce such agreement against the Charging Party, Hope Grant, (the “Charging Party” or “Grant”). The Company denies that it violated the Act.

The parties agreed to waive a hearing and submit the case on a stipulated record.¹ The ALJ issued his Decision on October 25, 2012. Relying largely on the Board’s decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the ALJ found that Convergys violated the Act by requiring applicants to sign the Waiver and by seeking to enforce the same. Convergys has taken the following exceptions to the ALJ’s Decision:

1. The Company excepts to the ALJ’s finding that *D.R. Horton* is not distinguishable from this case. (ALJD p. 3, lines 9–11.)
2. The Company excepts to the ALJ’s failure to acknowledge that *D.R. Horton* has been rejected by nearly every federal court that has had the opportunity to enforce it.
3. The Company excepts to the ALJ’s failure to acknowledge that Convergys’ Waiver has been upheld in federal court, despite *D.R. Horton*.
4. The Company excepts to the ALJ’s failure to address the fact that *D.R. Horton* was decided without the required quorum of the Board.
5. The Company excepts to the ALJ’s finding that the NLRA applies to applicants, who are not “employees” under long-standing Board precedent. (ALJD p. 3, lines 24–26.)

¹ The parties filed a Joint Motion and Stipulation of Facts, including exhibits, on September 13, 2012. References to the Stipulation of Facts and exhibits thereto will be cited in this Brief as “Stip., p. __,” “¶__” and “Stip. Ex. __,” respectively.

6. The Company excepts to the ALJ's failure to find that the NLRB has not been empowered by Congress to interpret the Fair Labor Standards Act ("FLSA").
7. The Company excepts to the ALJ's failure to find that the right to bring a FLSA collective action is a procedural right that can be waived.
8. The Company excepts to the ALJ's holding that only Board and Supreme Court decisions are binding on him. (ALJD p. 2, lines 44–46.)
9. The Company excepts to the ALJ's finding that even if employees are free to bring employment-related class or collective action lawsuits, employers violate the Act by seeking to have the suit dismissed based on the employees' execution of a class or collective action waiver. (ALJD p. 3, lines 34–37.)
10. The Company excepts to the ALJ's finding that an employer is not free to oppose a plaintiff's motion for class certification based on the plaintiffs' execution of a class or collective action waiver. (ALJD p. 3, lines 41–43.)
11. The Company excepts to the ALJ's Conclusions of Law in their entirety. (ALJD p. 4, lines 3-6.)
12. The Company excepts to the ALJ's Remedy and Order in their entirety. (ALJD p. 4, lines 10–39; p. 5, lines 1–19.)

II. STATEMENT OF FACTS

At all material times during the six month period prior to the filing of the initial charge in these cases, the Company has required job applicants, as a condition of employment at its various call centers, including the one in Hazelwood, Missouri, to execute applications containing the following clause (the "Waiver"):

I further agree that I will pursue any claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

(Stip., p. 4–5, ¶¶8, 12; Stip. Ex. M.) On or about September 16, 2011, Grant completed and submitted an application for employment at Convergys' Hazelwood call center.

(Stip. p. 4, ¶9; Stip. Ex. M.) Grant's application included the above-quoted Waiver

language. (*Id.*) Grant was hired by the Company in September 2011 as a Customer Service and Problem Resolution Specialist, fielding incoming calls to the Hazelwood call center. (Stip. p. 8, ¶10.)

On March 16, 2012, Grant filed a civil lawsuit (the “FLSA Suit”), individually and on behalf of other employees of Respondent’s Hazelwood call center, against Respondent in the United States District Court, Eastern District of Missouri. (Stip. p. 5, ¶16; Stip. Exs. O, P.) The FLSA Suit alleges that Respondent, *inter alia*, requires its employees to work uncompensated hours and denies overtime pay in violation of the Fair Labor Standards Act (FLSA). (*Id.*) On June 22, 2012, Respondent filed a Motion to Strike Class and Collective Allegations in the FLSA Suit on the basis that Grant and her purportedly similarly situated coworkers signed the Waiver, and have thereby relinquished any right to bring any collective claims or lawsuits pertaining to their wages, hours and terms and conditions of employment. (Stip. p. 5, ¶17; Stip. Ex. Q.) Respondent has defended the FLSA Suit by maintaining that, by virtue of its employees signing the Waiver, the claims raised in the FLSA Suit must be brought by employees individually, and not concerted, jointly, or as a group. (Stip. p. 5, ¶19.)

III. ARGUMENT

A. The Company’s Class and Collective Action Waiver Does Not Violate Section 8(a)(1) of the Act As Concluded by the ALJ.

1. The ALJ erred by relying upon *D.R. Horton* to invalidate Convergys’ Waiver.

a. *D.R. Horton* has been rejected by nearly every court that has interpreted it.

As is noted above, the ALJ’s Decision relies heavily upon the Board’s decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), in concluding that the Waiver violates

Section 8(a)(1) of the Act by interfering with, restraining, and/or coercing employees in the exercise of their right to engage in concerted activities for their mutual aid and protection. In *D.R. Horton*, the Board found that a mandatory arbitration agreement prohibiting class actions infringed on employees' Section 7 rights to engage in concerted activity. *Id.* The ALJ's reliance upon *D.R. Horton* is misguided for a number of reasons, however, and should not be adopted by the Board.

As an initial matter, *D.R. Horton's* efficacy has been called into serious doubt by a growing line of federal case law that expressly rejects its rationale. Indeed, nearly every federal court that has been asked to rely upon *D.R. Horton* to strike class and collective action waivers in employment cases has declined to do so, and has instead enforced contractual class action waivers. See, e.g., *Johnson v. TruGreen Ltd. Partnership*, No. 2012-CV-00166 (W.D.Tex. Oct. 25, 2012); *Tenet HealthSystem Philadelphia, Inc. v. Rooney*, No. 12-CV-58, 2012 WL 3550496 (E.D.Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Services USA, Inc.*, No. 4:11-CV-520, 2012 WL 3150391 (E.D.Ark., Aug. 1, 2012); *Spears v. Mid-American Waffles, Inc.*, No. 11-CV-2273, 2012 WL 2568157 (D.Kan. July 2, 2012); *De Oliveira v. CitiGroup N.A., Inc.*, No. 8:12-CV-251, 2012 WL 1831230 (M.D.Fla. May 18, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405, 2012 WL 1604851 (N.D.Cal. May 7, 2012); *Brown v. Trueblue, Inc.*, No. 1:10-CV-0514, 2012 WL 1268644 (M.D.Pa. April 16, 2012); *LaVoice v. UBS Financial Services, Inc.*, No. 11-CV-2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012)²; *Sanders v. Swift Transportation Co. of Arizona, LLC*, 843 F.Supp.2d 1033 (N.D.Cal.

² In addition to rejecting *D.R. Horton*, the *LaVoice* court also specifically refused to follow one of its own decisions—made just months earlier—in which it held that the right to proceed collectively cannot be waived. See *Raniere v. Citigroup Inc.*, 827 F.Supp.2d 294, 313 (S.D.N.Y. Nov. 22, 2011).

2012). What is more, the few outlying federal cases that did not reject *D.R. Horton* were decided very soon after the Board issued its January 3, 2012 decision. See, e.g., *Owen v. Bristol Care, Inc.*, No. 11-CV-04258, 2012 WL 1192005 (W.D. Mo. Feb.28, 2012). But since the dust has settled, federal courts throughout the country have coalesced around the conclusion that *D.R. Horton* was wrongly decided and is not good law.³ Thus, the Board should decline to follow it in this case.

In fact, one of the many federal courts that has rejected the logic of *D.R. Horton* held that the precise Waiver at issue in the instant case is enforceable. In *Palmer v. Convergys Corp.*, No. 7:10-CV-145, 2012 WL 425256 (M.D.Ga. Feb. 9, 2012), a case whose facts and allegations mirrored those of the FLSA Suit, the court granted Convergys' motion to strike the plaintiffs' class allegations because the plaintiffs signed class action waivers identical to the one signed by the Charging Party in this case. In reaching its decision, the court reviewed *D.R. Horton* and found that it "does not meaningfully apply to the facts of the present case." *Palmer*, 2012 WL 425256 at fn.2. Thus, by finding that Convergys' Waiver violates the Act and ordering Convergys, *inter alia*, to cease and desist the utilization of the Waiver at all of its facilities, the ALJ's Decision subjects Convergys to a judgment that is simply incompatible with the federal court's judgment in *Palmer*. As there is no material difference between the facts of the *Palmer* case and the charge underlying this Complaint, the Board should reject *D.R.*

³ Additionally, *D.R. Horton* was decided by a Board without a quorum and, therefore, has no legal effect. The case was decided by Members Pearce and Becker after Member Hayes was recused. In *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010), the Court made it clear that two members have authority to act on behalf of the Board only when there has been a valid delegation by at least three members. There was no such delegation in *D.R. Horton*. Moreover, Member Becker's recess appointment had expired at least by the end of December 2011. See Department of Justice Opinion, January 6, 2012 concerning the Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions. Consequently, he properly could not have participated in the January 3, 2012, decision, thereby reducing the decision-maker to one.

Horton and find, consistent with *Palmer*, that Convergys' Waiver does not violate Section 8(a)(1) of the Act.

Because there has been almost universal enforcement of collective or class action waivers by the federal district courts that have considered the issue, the Board should at the very least reconsider its *D.R. Horton* decision.

b. Contrary to *D.R. Horton*, the Act does not grant employees a right to utilize collective action procedures created by the FLSA.

In *D.R. Horton*, the Board stated that the Act “protects employees’ ability to join together to pursue workplace grievances, including through litigation.” At Sl. Op. 2. However, the decision fails to distinguish between employees collectively **asserting** legal rights and collectively **adjudicating** their claims. While the Act may protect the former, it says nothing about the latter. The cases cited by the Board in *D.R. Horton* show only that Section 7 protects employees from retaliation for concertedly asserting their legal rights, not that employees have a right to adjudicate claims collectively.

For example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court noted that some lower courts had applied the “mutual aid or protection” clause to protect employees from retaliation for “resort[ing] to administrative and judicial forums” in seeking to improve their working conditions. However, the Court declined to address the question of “what may constitute ‘concerted’ activities in this context.” *Id.* at 567.

In addition, the Board’s decision in *Salt River Valley Water Users Ass’n*, 99 NLRB 849 (1952), makes it clear that employees’ Section 7 right to “resort to judicial forums” is correctly understood as a right to *assert* legal rights collectively, not *adjudicate* them collectively. In that case, a number of employees believed they were due pay under the FLSA and grew dissatisfied when their union did not appear to be

pursuing the issue. *Id.* at 863–64. The employees enlisted “the support of others in a movement to recover back pay and overtime wages.” *Id.* They designated one of the employees as their agent “to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise” and authorized him to employ an attorney to represent them. *Id.*

That protected conduct involved employees attempting to exert group pressure on their employer and union to negotiate a settlement of their claims or, if necessary, pool their resources to finance litigation. The employees’ protected concerted activities did not utilize or depend on any class procedures. The employees collectively demanded their employer comply with the FLSA regardless of whether any claims actually filed would be adjudicated collectively or individually.

The other decisions cited in *D.R. Horton* also fail to establish that employees have a Section 7 right to adjudicate their claims collectively. Rather, those cases, like *Salt River Valley*, simply demonstrate the far more general proposition that employers may not retaliate against employees for concertedly asserting their legal rights.⁴ Thus, the ALJ erred in relying upon *D.R. Horton* and invalidating Convergys’ Waiver.

2. Convergys’ Waiver is indistinguishable from the class and collective action Waivers upheld in the federal cases rejecting *D.R. Horton*.

To the extent the General Counsel may argue that the cases criticizing *D.R. Horton* are distinguishable because they involve waivers found in arbitration agreements, this is a distinction without a difference. Federal courts have frequently

⁴ Worthy of note is the comment of the ALJ in *D.R. Horton* that he was “not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims.” *D.R. Horton*, sl. op. at 16. The *D.R. Horton* ALJ found the agreement’s class action waiver did not violate the Act.

upheld collective action waivers and declined to follow *D.R. Horton* by citing to *AT&T Mobility LLC, v. Concepcion*, 131 S.Ct. 1740 (2011). In *AT&T Mobility*, the Supreme Court relied upon the Federal Arbitration Act (FAA) to invalidate California’s public policy-based rule that class arbitration waivers in consumer contracts are *per se* unconscionable. Under the FAA, arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. As the Court explained, this clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply *only to arbitration* or that derive their meaning *from the fact that an agreement to arbitrate is at issue.*” *AT&T Mobility, supra* at 1746 (*quoting Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)) (emphasis added). Because California’s public policy rule evidenced a hostility directed uniquely at arbitration agreements, the Court held that it was inconsistent with, and preempted by, the FAA. *Id.* at 1753.

Importantly, *AT&T Mobility* does not hold that the FAA requires courts to give arbitration agreements *greater* deference than other contracts; rather, it explains that the FAA simply remedies the antiquated mindset that arbitration is inferior by obligating courts to enforce arbitration agreements *as if they were any other contracts.* *Id.* at 1745. Because the FAA places arbitration agreements on a level playing field with all other contracts, it naturally follows that a class or collective action waiver that appears in an arbitration agreement—such as the ones upheld in the cases rejecting *D.R. Horton*—is on equal footing with a class or collective action waiver that does not—such as the one at issue in the instant case. See *Palmer*, 2012 WL 425256 at *3 fn.2. Thus, just as

federal courts have repeatedly enforced class waivers found in employment arbitration agreements, so too should the Board uphold the waiver found in Convergys' employment application. See, e.g., *Carman v. Wachovia Capital Markets, LLC*, No. 4:08-CV-1547, 2009 WL 248680 (E.D.Mo. Feb. 2, 2009) (finding provisions in employment application to be contractually binding).

3. The NLRA does not apply in this case because the Waiver was signed by applicants, not by employees.

D.R. Horton is also inapplicable to this case on the facts because it dealt with a class action waiver in an arbitration agreement between an employer and an *employee*. By contrast, the Charging Party entered into her contractual class action Waiver in this case as an *applicant*, not as an employee. Her employment application Waiver had nothing to do with, nor was it contained in, an arbitration agreement. Under long-standing Board precedent, applicants for employment are not “employees” under the Act. *Star Tribune*, 295 NLRB 543 (1989) (citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)) (“Applicants for employment do not fall within the ordinary meaning of an employer’s ‘employees.’”).

The ALJ’s Decision plainly misapplies this precedent. Citing to *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845 (1941) and *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 116 S.Ct. 450 (1995), the ALJ held that “[a]pplicants for employment are employees within the meaning of section 2(3) of the NLRA.” (ALJD, p. 3, lines 24–25.) However, neither *Phelps Dodge* nor *Town & Country* stands for this proposition. Indeed, both cases cited by the ALJ held that job applicants are considered “employees” specifically for the purposes of the Act’s prohibition against discrimination *in hiring*. As the Supreme Court explained in *Town & Country*, the “statutory word

‘employee’ includes job applicants” *in the hiring context* because “otherwise the Act’s prohibition of “discrimination in regard to hire” would ‘serve no function.’”) *Town & Country*, 516 U.S. at 88 (*quoting Phelps Dodge*, 313 U.S. at 185–86).

Because the instant case does not involve allegations of discriminatory failure to hire, the hiring-specific interpretation of “employee” set out in *Phelps Dodge* and *Town & Country* simply has no bearing on this case. Indeed, the *Star Tribune* case cited above specifically held that the Board’s conclusion “does not affect the established body of law that holds that the *antidiscrimination* provisions of Sec. 8(a)(3) of the Act forbid discrimination against applicants for employment.” *Star Tribune*, *supra* at fn.10 (*citing Phelps Dodge*, *supra*) (emphasis added). Since the Act did not govern the Charging Party’s relationship with Convergys at the time she applied for employment, Convergys did not violate the Act by requiring her—or any other applicant—to sign the Waiver.

4. Congress has not authorized or empowered the NLRB to interpret the FAA or the FLSA.

The Board should also decline to apply *D.R. Horton* in this instance because the *D.R. Horton* decision turned on the Board’s interpretation of a statute—the FAA—that Congress has not authorized the Board to interpret or enforce. In *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984), the Supreme Court held that “[w]hile the Board’s interpretation of the NLRA should be given some deference, the proposition that the Board’s interpretation of statutes outside its expertise is likewise to be deferred to is novel.” *Id.* at 529, fn.9. Relying on this and similar propositions, many courts have declined to apply *D.R. Horton* because the Board improperly interpreted the FAA in reaching its decision. *See, e.g., Delock*, *supra*, 2012 WL 3150391 at *3 (“the Board has no special competence or experience in interpreting the Federal Arbitration

Act...[a]nd this Court is ‘not obligated to defer to [the Board’s] interpretation of Supreme Court precedent under *Chevron* or any other principle.’”); *Tenet, supra*, 2012 WL 3550496 at *4 (“Although the NLRB’s construction of the NLRA is entitled to deference, the NLRB has no special competence or experience interpreting the FAA.”). Thus, given the shaky foundation upon which *D.R. Horton* rests, the Board should not continue to apply it in this case.

What is more, the resolution of both *D.R. Horton* and the instant case also turn on the interpretation of another statute—the FLSA—that the Board has not been empowered to interpret or enforce. See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427 (1967) (“the [NLRA] does not undertake governmental regulation of wages, hours, or working conditions,”); *Cardenas v. U.P.S., Inc.*, No. 10-CV-6132, 2010 WL 5116343, at *3 (C.D.Cal. Dec. 9, 2010) (holding that plaintiff’s FLSA claims were not preempted by plaintiff’s failure to raise them the before the NLRB, because the “NLRB states that it does not enforce federal laws within the jurisdiction of other federal agencies” and “the NLRB specifically asserts that it does not enforce the FLSA, as it is under the jurisdiction of the Department of Labor.”) By holding that employees may not waive the FLSA’s collective action mechanism, the ALJ improperly interpreted the provisions of the FLSA, which is outside his realm of authority.

5. The ALJ’s and Board’s interpretations of the FLSA are incorrect.

In fact, the impermissible interpretations discussed above are at odds with a long line of well-established and precedential decisions holding that the FLSA’s right to a collective action is a *procedural* right, not a *substantive* right, and thus may be waived. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647 (1991) (“[E]ven if the arbitration could not go forward as a class action or class relief

could not be granted by the arbitrator, the fact that the [ADEA]⁵ provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”) (*quoting Nicholson v. CPC Int’l Inc.*, 877 F.2d 221, 241 (3d Cir.1989) (Becker, J., dissenting)); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1366 (11th Cir.2005) (enforcing arbitration agreement in which employees “agreed that no ‘Covered Claim,’” including wage claims, “may be brought as a class or collective action”); *Vilches v. The Travelers Companies, Inc.*, 413 Fed.Appx. 487 (3d Cir.2011) (finding waiver of collective action right to be neither procedurally nor substantively unconscionable); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir.2002) (“Adkins points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute.”); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) (“rejecting the...Appellants’ claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA.”); *Horenstein v. Mortgage. Mkt., Inc.*, 9 F.Appx. 618, 619 (9th Cir.2001) (holding that “[a]lthough plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the [FLSA].”). See also *Lu v. AT & T Services, Inc.*, No. 10-CV-05954, 2011 WL 2470268, *3 (N.D.Cal. June 21, 2011) (“The right to bring a collective action under the FLSA is a procedural—not a substantive one.”); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 812 F.Supp.2d 886 (N.D.Ill. 2011) (enforcing separation agreement class action waiver in FLSA suit); *Brown v.*

⁵ The Age Discrimination in Employment Act (ADEA) borrows its collective action procedures directly from the FLSA. 29 U.S.C. § 626(b).

Sears Holdings Mgmt., Corp., No. 09-cv-2203, 2009 WL 2514173 (N.D.Ill. Aug. 17, 2009) (enforcing severance agreement class action waiver in FLSA suit).

Moreover, in concluding employers and employees are not permitted to agree to litigate FLSA claims individually, the Board's decision in *D.R. Horton* failed to consider that individual litigation is fully consistent with the purposes underlying 29 U.S.C. § 216(b)'s current structure. Congress adopted the Portal-to-Portal Act in 1947 to amend the FLSA to limit the number of collective actions filed and require every employee who participates in such actions to give his or her consent to be a party-plaintiff. See *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989). There is no rational basis for finding the Waiver interfered with employees' purported right to engage in concerted activity any more than does the FLSA's own individual opt-in requirement.

Finally, it is well-established that unions may waive Section 7 rights pursuant to collective bargaining agreements, including the right to strike and an individual employee's right to a judicial forum. The effect of finding a violation in this case would be that a union can waive an employee's rights, but that same employee may not do so. There is no reason for such a position; it has no basis in contract law and runs counter to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which concluded that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." Even assuming a right exists under the Act to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith agreement. Consequently, even if FLSA collective actions are protected "concerted activity" under the Act,

employees may nevertheless waive the right to a collective action because Section 7 rights, as discussed above, may be waived. See *Webster v. Perales*, No. 3:07-CV-00919, 2008 WL 282305 at *3 (N.D.Tex. Feb. 1, 2008) (holding, in purported FLSA collective action, that “Plaintiffs cannot establish...that Section 7 forbids employees from waiving their right to a judicial forum, by agreeing to arbitrate disputes.”).

As is discussed above, the fundamental mistake in both *D.R. Horton* and the ALJ’s Decision is the confusion over employees’ ability to **assert** a right (which may be activity protected by the Act), with procedures to **adjudicate** claims provided for by various statutes. Absent a statutory prohibition, parties should have the right to mutually agree to alternative mechanisms to adjudicate claims, including entering into agreements to waive class claims. Ultimately, the ALJ’s Decision in the instant case and the Board’s decision in *D.R. Horton* are improper both because they interpreted a statute which they had no authority to interpret, and because their interpretations of the statute run contrary to well-established precedent.

6. The ALJ and Board are bound by decisions of superior courts.

The ALJ’s Decision also improperly states that the ALJ is “bound to follow Board precedent which neither the Board nor the Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals.” (ALJD p. 2, lines 44–46) (*citing Waco, Inc.*, 273 NLRB 746, 749 fn.14 (1984)). The ALJ’s holding fails to recognize the binding, *stare decisis* effect of the plethora of circuit court cases holding that employees may waive the procedural right to bring a collective action under the FLSA, as well as the many federal district court decisions refusing to uphold *D.R. Horton*. This *stare decisis* principle is illustrated in *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir.1991). In *BPS*, the Eighth Circuit, in which this case arises,

chastised the Board for certifying the petitioning union in contravention of *McDonnell Douglas Corp. v. NLRB*, 827 F.2d 324 (8th Cir.1987) (“*McDonnell II*”), a directly on-point precedential case that dictated the opposite result. The Board’s decision challenged the reasoning of *McDonnell II* because “it conflicted with Board precedent,” and stated that “[w]ith all due respect to the [Eighth Circuit] court of appeals, we rejected that contention in the representation case.” *Id.* at 522. In rejecting the Board’s decision, the Court held that

because “Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court,” the Board’s disagreement with *McDonnell II* is of no legal consequence in this circuit. *McDonnell II* sets forth the law of this circuit, and “[f]or the Board to predicate [orders] on its disagreement with [*McDonnell II*] is for it to operate outside the law.”

Id. at 524 (citing *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3rd Cir.1979)). See also *N.L.R.B. v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31 (1st Cir.1987) (“we are not persuaded that merely because the NLRB is a government agency, that in the current context, we should permit the Board to ignore the district court’s judgment.”); *Allegheny Gen. Hosp.*, *supra* (defining precedent as “a specific legal consequence [arising from] a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.”) (footnote omitted). Thus, because federal courts—which are hierarchically superior to the NLRB—have held that collective action rights may be waived and have repeatedly repudiated *D.R. Horton* since it was decided, the Board may not reach a conclusion in this case that ignores or disregards these precedents.

B. The Company's Attempts to Enforce Its Waiver Do Not Violate Section 8(a)(1) of the Act As Concluded by the ALJ.

The ALJ's Decision also incorrectly finds that Convergys has violated the Act by defending the FLSA Suit and opposing class certification based upon its employees' execution of the Waiver. In *D.R. Horton*, the Board recognized that a court may deny an employee's attempt to certify a class of employees. The Board conceded that Section 7 cannot grant employees a "right to class certification." The Board was thus forced to reason that Section 7 can guarantee employees a purported right only "to take the collective action inherent in *seeking* class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by *invoking* Rule 23, Section 216(b), or other legal procedures." *Id.* (emphasis added). Nevertheless, the Board acknowledged that an employer may oppose an employee's motion for class certification without violating Section 7. The strained rationale necessary to reconcile these positions is that, even if employees are unsuccessful in *obtaining* class certification, they were able to exercise their Section 7 rights by collectively "*seeking*" class certification and "*invoking*" Rule 23 or similar procedures.

Assuming the right to "seek" certification and "invoke" Rule 23 exists, however, logic dictates that neither the plaintiffs' execution of a Waiver nor the employer's opposition to a motion for class certification abridges this right. An agreement waiving class procedures does not, and cannot, prevent employees from joining together to file a class action lawsuit or from concertedly demanding class treatment of their claims. Indeed, the facts of this case show Grant *did* "invoke" the FLSA's collective action provisions. An employer may respond to such a purported class or collective action lawsuit by moving to compel individualized litigation, but there is no rational difference

for Section 7 purposes between an employer responding to a class action lawsuit with a successful motion to compel individualized litigation and responding with a successful opposition to class certification. In both instances, by the time the employer responds, the employees already will have taken “the collective action inherent in seeking class certification” and already acted concertedly by “invoking” class certification procedures. Therefore, employees are not prevented from acting concertedly by the Company enforcing a class action waiver.

Moreover, the ALJ’s Decision leads to the illogical conclusion that an employer commits an unfair labor practice by merely opposing a plaintiff’s motion for class certification. But even in *D.R. Horton*, the Board concedes that “there is no Section 7 right to class certification” and an “employer remains free to assert any and all arguments against certification.” *D.R. Horton* at sl. op. 10, fn.24. In order to reconcile this inconsistency, it must be the case that the underlying cause of action provides the remedy, and that cause of action, brought through a lawsuit, is the protected activity. Seeking to use procedural rules during litigation is not Section 7 protected activity.

IV. CONCLUSION

The ALJ’s Decision is grounded on the Board’s decision in *D.R. Horton*. The validity of *D.R. Horton* is at best questionable because of its treatment by several federal courts and because of the manner in which the Board’s decision was reached. In any event, the decision is distinguishable because it deals with waivers contained in arbitration agreements, where the class action waiver in issue in this case deals with an agreement signed by an applicant for employment which would not even be a mandatory subject of bargaining under *Star Tribune*. Moreover, finding a violation in

this case would impermissibly turn a procedural right under the FLSA into a substantive right. Finally, even if there is a Section 7 right to proceed as a class in FLSA litigation, there is no logical reason why such right cannot be waived by an employee, as it was by Grant in this case. Based on all the foregoing, the Board should overrule the ALJ's Decision, find that Convergys has not violated Section 8(a)(1) of the Act, and dismiss the Complaint.

Respectfully submitted,

/s/ Raymond D. Neusch
Raymond D. Neusch
George E. Yund
Adam R. Hanley
FROST BROWN TODD LLC
3300 Great American Tower
301 E. Fourth Street
Cincinnati, OH 45202
(513) 651-6704
(513) 651-6824
(513) 651-6981 facsimile
rneusch@fbtlaw.com
gyund@fbtlaw.com
ahanley@fbtlaw.com

Attorneys for Convergys Corporation

Dated: November 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been filed electronically and has been served upon the following individuals, electronically and by regular U.S. mail, this 21st day of November, 2012:

Mark A. Potashnick, Attorney
Weinhaus & Potashnick
11500 Olive Blvd., Ste. 133
St. Louis, MO 63141-7143

Rotimi Solanke
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

/s/ Raymond D. Neusch