

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

SECURITAS, INC.,

Respondent

And

CHARLES DUNAWAY, AND

WALTER LINARES

Charging Parties

**CASE NOS. 31-CA-072179, 31-
CA-072180, 31-CA-088081, AND
31-CA-088082**

**CHARGING PARTIES CHARLES DUNAWAY AND WALTER LINARES'
BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE GERALD A. WACKNOV'S DECISION**

Dennis F. Moss
15300 Ventura Blvd. # 207
Sherman Oaks, CA 91403
Telephone: (310) 773-0323
Facsimile: (310) 861-0389
dennis@dennismosslaw.com

Ira Spiro
Spiro Law Corp.
11377 W. Olympic Blvd, 5th Floor
Los Angeles, CA 90064
Telephone: (310) 235-2350
ira@spirolawcorp.com

Attorneys for Charging Parties

TABLE OF CONTENTS

I. INTRODUCTION.....	ii
II. ARGUMENT	2
A. THE FIFTH CIRCUIT GOT IT WRONG.....	2
B. THE ANALYSIS IN COURT DECISIONS REFERENCED IN THE APPENDIX TO SECURITAS' EXCEPTIONS BRIEF DO NOT UNDERMINE THE CORRECT ANALYSIS IN THE BOARD'S <i>HORTON</i> DECISION.....	6
<i>Morvant v. P.F. Chang's China Bistro, Inc.</i> 870 F. Supp.2d 831 (N.D. Cal. 2012) ..	7
<i>Richards v. Ernst & Young</i> (9 th Cir. 2013) 734 F.3d 871	10
<i>Owen v. Bristol Care, Inc.</i> 702 F.3d 1050 (8 th Cir. 2013)	11
<i>Sutherland v. Ernst & Young</i> (2d Cir. 2013) 726 F.3d 290	15
C. UNITED STATES SUPREME COURT CASES DO NOT UNDERMINE THE BOARD'S <i>HORTON</i> ANALYSIS	15
<i>American Express Co. v. Italian Colors Restaurants</i> 133 S.Ct. 2304 (2013)	17
<i>CompuCredit v. Greenwood</i> (2012) 132 S.Ct. 665,.....	19
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S.Ct 1740 (2011)	20
D. THIS CASE IS NOT ABOUT RULE 23.....	26
E. THE SUPPOSED "VOLUNTARINESS" OF THE CURRENT EMPLOYEE ARBITRATION AGREEMENT DOES NOT UNDERMINE CHARGING PARTIES' POSITION.	26

TABLE OF AUTHORITIES

<i>24 Hour Fitness USA, Inc.</i> 2012 WL 549 5007	22
<i>American Express v. Italian Colors</i> (2013)133 S.Ct. 2304.....	15, 17-19
<i>AT&T Mobility LLC v. Concepcion</i> (2011) 131 S.Ct. 1740.....	passim
<i>Bon Harbor Nursing & Rehab Ctr.</i> 348 NLRB 1062, 1073, 1078 (2006).....	28, 29
<i>Brady v. National Football League</i> (8 th Cir. 2011) 644 F.3d 661	2, 4
<i>Circuit City v. Adams</i> 532 U.S. 105 (2001).....	25
<i>CompuCredit v. Greenwood</i> (2012) 132 S.Ct. 665, <i>Morvant, supra</i> at 845.....	10, 15
<i>D.R. Horton v. NLRB</i> (5 th Cir. 2013) 737 F.3d 344	2
<i>D.R. Horton, supra</i> , 357 NLRB No. 187, at 4-5	passim
<i>Delock v. Securitas Sec. Servs. USA</i> , 833 F.Supp.2d 784,787	12
<i>Discover Bank v. Superior Court</i> (2005) 30 Cal. Rptr.3d 76.....	21
<i>Eastex, Inc. v. NLRB</i> (1978) 437 U.S. 556.....	2, 4, 7, 22
<i>Garner v. Teamsters</i> (1953) 346 U.S. 485,490-491.....	2, 4, 7
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> (1991) 500 U.S. 20	passim
<i>Harco Trucking, LLC</i> 344 NLRB 478 (2005)	4
<i>Ishikawa Gasket America, Inc.</i> 337 NLRB No. 29.....	28, 28
<i>J.H. Stone & Sons</i>	29
<i>J.I. Case Co. v. National Labor Relations Board</i> (1944) 321 U.S. 332	2, 7, 22, 28, 29
<i>Le Madri Restaurant</i> 331 NLRB 269, 275-276 (2000)	4
<i>Mandel Security Bureau, Inc.</i> 202 NLRB 117, 119 (1973).....	28
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> ,	
473 U.S. 614 (1985).....	3, 5, 9, 17
<i>Morvant v. P.F. Chang’s China Bistro, Inc.</i> 870 F. Supp.2d 831	7, 9
<i>National Labor Relations Board v. City Disposal Systems, Inc.</i>	
(1984) 465 U.S. 822.....	2, 7
<i>National Licorice v. National Labor Relations Board</i>	
(1940) 209 U.S. 350.....	1, 7, 22, 27, 29
<i>NLRB v. Jones & Laughlin Steel Corp.</i> (1937) 310 U.S. 1, 33.....	4, 29
<i>NLRB v. Stone, supra</i> , 125 F.2d at 756.....	28, 29
<i>NLRB v. Superior Tanning Co.</i> 117 F.2d 881, 892 (7 th Cir. 1940)	28, 29
<i>Owen v. Bristol Care, Inc.</i> 702 F.3d (8 th Cir. 2013)	11-13

<i>Penn Plaza LLV v. Pyett</i> 556 U.S. 247(2009).....	25
<i>Richards v. Ernst & Young</i> (9 th Cir. 2013) 734 F.3d 871.....	10
<i>Saigon Gourmet</i> 353 NLRB 1063, 1084 (2009).....	4
<i>Sonic-Calabassas v. Moreno</i> 132 S.Ct 496 (2011)	25
<i>St. John’s Mercy Health Sys. v. NLRB</i> 436 F.3d 843, 846 (8 th Cir. 2006).....	12
<i>Sutherland v. Ernst & Young</i> (2d Cir. 2013).....	15
<i>United Parcel Service</i> 252 NLRB 1015, 1018 (1980)	4

I. INTRODUCTION

Adolescents and parents are familiar with the following teenage refrain after a parent has said “no” with good reason.

“Everybody else does it.”

This statement is uttered in argument by protesting adolescents, as though such sentiment should trump, every time, rational, well thought out, convincing positions set out by a parent.

That type of argument, “everyone else is doing it”, seems to be the thrust of much of the anti-NLRB hysteria that has swept through a number of Courts in their assessment of the Board’s correct decision in *D.R. Horton* 357 NLRB No. 184.

Respondent Securitas, just as the Courts in the numerous cases referenced in the Appendix to its Exceptions Brief, fails to confront:

- The history of the Norris LaGuardia Act, and the National Labor Relations Act;
- The NLRB, Supreme Court, and Circuit Court precedent that finds employee legal action on behalf of a group, a protected form of concerted activity;
- The Supreme Court and Board rulings finding that the right to engage in concerted activity is a substantive fundamental right; and
- The fact that the Supreme Court’s arbitration jurisprudence has consistently stood for the proposition that an arbitration agreement cannot deprive an employee of substantive rights.

Respondent's Exceptions Brief ignores cases that pre-date and post-date the Board’s *Horton* decision like *National Licorice v. National Labor Relations Board* (1940) 209 U.S. 350, *J.I. Case Co. v. National Labor Relations Board* (1944) 321 U.S.

332; *National Labor Relations Board v. City Disposal Systems, Inc.* (1984) 465 U.S. 822; *Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661; *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556; *Garner v. Teamsters* (1953) 346 U.S. 485 (reference to concerted activity as a substantive right); and the numerous other Court and NLRB decisions that firmly establish legal action as a form of protected concerted activity, recognize protected concerted activity as a substantive right, and hold that contract promises that commit employees not to engage in any form of concerted activity, are illegal.

Respondent's Exceptions Brief treats the language and history of the Norris LaGuardia Act and NLRA as non-existent.

Galileo was treated in a manner similar to how Courts have treated the Board in this matter. The powers that be condemned Galileo for having an opinion that the world was not flat, never stopping to examine the validity of his conclusions.

II. ARGUMENT

A. THE FIFTH CIRCUIT GOT IT WRONG

The Fifth Circuit's *Horton* decision *D.R. Horton v. NLRB* (5th Cir. 2013) 737 F.3d 344 is not binding on the Board in a case arising in the Ninth Circuit. The Fifth Circuit clearly failed to assess the nature of the rights created by the NLGA and NLRA, and how those rights set *Horton* apart from the Supreme Court's recent arbitration related decisions.

In *Horton*, this Board held that an employer commits an unfair labor practice if it requires employees to pursue all employment-related disputes through individual (i.e., not collective or class) arbitration. By prohibiting employees from

pursuing collective legal action on claims related to their employment, the Board held such an arbitration clause interferes with employees' NLRA section 7 right to "engage in concerted activities for the purpose of...mutual aid or protection." This Board's decision in *Horton* is among the most well-reasoned and well-crafted NLRB decisions written by any entity with judicial or quasi-judicial authority in recent history. The basic ideas of this Board's *Horton* decision are straightforward and correct. The Fifth Circuit's reasoning on the core argument in *Horton* is just as clearly incorrect.

In recent years, the Supreme Court has issued a series of decisions that make a wide range of arbitration clauses – in both consumer and employment contracts – enforceable. This includes, as a general matter, arbitration clauses that preclude arbitration on a class basis. But there is a core principle that runs through all of these staunchly pro-arbitration decisions: no arbitration clause may require a party to "forgo substantive rights." E.g. *Gilmer v. Interstate* (1991) 500 U.S. 20, 26. Arbitration agreements can require parties to submit the resolution of statutory rights to an arbitral forum, and, in doing so, they may alter the procedural rules governing the resolution of such statutory claims. But no arbitration clause can require a party to waive a substantive statutory right. (See also *Mitsubishi v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S.614, 628).

Section 7 of the NLRA contains the core substantive rights of federal labor law. Those rights include employees' right to "engage in concerted activities for...mutual aid or protection." Stated another way, the core substantive NLRA right is the right of employees to act collectively to improve the terms and conditions of

their employment. Sometimes, such employee collective action takes the form of union organizing. Sometimes it takes the form of pickets and demonstrations aimed at improving working conditions. And, sometimes, it takes the form of collective legal action designed to improve those conditions. Whichever *form* employee collective action takes, when such collective action is directed at improving terms and conditions of employment, it is a substantive right protected by the NLRA. This notion that the right to engage in concerted activity for mutual aid or protection is a substantive right, did not originate with the Board's decision in *Horton*. (See *Garner v. Teamsters* (1953) 346 U.S. 485,490-491; and *NLRB v. Jones & Laughlin Steel Corp.* (1937) 310 U.S. 1, 33 declaring such rights “fundamental”.)

The Board has long held that when employees collectively pursue *legal* action against their employers, they engage in Section 7 protected activity. (e.g. *United Parcel Service* 252 NLRB 1015, 1018 (1980); *Harco Trucking, LLC* 344 NLRB 478 (2005); *Le Madri Restaurant* 331 NLRB 269, 275-276 (2000); and *Saigon Gourmet* 353 NLRB 1063, 1084 (2009)). And the Board’s rule on the protected nature of collective legal action has been consistently upheld by the courts. To take but one example, the Eighth Circuit concluded that “a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under Section 7 of the National Labor Relations Act.” *Brady v. National Football League* (8th Cir. 2011) 644 F.3d 661 citing *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556. The same is true for arbitrations that employees pursue collectively against their employer: They are Section 7-protected activity.

Because, under the NLRA, employees have a substantive statutory right to pursue collective actions against their employers regarding working conditions, an arbitration clause that waives the right to pursue such collective actions is a waiver of a substantive federal right. That waiver is impermissible under the Supreme Court's arbitration jurisprudence. *Gilmer, supra* and *Mitsubishi, supra*.

The Fifth Circuit *Horton* decision rejects this conclusion but with flawed reasoning. The circuit court begins its analysis by noting that "[t]he use of class action procedures is not a substantive right." True enough in general terms, but beside the point: The Board's *Horton* decision does not hold or imply that the use of class procedures, in the abstract, is a substantive right; only that under the NLRA *employees* have a substantive labor law right to pursue collective legal actions against their employers when that legal action concerns working conditions. The Fifth Circuit in fact more or less acknowledges this point, writing that the Board's holding in *Horton* is predicated on the idea that the NLRA is different from Rule 23 because the NLRA's "fundamental precept is the right of employees to act collectively." But then the Fifth Circuit concludes:

"Even so, there are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks. For example, the Supreme Court has determined that there is no substantive right to proceed collectively under the FLSA."
D.R. Horton v. NLRB, supra 737 F.3d at 357-358

But the fact the courts have held that neither the ADEA nor the FLSA provides a substantive right to class procedures is immaterial to this analysis precisely because those statutes do not afford employees a substantive right to "engage in concerted activities for the purpose of...mutual aid or protection." That

is, courts could well conclude that an arbitration agreement barring class actions doesn't violate the ADEA or the FLSA because neither statute provides a substantive right to collective employee action. Only the NLGA and NLRA provide that. And because the NLRA affords such a substantive right, this Board was correct to conclude that an arbitration clause waiving the right contravenes the NLRA and is impermissible for that reason, notwithstanding Court holdings regarding the ADEA, the FLSA, or any other federal employment statute. A fundamental precept of the Supreme Court's arbitration jurisprudence is the notion that an arbitration agreement that deprives an employee of a substantive right is unenforceable.

This point was not lost in the Judge Graves, who dissented from the Fifth Circuit's opinion. Judge Graves wrote quite plainly, that the arbitration agreement at issue in the case "interferes with the exercise of employees' substantive rights under Section 7 of the NLRA."

B. THE ANALYSIS IN COURT DECISIONS REFERENCED IN THE APPENDIX TO SECURITAS' EXCEPTIONS BRIEF DO NOT UNDERMINE THE CORRECT ANALYSIS IN THE BOARD'S *HORTON* DECISION

The 40 cases referenced in the Appendix to Securitas' Exceptions Brief that address the Board's *Horton* decision are stunning in their failure to carefully address or refute the Board's analysis.

One track in a large number of the cases is to simply assert no deference is owed to an NLRB decision, without taking the next step and assessing whether the reasoning not being deferred to is, nonetheless, sound.

Another track is to simply assert that it is proper to reject the Board's analysis because several other courts have done so. Some of the courts referenced

in the Appendix contend, contrary to the NLGA, “An agreement to arbitrate is not one of those contracts to which the Norris LaGuardia applies.”

Ignoring *National Licorice, supra, J.I. Case, supra, Garner, supra, City Disposal, supra, Eastex, supra*, and the historical context that led to passage of the broad language of the NLGA and NLRA, does not make that history and precedent vanish.

There are few original rationales for disregarding the Board's *Horton* decision in the Court decisions cited in the Appendix to Respondent's Exceptions Brief . The cases from the Appendix addressed below, are the Circuit court cases (other than the 5th circuit *Horton* decision addressed above), and a representative district court case that attempted, more than the others, to justify its disregard of the NLRB's *Horton* decision.

Morvant v. P.F. Chang's China Bistro, Inc. 870 F. Supp.2d 831 (N.D. Cal. 2012)

Among the cases cited in the Appendix to Respondent's Brief in Support of Exceptions is *Morvant v. P.F. Chang's China Bistro, Inc. 870 F. Supp.2d 831(N.D. Cal. 2012)*. It provides one of the lengthier discussions of *Horton*. However, much of what it contains is a recitation of the arguments made by each party. When it gets around to ruling, its analysis is flawed.

At 870 F.Supp.2d 843-844, the *Morvant* court states that the NLRB's interpretation of the Norris LaGuardia Act should not be given deference. Such a narrow proposition denies the Board the prerogative to assess the history establishing the relationship between the NLGA and NLRA and the propriety, therefore, of the Board looking to the NLGA in carrying out its function to interpret and apply the NLRA. Not unsurprisingly, after faulting the NLRB for interpreting the

NLGA, *Morvant* does not bother to refute the Board's analysis of the NLGA in *Horton*. It states, instead:

"[T]he Norris-LaGuardia Act specifically defines those contracts to which it applies. 29 U.S.C. 103 (a),(b) an agreement to arbitrate is not one of those contracts to which the Norris LaGuardia act applies." *Id*, at 844.

Examination of the NLGA easily exposes the error of the *Morvant* Court's NLGA analysis. 29 USC 102 states the NLGA Public Policy that guarantees that employers shall not interfere with employee rights to engage in concerted activity for mutual aid or protection.

29 USC 103 expressly provides, contrary to *Morvant's* analysis, that the types of contract promises set forth in subsections (a) and (b) of section 103 are **NOT** the only promises that are unenforceable:

It provides: "Any undertaking or promise, such as is described in this section, **or any other undertaking or promise in conflict with the public policy declared in section 102 of this title**, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following: [Specific Types of contracts set forth in 29 USC § 103(a) and (b).]" (Emphasis added)

Clearly, the language in 29 USC 103 " **or any other undertaking or promise in conflict with the public policy declared in section 102 of this title**", is at complete odds with the erroneous holding in *Morvant* that only the specific

promises referenced in 29 USC 103 (a) and (b) are unenforceable by virtue of 29 USC 102-103.

The court in *Morvant* then moves on, after setting forth the Parties' positions as to the applicability of *Gilmer v. Interstate/Johnson Lane Corp.*(1991) 500 U.S. 20, as it relates to the Board's decision in *Horton*, to point out and hold: that in *Gilmer* "[T]he Plaintiff's employment claims under the Age Discrimination In Employment Act ("ADEA") must be arbitrated 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator.' [cite omitted]. Although decided under the ADEA, this court finds no reason that the dicta in *Gilmer* would not apply with equal force to other non-NLRA claims." *Morvant, supra* at 844.

The conclusion that the court has "no reason" to not apply the *Gilmer* dicta to a case where employees covered by the NLRA is concerned, completely ignores the "reason" at the heart of the Board's *Horton* analysis, that a class action bar agreement that bans class arbitrations and class court litigation, deprives employees of a substantive NLRA right. *Gilmer* cannot be read to contradict the Board's *Horton* decision because it did not confront the issue of the substantive right to engage in concerted activity at the heart of the NLRA and *Horton*. The ADEA, which *Gilmer* did analyze, did not create a comparable substantive right. Had the *Gilmer* court found a substantive right was adversely affected by the arbitration agreement at issue, there is no question that it would have not enforced the Agreement. *Gilmer, supra* at 26.

Gilmer cites to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) which provides in relevant part:

"Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Id.*, at 627

Here, the "category of claims" to which the particular arbitration agreement must be held unenforceable, given the NLRA and NLGA, are claims filed by employees to enforce laws on behalf of themselves and their co-workers, given the "congressional intention expressed" in the NLRA and NLGA which make group claims a substantive right that supersedes promises or undertakings not to bring such claims. Had the Securitas arbitration permitted employees to pursue group arbitrations in concert, for and on behalf of each other, it may have been enforceable.

Morvant then turns its analysis to *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, and *CompuCredit v. Greenwood* (2012) 132 S.Ct. 665, *Morvant, supra* at 845; two cases that involve consumer class actions. Consumers do not have a NLGA or NLRA providing them with a substantive right to engage in class actions for their mutual benefit or protection. The inapplicability of *AT&T* and *CompuCredit* is set forth in more detail *infra*.

***Richards v. Ernst & Young* (9th Cir. 2013) 734 F.3d 871**

Respondent cites *Richards v. Ernst & Young* (9th Cir. 2013) 734 F.3d 871 as Circuit Court authority rejecting *D.R. Horton*. Preliminarily, the text of that decision, as originally written, leaves little doubt that the comments of the Court regarding

Horton were dicta. However, more significantly, subsequent to Respondent citing the case, the 9th Circuit panel that decided it, re-wrote that section of the decision dealing with *Horton* in an ORDER AND AMENDED OPINION 2013 WL 6405045. In the AMENDED OPINION, THE COURT expressly stated they were not deciding the issue, applying the rule “against entertaining arguments” not presented in the lower Court. Further, when it made comments regarding the Board's *Horton* decision in the revised opinion, it relegated those comments to footnote 3 that begins by disavowing any possible reading of the comments as a holding: “**Without deciding the [D.R. Horton] issue, we note...**” followed by references to what other Courts have said. Slip Opinion pgs. 2-3(Emphasis Added)

Owen v. Bristol Care, Inc. 702 F.3d 1050 (8th Cir. 2013)

Respondent cites to *Owen v. Bristol Care, Inc.* 702 F.3d (8th Cir. 2013) as authority that should be looked to as a Circuit Court case that rejected the Board's *Horton* decision. Although Respondent cites *Owen* on four separate pages in its brief, surprisingly, it nowhere explains how the *Owen* decision undermines the solid reasoning in the Board's *Horton* decision. *Owen* does not establish that the Board's analysis was wrong. It completely ignores the NLGA, NLRA history, substantive right/concerted activity heart and soul of the Board decision in *Horton*, reasoning instead, as follows:

“[T]he NLRB [in *Horton*] limited its holding to arbitration agreements barring all protected action. *Id* at 16. In contrast, the MAA [Bristol Care Arb. Agreement at issue in *Owen*] does not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor (which has jurisdiction over

FLSA claims), the Equal Employment Opportunity Commission, the NLRB, or any similar administrative body. Further, nothing in the MAA precludes any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees. Second, even if *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning. *Delock v. Securitas Sec. Servs. USA*, 833 F.Supp.2d 784,787 (The Board's construction of the [NLRA] 'is entitled to considerable deference and must be upheld if it is reasonable and consistent with the policies of the Act.' ...the Board has no special competence or experience in interpreting the Federal Arbitration Act.' (quoting *St. John's Mercy Health Sys. v. NLRB* 436 F.3d 843, 846 (8th Cir. 2006))). The NLRB also attempted to distinguish its conclusion from pro-arbitration Supreme Court decisions such as *Concepcion*, *D.R. Horton* 2012 WL 36274 at 16. This court, however, is 'not obligated to defer to [the Board's] interpretation of Supreme Court precedent under *Chevron* or any other principle.' (cites omitted). Additionally, although no court of appeals has addressed *D.R. Horton*, nearly all of the district courts to consider the decision have declined to follow it." *Id*, 702 F.3d at 1053-1054

The first line of attack by which *Owen* attempts to discredit *Horton* is absurd. It takes a law, the NLRA, that clearly protects the rights of working men and women to engage in *any lawful* concerted activity, and without statutory or precedential authority, concludes that somehow the law allows the prohibition of one type of concerted activity for mutual aid or protection, bringing group legal action, simply because other concerted activity (e.g. group EEOC or DOL actions) might be possible. To sanction such reasoning would suggest that Courts could ban strikes

because leafleting before and after work, are available alternative types of concerted activity that can be engaged in. This rationale for distinguishing or not applying *Horton* is not consistent with a law that protects all forms of concerted activity irrespective of the availability of alternatives.

The second rationale of *Owen* similarly does not stand up to scrutiny. Although the *Owen* court acknowledges that the Board's "construction of the NLRA is entitled to considerable deference and must be upheld if it is reasonable and consistent with the policies of the Act," it fails to assess that truism against what this Board has done in its *Horton* decision.

Had it applied the deference standard it articulated, the *Owen* court would have concluded that the Board's position, supported over many decades by ample judicial authority, that recognizes that group legal action is a form of protected concerted activity protected by the Act, must be deferred to.

Had it applied the deference standard, the *Owen* court would have also had to defer to the Board's conclusion, in connection with the Act it is mandated to interpret, that the right to engage in concerted activity, borne out of Congress' recognition that workers alone are helpless, is a substantive right that cannot be waived by a contractual promise an employee makes to an employer.

Neither of the Board positions that the *Owen* court should have deferred to, involve interpretation or application of the FAA.

Owen then concludes that the Board's interpretation of the FAA does not have to be deferred to, but it does not take the next step and explain in any way how the Board's discussion in *Horton* of the FAA is erroneous. It is axiomatic that a rule

that states a Court does not have to defer to an administrative agency's analysis of a law outside its domain, does not render that analysis wrong.

Owen compounds this faulty reasoning, commenting on the fact that *Horton* attempts to distinguish *Concepcion*, and then saying it is not obligated to defer to such efforts by the Board. Nowhere does the *Owen* decision even begin to grapple with the Board's correct explanation of why *Concepcion* does not apply to agreements that get in the way of a Congressionally sanctioned substantive right to engage in concerted activity.

Finally, *Owen* references district court rejections of the Board's *Horton* decision without addressing, at all, the complete failure of those cases to confront the reasoning behind the Board decision.

The failure of the analysis in *Owen* is compounded in the penultimate paragraph of the decision, where it embraces the "contrary congressional command" language of Supreme Court cases that are not dealing with arbitration clauses that interfere with substantive rights.

Applying that analysis to arbitration agreements that would impair substantive rights is clearly problematic, and not justified by the savings clause of the FAA. For example, imagine its application to an arbitration agreement that required an employee to waive her right to the minimum wage (a substantive right), or waive her right to be free from gender discrimination, as part of an arbitration agreement. Such waivers in arbitration agreements would be illegal notwithstanding the lack of a reference-- "Congressional Command", in the minimum wage law or gender discrimination law, that provide the right to

minimum wages and right to be free from gender discrimination supersedes arbitration agreements that waive those rights. The same analysis applies here. When Congress created a substantive right to engage in concerted activity, it did not have to reference the fact that arbitration agreements cannot supersede that right. The "contrary congressional command" language embraced by the *Owen* court has never been applied to contexts where the language within the law at issue created substantive rights. (See below analysis of Supreme Court cases).

Sutherland v. Ernst & Young (2d Cir. 2013) 726 F.3d 290

Respondent cites to *Sutherland v. Ernst & Young* (2d Cir. 2013), as a basis upon which this Board should overturn its *Horton* decision.

The *Horton* discussion in *Sutherland* is confined to footnote 8. It, like *Owen*, attacks the messenger, not the reasoning behind the message, saying “we decline to follow” the Board’s decision, “we owe no deference to its reasoning” and the decision may have been decided without a quorum. Nowhere does *Sutherland* even begin to point out how the *Horton* analysis is wrong. (CF *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, where the California Supreme Court explained why it would not defer to an agency's opinion in the context of that case, but then performed its own analysis and came to the same conclusion.

C. UNITED STATES SUPREME COURT CASES DO NOT UNDERMINE THE BOARD'S HORTON ANALYSIS

The issue in *Gilmer, supra, American Express v. Italian Colors* (2013)133 S.Ct. 2304, and *CompuCredit* (2012) 132 S.Ct. 665 was whether substantive Federal laws that regulated Age Discrimination, Anti-Trust, and Credit of Consumers, contained

provisions that precluded contractual waivers of a judicial forum for vindication of the rights created by the laws.

The Supreme Court found in each instance that references to judicial forums in the law, or "class action", did not preclude enforcement of arbitration agreements that required arbitration of claims in lieu of court actions.

There is a clear difference here. The charging parties are not asserting a "Clear Congressional command" exists in the wage laws they are trying to enforce that overrides agreements to arbitrate. The issue here is the effect of laws independent of the State wage laws that Plaintiffs seek to enforce, enacted by Congress that clearly command that any employee promise not to engage in concerted activity is unenforceable, and any interference with an employee's right to engage in such activity is unlawful.

Whereas, the FAA contemplates promises between parties to arbitrate claims, the NLGA and NLRA preclude promises to arbitrate claims conditioned on giving up the right to join together to improve working conditions, to join unions, or engage in other forms of concerted activity, such as group litigation, for mutual aid or protection. There is a "Clear Congressional Command" that precludes such promises. "Any promise or undertaking" not to engage in concerted activity is unenforceable. 29 USC 102-103, and under the NLRA any effort by an employer to get such a promise from an employee is an unlawful interference with the right to engage in concerted activity.

Just as an employee's voluntarily promise to never join a union in exchange for a \$2000 payment from her employer and the right to arbitrate claims

individually, is not enforceable, given the express provisions of the NLRA and NLGA, an employee's uncoerced, voluntary promise for any consideration, not to join with others to pursue claims on behalf of a group of employees, is unenforceable. Both voluntary promises interfere with an employee's unwaivable right, after such a promise is made, to engage in concerted activity.

American Express Co. v. Italian Colors Restaurants 133 S.Ct. 2304 (2013)

Securitas relies in part on *American Express Co. v. Italian Colors Restaurants* 133 S.Ct. 2304 (2013). Plaintiffs in *American Express* were not employees protected by the NLRA and NLGA. There is absolutely no discussion of concerted activity as a substantive right of employees in *American Express*. There is no discussion of employee group litigation in arbitration or judicial forums as a form of Congressionally protected concerted activity in *American Express*, and no discussion in the *American Express* case of the prohibition, set forth in the NLGA, of promises by employees not to engage in concerted activity. Given the foregoing, the Board cannot rely on *American Express* to inform its decision in the instant case, or hold that, on account of *American Express*, the analysis behind the Board's *Horton* decision is no longer operative.

The Court's decision in *American Express* was premised on its conclusion that "[n]o contrary congressional command" specifically in the antitrust laws required the Court to reject the waiver of class arbitration at issue there, based on its finding that the "antitrust laws do not 'evince an intention to preclude a waiver' of class-action procedure." *Id.*, 133 S.Ct. at 2309, quoting *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). Here, the NLGA and NLRA clearly

"evinced an intention" to preclude a waiver of the right to engage in concerted activity.

This Board's analysis of the NLRA in *Horton* is properly distinguished from the Court's analysis of antitrust law in *American Express*. As the Board stated in *Horton*, "[t]he question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See *Gilmer, supra*. Rather, the issue here is whether the [arb. Agreement's] categorical prohibition of joint, class, or collective federal or state employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." 357 NLRB No. 184, slip op. at 9.

Significantly, *American Express* did not address another basis for invalidating an arbitration agreement raised in *Gilmer*, i.e., where there is an "inherent conflict" between an arbitration agreement and the underlying purpose of another Federal statute. 500 U.S. at 26. This is the aspect of *Gilmer* that is more relevant to *Horton*, 357 NLRB No. 184, slip op. at 11. Here, the underlying purposes of the NLRA and NLGA are destroyed by the Arbitration Agreement. In *American Express*, the underlying purposes of the Anti-Trust laws were, per the Supreme Court, unaffected by an obligation to arbitrate anti-trust claims one at a time.

The instant case, like *Horton*, does not present a conflict between the FAA and the Act. As the Board in *Horton* explained: "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest

extent possible.” 357 NLRB No. 184, slip op. at 12. This is because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip op. at 11. Inasmuch as the mandatory arbitration agreement here denies employees the right to join together to pursue violations of their rights as employees in any forum, it is inconsistent with the NLRA and NLGA, and it is not enforceable under the FAA.

The Board also emphasized that finding an arbitration policy such as the one presented here unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” *Id.* The mandatory arbitration agreement here clearly requires employees to forego substantive rights under the NLRA – namely, employees’ right to pursue employment-related claims in a collective or class action – and the Board has so held. *Id.*, slip op. at 10-11. The *American Express* decision does not contravene this authority. The arbitration agreement here is unlawful not because it involves arbitration or specifies particular litigation procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in collective legal activity in any forum.

***CompuCredit v. Greenwood* (2012) 132 S.Ct. 665,**

CompuCredit v. Greenwood (2012) 132 S.Ct. 665, relied on extensively by *Securitas*, similarly does not address the fact that the NLGA and NLRA protect “concerted activities” by employees.

CompuCredit, like *American Express* is essentially a statutory interpretation case. It arose after lower courts decided to deny the defendant’s motion to compel contractual

arbitration based on their conclusion that certain statutory language evidenced a congressional intent that class claims arising under the Credit Repair Organizations Act (CROA) were not precluded by an arbitration agreement with a class action bar. In its decision, the Supreme Court concluded that the lower courts had misconstrued specific statutory language in CROA as precluding litigation in an arbitral forum. It concluded that the remedial language in CROA did not foreclose the parties from adopting “a reasonable forum-selection clause” that included arbitration and, if they did so, the courts were obliged to enforce the parties’ agreement under the FAA. 132 S.Ct. at 671-672.

In stark contrast, the right of workers to engage in group actions pursuant to the NLGA and NLRA is not an open question of statutory construction, but rather an NLRB and Supreme Court recognized substantive, settled form of “concerted activity” for mutual aid or protection that Employers cannot interfere with.

Neither the consumers in *CompuCredit*, nor the businesses that sued in *American Express* can point to comparable action by Congress, equivalent to the NLGA and NLRA, that creates and protects their right to band together with other businesses and/or consumers to pursue their common interests.

AT&T Mobility LLC v. Concepcion, 131 S.Ct 1740 (2011)

Concepcion has little, if anything, to do with arbitration in the context of the employer-employee relationship when employees exercise their unwaivable right to engage in “concerted activity.”

Securitas' reliance on *Concepcion, supra* fails to confront the reality that the NLRB has the authority to interpret what constitutes “concerted activity for mutual aid or protection,” and has an unfettered right to determine what constitutes “interference” with concerted activities.

Securitas also ignores the “emphatic” Congressional command that contracts that interfere with concerted activity for mutual aid or protection are contrary to the public policy of the United States and shall not be enforceable in any Court of the United States. 29 U.S.C. § 102 and § 103.

Concepcion is a case in which the Supreme Court held that the FAA’s requirement that courts enforce private arbitration agreements preempted the California Supreme Court’s holding in *Discover Bank v. Superior Court* (2005) 30 Cal. Rptr.3d 76, a case where a state court held that arbitration agreements containing class-action waivers in certain consumer contracts of adhesion were unenforceable. This matter is completely different. Here, Securitas seeks to destroy, on the basis of a contract, decades old Congressionally created statutory rights of employees to engage in concerted activities, including the concerted activity of pursuing class cases without employer interference.

There should be no mistake about how Securitas' position is a radical departure from the manner in which the NLGA and NLRA have been applied in the past. Here, the core issue is whether or not Securitas can buy, with any consideration, such as a raise, individual arbitration promise, a job, or a decent parking space in the employee parking lot, an employee’s agreement not to engage, in the future, in concerted activity. Though instructive with respect to the FAA’s standing in the world of general consumer litigation, the arguments Securitas has fashioned from *Concepcion*, would require that statutory rights of employees be wiped out in order to reach the conclusions they advocate.

“Employer devised agreements that seek to restrict employees from acting in concert with each other are the *raison d’etre* for both the Norris La Guardia Act and Section 7 of the NLRA. The congressional findings giving rise to the NLRA and NLGA plainly state that these

statutes were intended to correct the massive imbalance in bargaining power between the individual worker and his employer. To correct this imbalance, Congress empowered workers to act concertedly for their mutual aid and benefit in the workplace.”

24 Hour Fitness USA, Inc. 2012 WL 549 5007 (NLRB ALJ Decision) (Nov. 16, 2012). In *24 Hour Fitness* 2012 WL 5495007, applying *D.R. Horton* 357 NLRB No. 184 (2012), *Eastex, supra*, *J.I. Case, supra*, and other authority, the NLRB ALJ set aside a class action bar in an arbitration agreement where, as here, employees had the option to opt-out of arbitration.

Securitas' agreements with workers compelling them to give up a future right to seek class relief, in exchange for the right to arbitrate disputes, serves to restore the imbalance between the individual worker and employers that the NLGA and NLRA were intended to eliminate by prohibiting employees from pursuing the resolution of workplace grievances through concerted activity.

“Obviously,” the Court concluded, in *National Licorice, supra* 309 U.S. at 364, “employers cannot set at naught the NLRA by inducing their workmen to agree not to demand performance of the duties which it imposes.” (e.g. the employer duty to refrain from interfering with and restraining employee rights to engage in concerted activities).

The right of workers to engage in class actions pursuant to the NLGA and NLRA is not an open question of statutory construction, but rather an NLRB and Supreme Court recognized settled form of “concerted activity” for mutual aid or protection that Employers cannot interfere with.

In *Horton*, the Board specifically addressed *Concepcion*. The Board found that it did not affect its application of the Act, as it was not holding that employers were *required* to permit, participate in, or be bound by a class-wide or collective

arbitration proceeding. Instead, the Board held only that employers may not compel employees to waive their Section 7 right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. Thus, so long as the employer leaves open some judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class arbitration, and employers remain free to insist that arbitral proceeding be conducted on an individual basis. 357 NLRB No. 184, slip op. at 12.

Permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employee cannot agree to forego the possible future exercise of that right. It therefore follows that prohibiting employers from inducing individual employees to refrain at any time from any form of concerted activity protects the values inherent in the NLRA, without offending those inherent in the FAA. Put another way, requiring an employer to adhere to the NLRA is consistent with the FAA.

As the *Horton* Board made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the NLRA and FAA, "the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLGA and NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute." 357 NLRB No. 184, slip op. at 12, n. 26.

In its Brief in Support of Exceptions, Securitas makes assertions that suggest the FAA is an *Uber* law that is entitled to more dignity and respect than other Federal laws, stating that the Supreme Court has upheld "the supremacy of the FAA

when that statute collides with other federal statutes", "It is no longer a debatable question whether the FAA overrides other Federal statutes, or whether the Board must defer to the FAA," and "[T]here is no doubt that the FAA overrides the NLRA."

Securitas attempts to support the foregoing assertions through its analysis of the Supreme Court cases referenced, *supra*. The holes in this analysis have been set forth above. Of equal significance is the fact that just as there is a strong federal policy favoring arbitration, there is a stronger federal policy supportive of the rights of employees to engage in concerted activity for mutual aid or protection. The fact that the NLRA does not express any language suggesting that the Federal policy of the FAA must give way to the NLRA, is not as significant as the FAA's failure to indicate its policy favoring arbitration trumps any Labor Laws protecting concerted activity. In Section 2 of the FAA, Congress made clear that arbitration agreements that violate public policies, such as those expressed in the NLGA and NLRA, are unenforceable. In contrast, nothing in the NLRA suggests the substantive rights it creates must give way to arbitration agreements.

A Supreme Court assertion that an arbitration agreement must be enforced according to its terms is, as the Supreme Court has agreed, only true so long as those terms do not deprive a contracting party of substantive rights. See *Gilmer, supra*, where arbitration was upheld only because enforcement of the arbitration agreement did not deprive the Plaintiff of a substantive right. The Plaintiff in *Gilmer* failed to make the point that controls here, that Congress intended, and the Supreme Court and Board have held, legal action by and for employees, is a form of concerted activity protected by the NLRA.

Securitas' reliance on the Supreme Court's remand of the *Sonic-Calabassas v. Moreno* 132 S.Ct 496 (2011) case, and its reference to *Circuit City v. Adams* 532 U.S. 105 (2001), and *Penn Plaza LLV v. Pyett* 556 U.S. 247(2009), are all inapposite. None of those cases confronted the issue at the heart of the Board's *Horton analysis*; the interplay between Section 2 of the FAA and an arbitration agreement that precludes non-union employees from engaging in an effective form of concerted activity recognized by the Courts and Board as a protected substantive right embedded in the NLRA and NLGA.

Respondent ends Section A. of its Argument proclaiming the Board must consider the NLRA's policies against the FAA's express policy in favor of arbitration. Such consideration leads to only one result--a finding that Securitas' arbitration agreements cannot be enforced so long as they preclude employees from pursuing group claims in any arbitral or judicial forum.

In the middle of the Great depression Congress declared that individual employees are helpless in dealing with their employers individually, it enacted a law that stated employees shall be free from the interference of employers in engaging in any form of concerted activity for mutual aid or protection, and it declared any promise not to engage in concerted activity as unenforceable. (NLGA). That law was followed by enactment of the NLRA, making any interference with the right to engage in concerted activity unlawful, which in turn was followed by Supreme Court cases finding agreements to refrain from concerted activity, no matter if they were not coerced, unlawful interference, and Board and Court cases finding that efforts at group legal action by employees for employees are protected concerted activity.

Juxtaposing the foregoing, as Securitas implicitly suggests, with the policies of the FAA favoring arbitration, in the face of Section 2 of the FAA, leads to only one logical conclusion, Securitas cannot legally prohibit group litigation by employees for employees in both arbitral and judicial forums through its arbitration agreement without running afoul of the NLRA.

D. THIS CASE IS NOT ABOUT RULE 23

In Section B. of Securitas' Exceptions Brief, Securitas argues that since Rule 23 deals with procedural rights, Charging Parties can waive their right to pursue their claims on behalf of a group of employees. This argument misapprehends charging parties' position. Charging parties are not asserting before the Board that Rule 23 creates a substantive right to pursue class actions, nor contending that a court must certify a class because of the NLRA and NLGA; they are asserting that they cannot be barred, on account of an illegal agreement, from engaging in their Section 7 right to engage in the concerted activity of attempting to vindicate employee rights through group action procedures. Further, Rule 23 analysis does not apply here because the underlying action is not pending in Federal Court, it is pending in State court.

E. THE SUPPOSED "VOLUNTARINESS" OF THE CURRENT EMPLOYEE ARBITRATION AGREEMENT DOES NOT UNDERMINE CHARGING PARTIES' POSITION.

Footnote 28 of the Board's *Horton* decision raised the question of whether or not the consideration, a job, as opposed to another inducement, that could be accepted or rejected without forfeiting an opportunity to continue working, might make a difference in its analysis.

It is clear that the illegality of a contract prohibiting the concerted activity of initiating group action to enforce wage laws on behalf of a group of workers is not dependent on whether or not the consideration for the agreement was a job for new hires of Securitas (condition of employment) as in *D.R. Horton*, a raise in pay, or, for current Securitas employees, the right to engage in individual arbitration.

Obviously, a voluntary agreement between an employer and an employee, wherein the employee voluntarily agrees not to join a union in the future for \$1,000, would run afoul of the NLGA and NLRA. There is no analytical reason to hold otherwise if, in exchange for the right to engage in individual arbitration, an employee agrees not to engage in the future in other forms of concerted activity, other than joining a union---agrees, for example, not to pursue concerted litigation, not to join with others in a judicial or other forum to litigate wage claims.

In *National Licorice Co, supra*, 309 U.S. 350 (1940), the employer encouraged employees to enter into individual contracts through, among other things, the incentive of raises, in exchange for an agreement that they would not present grievances through their own chosen representatives or labor organizations. As in this case, where every employee did not enter into the "contract", the "contract" in *National Licorice Co*, was not a condition of employment for existing employees:

"The Court agreed that the contracts 'were a continuing means of thwarting the policy of the Act *Id. [National Licorice]* at 361. 'Obviously,' the Court concluded, 'employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it [the NLRA] imposes [on employers]: *Id* at 364" *D.R. Horton* at pg. 4.

National Licorice did not indicate that its "inducing" reference only applied to the inducement of employment. In fact, a "raise" was an inducement for the waiver

of Section 7 rights in that case. Consistent with that principle, the Seventh Circuit recognized, long ago, that individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, “constitutes a violation of the [NLRA] per se, *even when they were entered into without coercion.*” *NLRB v. Stone, supra*, 125 F.2d at 756 (emphasis added). See also: *NLRB v. Superior Tanning Co.* 117 F.2d 881, 892 (7th Cir. 1940).

After *National Licorice*, in 1944, the Supreme Court in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) observed that:

Individual contracts *no matter what the circumstances that justify their execution or what their terms*, may not be availed of to defeat or delay the procedures prescribed in the [NLRA]....Wherever private contracts conflict with [the board's] functions [of preventing of unfair labor practices], they obviously must yield or the act would be reduced to a futility. *Id.* at 337 [Emphasis added]

The "no matter what the circumstances" language of *J.I. Case* makes the *voluntariness* of current employee class action waivers herein irrelevant. Securitas cannot take the position that because of the waiver, it can engage in the unfair labor practice of prohibiting employees from engaging in the "core" concerted activity of bringing or participating in group actions.

In *Ishikawa Gasket America, Inc.* 337 NLRB No. 29, the employer paid a worker money in exchange for a promise not to engage in concerted activity in the future. The Board held:

“[T]his separation agreement is overly broad in that it forces Brown [in exchange for payment] to prospectively waive her lawful Section 7 rights. ‘[F]uture rights of employees as well as the rights of the public may not be traded away in this manner.’ [cite omitted].” *Ishikawa, supra* 337 NLRB at 175-176 See also *Bon Harbor Nursing & Rehab Ctr.* 348 NLRB 1062 (2006).

See also D.R. Horton, supra, 357 NLRB No. 184, at 4-5..

Not one word of the FAA conflicts with any of the aforementioned rulings.

The NLRA and NLGA make it illegal, irrespective of whether or not it is a condition of employment, for an employer and an unorganized worker to enter into any contract, let alone an arbitration contract, that would interfere with or restrain the rights of workers to engage, in the future, in class actions for mutual aid and protection.

As *J.I. Case, J.H. Stone & Sons, NLRB v. Stone, National Licorice, and Ishikawa*, make clear, the voluntariness of such agreements, does not render them valid.

The holdings and analysis in these cases, answers the question raised by footnote 28 of *D.R. Horton* cases.

The statutory prohibition of contractual promises or undertakings that interfere with concerted activity for mutual aid and protection, set forth in the NLGA, 29 USC Sec. 101-103 is not modified by any statute or case law that suggests the prohibition is not operative when the promise is not made as a condition of employment. Concerted activity is a core fundamental substantive right that cannot be waived by an individual employee's promise irrespective of the inducement offered by an employer, or circumstances that prompted the waiver promise. *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 33 (1937); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337; (1944) *Ishikawa, supra* 337 NLRB at 175-176; *Bon Harbor Nursing & Rehab Ctr.* 348 NLRB 1062 (2006); *D.R. Horton, supra*, 357 NLRB No. 184, at 4-5; *NLRB v. Stone, supra*, 125 F.2d at 756; *NLRB v. Superior Tanning Co.* 117 F.2d 881, 892 (7th Cir. 1940); *National Licorice Co, supra*, 309 U.S. 350 (1940).

Contrary to Securitas' assertion, there is an analytical difference between the statutory right to "refrain" from engaging in concerted activity, and enforcing a promise to refrain from such activity. An employee has a statutory right to refrain from concerted activity pursuant to the NLGA and NLRA. However, an employee cannot be put in a position, by an employer, to promise to do so. To rule otherwise, would license the reintroduction of "Yellow Dog" contracts where employers elicit promises from employees not to engage in concerted activity, and then effectively enforce those promises. Congress took the bold step of prohibiting employee promises of any type that would interfere with a future choice to refrain or participate in concerted activity, while preserving unfettered employee choice to refrain from concerted activity, for example, joining into a class action that does not appeal to him or her.

III. CONCLUSION

The result reached by the ALJ in this action should not be overturned. The Board should uphold the result, but in doing so, should clearly articulate that irrespective of "voluntariness", any effort by an employer to acquire an employee's promise not to participate in or bring actions for the benefit of co-workers is an unfair labor practice, as is any effort to enforce such promises.

Dated: January 21, 2014

Respectfully Submitted,

/S/

DENNIS F. MOSS
Attorneys for Charging Parties
Walter Linares and Charles Dunaway

Re: SECURITAS 31-CA-072179; 31-CA-072180; 31-CA-088081; 31-CA-088082

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **CHARGING PARTIES BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE GERALD A. WACKNOV'S DECISION** on the parties listed below on the 21st day of JANUARY, 2014.

SERVED VIA E-MAIL

William J. Emanuel
LITTLER MENDELSON,
P.C.
2049 Century Park East, Suite 500
Los Angeles, CA 90067
Telephone: (310) 553-0308

Ira Spiro, Esq.
11377 W. Olympic Blvd., 5th Floor
Los Angeles, CA 90064-1625
Email: ira@spirolawcorp.com

Email: Jeanette@spirolawcorp.com

Rudy Pong-Sandoval
Region 31
National Labor Relations Board
11500 West Olympic Boulevard, Suite 600
Los Angeles, CA 90064
Email: rudy.fong-sandoval@nrlrb.gov



Dennis F. Moss, Attorney for Charging Parties
15300 Ventura Boulevard, Suite 207
Sherman Oaks, CA 91403