

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

FRY'S ELECTRONICS, INC.

and

Case 32-CA-156938

ALEXANDER WARNER, an Individual

**MOTION TO TRANSFER CASE TO THE
BOARD AND MOTION FOR SUMMARY JUDGMENT**

Comes now Counsel for the General Counsel for the National Labor Relations Board (the Board) by the undersigned, and alleges as follows:

1. On July 27, 2015, Alexander Warner, an individual (Charging Party or Warner), filed the unfair labor practice charge in Case 32-CA-156938, alleging that Fry's Electronics, Inc. (Respondent) violated Section 8(a)(1) of the Act by maintaining and enforcing, in pertinent part, a rule prohibiting employees' participation in collective or class actions. A copy of the charge is attached hereto as Exhibit 1.

2. On November 24, 2015, the Regional Director for Region 32 of the Board issued and served a Complaint and Notice of Hearing in Case 32-CA-156938. A copy of the November 24, 2015 Complaint is attached hereto as Exhibit 2. On November 27, 2015, the Acting Regional Director for Region 32 of the Board issued an Errata to the Complaint and Notice of Hearing. A copy of the Errata is attached hereto as Exhibit 3. Thereafter, on December 7, 2015, and January 25, 2016, the Regional Director issued and served an Amended Complaint and Notice of Hearing and Second Amended Complaint and Notice of Hearing, respectively. Copies of the Amended Complaint and Notice of Hearing and Second Amended Complaint and Notice of Hearing are attached hereto as Exhibits 4 and 5, respectively. The Second Amended Complaint alleges that

at all material times, Respondent has required its employees, as a condition of employment, to sign an “Agreement to Arbitrate Disputes Regarding Employment.” A copy of the Arbitration Agreement that Respondent required its employees to sign between approximately September 2012 to February 2014 (the 2012 Arbitration Agreement) is attached as Exhibit A to the Second Amended Complaint and Notice of Hearing. A copy of the Arbitration Agreement that Respondent has required employees to sign from approximately February 2014 to the present and that has been in effect at all material times since January 27, 2015, (the 2014 Arbitration Agreement), is attached as Exhibit B to the Second Amended Complaint and Notice of Hearing. The Second Amended Complaint alleges that Respondent has violated Section 8(a)(1) of the Act by the maintenance of the 2012 Arbitration Agreement and the enforcement of it against Warner, and by maintenance of the 2014 Arbitration Agreement.¹

3. On December 21, 2015, Respondent filed an Answer to the Amended Complaint. A copy of Respondent’s December 21, 2015 Answer to the Amended Complaint is attached hereto as Exhibit 6. On January 26, 2016, Respondent filed an Answer to Second Amended Complaint. A copy of Respondent’s January 25, 2016 Answer to Second Amended Complaint is attached hereto as Exhibit 7. In its Answer to Second Amended Complaint, Respondent admitted, as alleged in the Second Amended Complaint, that: from approximately September 2012 to approximately February 2014, Respondent required its employees, as a condition of employment, to sign the 2012 Arbitration Agreement; from approximately February 2014 to the present, Respondent required its new employees, as a condition of employment, to sign the 2014 Arbitration Agreement; Respondent maintains and enforces the 2012 Arbitration Agreement as a

¹ As reflected in Exhibits A and B to the Second Amended Complaint, the 2012 Arbitration Agreement and the 2014 Arbitration Agreement are nearly identical save for some language regarding service/answer requirements and synonyms that are not determinative to this proceeding.

condition of employment with Respondent; and Respondent maintains the 2014 Arbitration Agreement as a condition of employment with Respondent.

4. In support of this Motion for Summary Judgment, the undersigned notes the following regarding the Second Amended Complaint and Respondent's Answer to Second Amended Complaint herein:

- (a) Respondent's Answer to Second Amended Complaint admits the following paragraphs/portions of the Second Amended Complaint:
 - (1) Paragraph 1. Filing and receipt of the charge;
 - (2) Paragraphs 2(a), 2(b), and 2(c): Jurisdictional facts;
 - (3) Paragraph 3: The conclusion that Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act;
 - (4) Paragraph 4(a): At all material times, since at least January 27, 2015, and continuing to date, Respondent, on a nationwide basis, has maintained and/or enforced, the 2012 Arbitration Agreement, that it required employees, including Warner, to sign, as a condition of their employment, between approximately September 2012 and February 2014;
 - (5) Paragraph 5(a): On about November 6, 2014, Warner filed a class action wage and hour law suit in the Superior Court in the State of California for the County of Contra Costa in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052;
 - (6) Paragraph 5(b): On about November 21, 2014, Respondent sought enforcement of the 2012 Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action claims on an individual basis;
 - (7) Paragraph (5)(c): On about December 23, 2014, Warner filed a first amended complaint in Case No. MSC14-02052, adding, *inter alia*, a claim for civil penalties under the Private Attorney's General Act;

- (8) Paragraph 5(d): Although Respondent denied this paragraph, Respondent admitted that on or about January 27, 2015, Respondent renewed its demand to enforce the 2012 Arbitration Agreement in the Superior Court of California for the County of Contra Costa (“Court”) by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry’s Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and California Labor Code Private Attorney General Act of 2004 derived claims on an individual basis;²
 - (9) Paragraph 6(a): At all material times since at least January 27, 2015, and continuing to date, Respondent, on a nationwide basis, has required employees to sign, as a condition of their employment, the 2014 Arbitration Agreement; and
 - (10) Paragraph 6(b): At all material times since at least January 27, 2015, and continuing to date, Respondent has maintained the 2014 Arbitration Agreement as to its employees nationwide.
- (b) Respondent’s Answer to Second Amended Complaint denies the following paragraphs of the Second Amended Complaint:
- (1) Paragraph 4(b): The legal conclusion that the 2012 Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation;
 - (2) Paragraph 4(c): The legal conclusion that the 2012 Arbitration Agreement interferes with employees’ access to the Board and its processes because it contains language which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board;
 - (3) Paragraph 6(c): The legal conclusion that the 2014 Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation;
 - (4) Paragraph 6(d): The legal conclusion that the 2014 Arbitration Agreement interferes with employees’ access to the Board and its processes because it contains language which employees would

² In its Answer to Second Amended Complaint, Respondent admits nearly all of the exact language of the paragraph 5(d) of the Second Amended Complaint. Its only denial is to the use of the word “concerted” found in the second to last line in paragraph 5(d) of the Second Amended Complaint.

reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board;

- (5) Paragraph 7: The legal conclusion that Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act; and
- (6) Paragraph 8: The legal conclusion that Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. In denying the allegations in Paragraph Nos. 4(b), 4(c), 5, 6(c), 6(d), 7, and 8 of the Second Amended Complaint, Respondent has admitted to each of Counsel for the General Counsel's factual allegations and denies only the legal conclusions to be drawn from the admitted factual allegations set forth above. Consequently, Respondent's admissions and denials do not raise any bona fide issues of fact that preclude the granting of Counsel for the General Counsel's Motion for Summary Judgment.

6. Respondent's maintenance of the 2012 and 2014 Arbitration Agreements, and enforcement of the 2012 Arbitration Agreement, violates Section 8(a)(1) of the Act, as governed by the Board's decisions in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.2d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

In evaluating the legality of an employer's policies and agreements that limit collective and class legal activity in non-union settings, the Board applies the legal framework set forth in *D.R. Horton*, 357 NLRB No. 184, slip op. at 1-7. In *D.R. Horton*, the employer required each employee to execute a mutual arbitration agreement (MAA) as a condition of employment, which precluded them from filing employment-related collective or class claims against their employer. The Board reasoned that policies and agreements like the MAA restrict employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violate

Section 8(a)(1) of the Act. *Id.*, slip op. at 10. Thus, Section 7 vests employees with the right to invoke, without employer coercion or interference, procedures generally available under state or federal law for concerted pursuing employment-related legal claims. *Id.*, at fn. 24; see, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978).

In signing the 2012 and 2014 Arbitration Agreements, employees are forced to essentially waive their right to file collective and class litigation, thereby limiting their ability to engage in collective legal activity. Like the arbitration agreement at issue in *D.R. Horton*, Respondent's 2012 and 2014 Arbitration Agreements plainly restrict employees' Section 7 activities by, as a condition of employment, interfering with their right to participate in collective and class litigation. Indeed, the 2012 and 2014 Arbitration Agreements explicitly state, in relevant part:

Agreement To Arbitrate – [The employee] and [Respondent] hereby agree that any and all disputes and/or controversies that [the employee] has with [Respondent] or [Respondent] has with [employee] arising from or in any way related to [employees'] employment by [Respondent], including but not limited to claims for damages and violations of state, federal and/or local laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims which as a matter of law may not be the subject of arbitration), shall be determined and decided by final and binding arbitration pursuant to the substantive and procedural provisions of the Federal Arbitration Act, and state law to the extent state law would otherwise be applicable, is consistent with the Federal Arbitration Act, and does not preclude or delay arbitration or apply to void or invalidate this Agreement or any portion of this Agreement. This Agreement does not prohibit [the employee] from engaging in concerted activity with other employees as protected by law, and [the employee] will not be subject to discipline or retaliation for engaging in such activity. This Agreement is not intended to prevent [the employee] from filing complaints and/or claims with governmental agencies, commissions, board and/or other bodies of the government. However, this Agreement is not intended to cover such complaints and claims to the extent such coverage is permitted by law. In order to fully benefit from the arbitration process [the employee] and

[Respondent] understand that they are waiving all rights to a court or jury trial and to a government administrative process for all disputes covered by this Agreement.

Initiating the Arbitration Claims may only be brought and maintained in a party's individual capacity, and not as a plaintiff, claimant or class or collective action member in any purported class or representative proceeding or Fair Labor Standard Act ("FLSA") collective action, provided that such restrictions apply only to the extent applicable law permits them.

Pleadings and Procedures – A matter covered by this Agreement shall be resolved by a single neutral arbitrator. The Arbitrator may not preside over any form of a representative or class action proceeding or FLSA collective action otherwise prohibited by this Agreement without the express written consent of the parties.³

7. In *Murphy Oil USA, Inc., supra*, the Board reaffirmed its *D.R. Horton* decision, holding that an employer violates Section 8(a)(1) of the Act by maintaining, and enforcing, a mandatory arbitration agreement that waives employees' right to maintain class or collective actions and requires individual arbitration of employees' legal claims. The Board emphasized the unlawfulness of such agreements because "[f]or almost 80 years, Federal labor law has protected the right of employees to pursue their work-related claims together, i.e., with one another, for the purpose of improving their working conditions." *Murphy Oil USA, Inc., supra*, slip op. at 1. Here, just as in *Murphy Oil USA*, Respondent maintained the unlawful 2012 and 2014 Arbitration Agreements and enforced the 2012 Arbitration Agreement on the Charging Party. In this regard, it is undisputed that, from approximately September 2012 to February 2014, Respondent required all employees to sign the 2012 Arbitration Agreement at the time of their hire. It is further undisputed that from approximately February 2014 to the present, Respondent required all employees to sign the 2014 Arbitration Agreement at their time of their

³ See Exhibit 5.

hire. Respondent concedes that it maintains the unlawful 2012 and 2014 Arbitration Agreements and further admits that it enforced the 2012 Arbitration Agreement on the Charging Party.

The 2012 and 2014 Arbitration Agreements require that employees waive their right to bring class complaints, and there can be no doubt that this irrevocable and binding agreement becomes a condition of employment once signed by an employee. Indeed, Respondent has admitted that the 2012 and 2014 Arbitration Agreements are a mandatory term and condition of their employment.

In executing the Arbitration Agreements, employees are prohibited from bringing claims for damages or violation of State or Federal law. Upon execution of the Arbitration Agreements by employees, Respondent can thereafter preclude employees' exercise of Section 7 rights to engage in collective legal activity and employees can reasonably expect that they may be disciplined as well as face legal action if they breach the Arbitration Agreement. Thus, once executed, the Arbitration Agreements completely extinguish employees' Section 7 right to choose to act concertedly or individually in any future legal dispute with Respondent.

Therefore, Respondent's maintenance of the 2012 and 2014 Arbitration Agreements, and enforcement of the 2014 Arbitration Agreement violate Section 8(a)(1) of the Act.

8. The 2012 and 2014 Arbitration Agreements further violate Section 8(a)(1) of the Act as an employee could reasonably interpret the 2012 and 2014 Arbitration Agreements to preclude or restrict access to the Board.

When work rules and policies, such as those contained in the 2012 and 2014 Arbitration Agreements, are alleged to violate Section 8(a)(1) of the Act, the Board's task is to determine how a reasonable employee would interpret the policy and whether the policy would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights. See

Cellular Sales of Missouri, LLC, 362 NLRB No. 27, slip op. at 1, fn. 4 (2015); see also *Lutheran Heritage Village-Livonia*, 343 NLRB 641 (2004).

In *Cellular Sales of Missouri*, the Board found that a work rule that is a condition of employment, such as the 2012 and 2014 Arbitration Agreements here, is unlawful if employees would reasonably believe that it interferes with their ability to file a Board charge or access to the Board's processes, even if the rule or policy does not expressly prohibit access to the Board. *Cellular Sales of Missouri*, supra at 1, fn. 4. Thus, the standard is an objective one and does not require evidence of actual coercion or interference. Moreover, any ambiguities in an allegedly unlawful work rule must be construed against the drafter of the agreement. See *Supply Technologies, LLC*, 359 NLRB No. 39, slip op. at 3 (2012); see also *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

Here, the 2012 and 2014 Arbitration Agreements state that they are not intended to prevent employees from filing complaints with governmental agencies, boards, or other governmental bodies. However, the 2012 and 2014 Arbitration Agreements further state that employees are "waiving all rights to a court or jury trial and to government administrative process for all disputes" covered by the 2012 and 2014 Arbitration Agreements. While the first sentence seemingly allows employee access to the Board, the second sentence clearly and unequivocally forces employees to waive their right to access the Board and Board proceedings. Thus, an employee would reasonably conclude that the 2012 and 2014 Arbitration Agreements restrict the filing of an unfair labor practice charge against Respondent with the Board—a federal administrative agency.

Given these conflicting provisions, Respondent's 2012 and 2014 Arbitration Agreements are, at best, ambiguous and confusing as to whether employees are permitted to file

charges with the Board, and, at worst, prohibit employees' exercise of these Section 7 rights by making employees believe that they are so restricted. In either case, it is evident that employees would reasonably construe that both the 2012 and 2014 Arbitration Agreements require arbitration of NLRA claims and, thus, the 2012 and 2014 Arbitration Agreements discourage employees from utilizing the Board's processes. See *P.J. Cheese, Inc.*, 362 NLRB No. 177 slip op. at 2, fn. 6 (2015).

Therefore, the 2012 and 2014 Arbitration Agreements violate Section 8(a)(1) of the Act because they preclude Respondent's employees from access to the Board.

9. The Board should not give credence to Respondent's First Affirmative Defense in its Answer to Second Amended Complaint, that this matter is time barred by Section 10(b) of the Act. Where a violation occurs more than six months prior to the filing of the unfair labor practice charge but the alleged violation is of a continuous nature, then the charge will not be time barred by Section 10(b). See *North American Pipe Corp.*, 347 NLRB 836 n.10 (2006). A violation is considered continuous, and thus not time barred by Section 10(b) of the Act, when an employer commits an unfair labor practice outside the 10(b) period that continues during the 10(b) period. See *Media General Operations, Inc.*, 346 NLRB 74, 78 (2005). To that end, the Board has long held that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated. See, e.g., *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015). Thus, the fact that the 2012 and 2014 Arbitration Agreements were promulgated outside the 10(b) period is of no import. Respondent has admittedly maintained the 2012 Arbitration Agreement and 2014 Arbitration Agreement and sought enforcement of the 2012 Arbitration Agreement all within the 10(b) period. Therefore, the underlying unfair labor practice charge herein is timely.

10. In its Second Affirmative Defense to the Second Amended Complaint, Respondent argues that the complaint fails to allege facts sufficient to state a claim by which relief may be granted. Contrary to this unfounded assertion, the Board may find that the 2012 and 2014 Arbitration Agreements are unlawful as alleged in the Second Amended Complaint and order Respondent to post a Notice to Employees thereby affirming employees' rights under the Act.

11. In Affirmative Defense Nos. 3, 9 – 11, 14, 15, 21, and 23, Respondent essentially asserts that the Board lacks jurisdiction in this type of matter and/or that the Second Amended Complaint is not supported by case law. As noted above, the Board has consistently held that the maintenance of an agreement that prohibits class or collective litigation violates the Act. See *D.R. Horton*, supra; *Murphy Oil*, supra. Moreover, the Board dealt with and rejected these arguments, including the argument that *D.R. Horton* was inconsistent with the Federal Arbitration Act, in *Murphy Oil USA*, supra. The simple response is that this is the controlling Board authority until it is reversed by the Supreme Court. See *Waco, Inc.*, supra at 749 fn. 14; see also *Los Angeles New Hosp.*, 244 NLRB 960, 962, fn. 4 (1979), enf'd 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). As recently as December 31, 2015, the Board reaffirmed the principles set forth in *D.R. Horton* and *Murphy Oil* in *GameStop Corp.*, 363 NLRB No. 89 (2015).

12. Respondent's Affirmative Defense No. 4--that the Second Amended Complaint is not based on protected concerted activity--is equally unavailing. As noted in the above-referenced cases, an employer violates Section 8(a)(1) Act by maintaining and/or enforcing rules which infringe upon an employees' rights to collective and class action complaints and/or which restrict employees' access to the Board's processes.

13. In Affirmative Defense Nos. 5 and 6- 8, Respondent essentially argues that the Act does not provide a right to pursue class and collective actions. While this is likely premised on Respondent's belief that *D.R. Horton* and *Murphy Oil USA* were incorrectly decided, it is nonetheless an incorrect assertion as the Board has long held that collective actions are considered protected activity within the meaning of the Act. See *Harco Trucking, LLC*, 344 NLRB 478, 482 (2005). Similarly, Respondent's related arguments in Affirmative Defense Nos. 6-8--that employees have the choice to refrain from collective actions--are without merit. Plainly, a decision that rests with the employee cannot be mandated by its employer in the form a mandatory term and condition of employment. *Murphy Oil USA, supra*.

14. Respondent's arguments in Affirmative Defense Nos. 12 and 13 to the Second Amended Complaint do not raise any material issue of fact or law. In this regard, if the Board finds that that Respondent violated the Act as alleged in the Second Amended Complaint, Respondent will still have access to the courts via the Board and appellate process, which will in turn afford Respondent due process. Similarly, Respondent cannot hide behind its First Amendment argument. The Board has previously addressed this issue and held that an employer cannot shield itself from violating Section 8(a)(1) of the Act, by claiming the First Amendment to the United States Constitution, where it seeks to enforce an arbitration clause against an individual because in doing so, the employer has an illegal objective of seeking to enforce an unlawful contract provision. See *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 737 n.5 (1983).

15. In Affirmative Defense No. 16, Respondent claims that the 2012 and 2014 Arbitration Agreements are not reasonably interpreted as precluding Section 7 activity. To the contrary, and as discussed at length above, the clear and unambiguous language of the 2012 and

2014 Arbitration Agreements force Respondent's employees to unlawfully waive their Section 7 right to collective and class litigation. These Agreements can reasonably be read by its employees to preclude their access to the Board.

16. In Affirmative Defense No. 17 to the Second Amended Complaint, Respondent argues that the Arbitration Agreement is not intended to prevent the filing of complaints and/or claims with governmental agencies. However, this assertion is directly contradicted by the 2012 and 2014 Arbitration Agreements' own language that not only bars a collective complaint, but forces employees to waive their right to court trials and administrative processes for all disputes covered under the Agreements. Such a rule interferes with Section 7 rights and access to the Board. As discussed by the United States Supreme Court, Section 7's "mutual aid or protection" clause covers employees who seek to improve working conditions by resorting to administrative and judicial forums. *See Eastex v. NLRB*, 437 U.S. at 566.

17. In Affirmative Defense No. 18, Respondent essentially argues that all ambiguities should be construed in its favor and that employees should understand that they are not precluded from filing charges with the Board. Respondent's attempt to parse out the unlawful portions of the 2012 and 2014 Arbitration Agreements is an attorney's sophisticated attempt to have it both ways, but this sophistry runs afoul of the Board's traditional policy disfavoring such attempts to mislead employees with legalese. It should, therefore, be found that the conflicting provisions in the 2012 and 2014 Arbitration Agreements create an ambiguity that could reasonably lead employees to believe that their right to file collective and class legal complaints, as well as unfair labor practice charges with the Board, are prohibited or restricted.

18. In Affirmative Defense Nos. 19 and 20 to the Second Amended Complaint, Respondent argues that the Board lacks the authority to interpret contractual language. Again,

Respondent's argument misses the point. First, putting aside the interpretation issue, the 2012 and 2014 Arbitration Agreements' plain and unambiguous language restrict employees from filing collective and class legal actions. Therefore, they are unlawful. Moreover, and as noted above, based on Board precedent, a reasonable employee would construe the relevant portions of the 2012 and 2014 Arbitration Agreements as restricting their rights to file collective and class actions and to take part in Board proceedings. Such activities are rights guaranteed under Section 7 of the Act and the restriction thereof violated Section 8(a)(1) of the Act. See *Harco Trucking, LLC*, 344 NLRB at 482.

19. Finally, in Affirmative Defense Nos. 22, and 24 – 25 to the Second Amended Complaint, Respondent argues that the remedies requested in the Second Amended Complaint are impermissible. Noticeably lacking any case authority for this proposition, Respondent's arguments lack merit. Counsel for the General Counsel merely seeks revocation of the unlawful rule, restoration of the *status quo ante*, and that Respondent make the Charging Party whole for litigation expenses incurred in opposing the Arbitration Agreement's unlawful provisions. These standard remedies are wholly consistent with Board policies, practice, and precedent regarding the violations in these cases.

20. Where, as here, there are no factual issues warranting a hearing, it has long been the practice of the Board to grant Summary Judgment. *Henderson Trumbell Supply Co.*, 205 NLRB No. 8 (1973); see also *Richmond, Division of Pak-Well*, 206 NLRB No. 42 (1973); *Tri-City Linen Supply*, 226 NLRB No. 98 (1976). Accordingly, as outlined in the Second Amended Complaint, the General Counsel seeks to remedy the legal consequences of Respondent's maintenance of its unlawful policies contained in the 2012 and 2014 Arbitration Agreements and its enforcement of the 2012 Arbitration Agreement, and to return employees to

the *status quo ante* in accordance with the Board's standard rescission, notice posting, and make-whole requirements.

WHEREFORE, in view of the matters set forth above, and upon consideration of the documents attached hereto and incorporated in this Motion, and as Respondent's Amended Answer to Second Amended Complaint raises no issues of fact or law requiring a hearing in this proceeding, the undersigned prays that the Board find and conclude that Respondent has violated Section 8(a)(1) of the Act and that it issue a Decision and Order in conformity with the allegations in the Complaint.

DATED AT Oakland, California this 29th day of January 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Noah J. Garber/c.v.". The signature is written in a cursive style and is underlined.

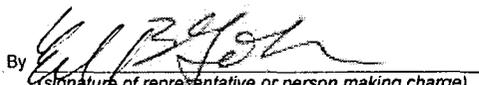
Noah J. Garber
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300 N
Oakland, CA 94612-5224

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER**DO NOT WRITE IN THIS SPACE**

Case 32-CA-156938	Date Filed 07/27/2015
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INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Fry's Electronics, Inc. (multiple locations, including in Region 20)	b. Tel. No. (408) 487-4748
	c. Cell No.
	f. Fax No. (408) 852-3316
d. Address (Street, city, state, and ZIP code) 600 East Brokaw Road San Jose, CA 95112	e. Employer Representative John Castro
	g. e-Mail jpc@i.frys.com
	h. Number of workers employed
i. Type of Establishment (factory, mine, wholesaler, etc.) retail	j. Identify principal product or service electronics sales
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Within the past six months, the Employer has required and continues to require employees to execute an arbitration agreement as a condition of employment that requires employees to waive their right to bring class, collective, or representative claims in any forum; and that requires employees to waive their right to pursue charges before the NLRB. Within the past six months, the Employer has enforced this Agreement against employee Alexander Warner to preclude him from asserting minimum wage claims on a class basis in Warner v. Fry's Electronics, Inc., Contra Costa Superior Court Case No. MSC 14-02052. Charging party requests an order that the Employer rescind the Agreement, cease and desist from requiring employees to sign the Agreement as a condition of employment, cease and desist from seeking to the Agreement against Mr. Warner in the Contra Costa Superior Court litigation, and pay Mr. Warner's reasonable attorneys' fees and expenses for opposing that effort.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Alexander Warner	
4a. Address (Street and number, city, state, and ZIP code) c/o Eileen Goldsmith Altshuler Berzon LLP 177 Post St., Suite 300 San Francisco, CA 94108	4b. Tel. No. (415) 421-7151
	4c. Cell No.
	4d. Fax No. (415) 362-8064
	4e. e-Mail egoldsmith@altber.com
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) n/a	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  (signature of representative or person making charge)	Eileen Goldsmith, atty. for charging party (Print/type name and title or office, if any)
177 Post St., Suite 300, San Francisco, CA 94108	
7/27/15 (date)	
Tel. No. (415) 421-7151	
Office, if any, Cell No.	
Fax No. (415) 362-8064	
e-Mail egoldsmith@altber.com	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit 1

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

and

Case 32-CA-156938

ALEXANDER WARNER, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Alexander Warner, an Individual (Warner or Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that FRY'S ELECTRONICS, INC. (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by the Charging Party on July 27, 2015, and a copy was served on Respondent by U.S. mail on July 27, 2015 by the Charging Party and on July 29, 2015 by Region 32.

2.

(a) At all material times, Respondent, a California corporation with its corporate office located in San Jose, California, has been engaged in the retail sale of electronics and other household goods at retail stores nationwide, including a retail store in Concord, California.

(b) In conducting its operations during the 12-month period ending November 30, 2014, Respondent derived gross revenues in excess of \$500,000.

(c) During the period of time described above in paragraph 2(b), Respondent purchased and received at its Concord, California retail store facility goods valued in excess of \$5,000 directly from points outside the State of California.

3.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

(a) At all material times since at least January 27, 2014, and continuing to date, Respondent, on a nationwide basis, has promulgated to its employees at the time of their hire and required them to sign an “Agreement to Arbitrate Disputes Regarding Employment” (the Arbitration Agreement). A copy of the Arbitration Agreement is attached hereto as Exhibit A.

(b) The Arbitration Agreement specifically informs Respondent’s employees that they are bound to the Arbitration Agreement as a condition of their employment with Respondent.

(c) At all material times since at least January 27, 2014, and continuing to date, Respondent has maintained and/or enforced the Arbitration Agreement as to its employees nationwide, including Warner.

(d) The Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation.

(e) The Arbitration Agreement interferes with employees’ access to the Board and its processes because it contains language which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

5.

(a) On about November 6, 2014, Warner filed a class action wage and hour law suit in the Superior Court in the State of California for the County of Contra Costa in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052.

(b) On about November 21, 2014, Respondent sought enforcement of the Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action claims on an individual basis.

(c) On about December 23, 2014, Warner filed a first amended complaint in Case No. MSC14-02052, adding, *inter alia*, a claim for civil penalties under the Private Attorney's General Act (PAGA).

(d) On about January 27, 2015, Respondent renewed its demand to enforce the Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and concerted representative PAGA claims on an individual basis.

6.

(c) On about March 11, 2015, the Superior Court in the State of California for the County of Contra Costa ruled in an Order granting Respondent's Petition to Compel Arbitration that the waiver of class, collective, and representative claims in the Arbitration Agreement was enforceable against Warner and ordered that he proceed to arbitration on an individual basis.

The Court also ordered that Warner's PAGA claims be stayed until the conclusion of the arbitration of his individual claims.

7.

By the conduct described above in paragraphs 4, 5(b), and 5(d), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as a part of the remedy for the unfair labor practices alleged in paragraphs 4, 5(b), and 5(d), Respondent should be ordered to rescind the Arbitration Agreement in all of its forms on a nationwide basis to make clear to employees that the Arbitration Agreement does not constitute a waiver of their right to maintain employment-related class or collective actions in all forums, and that it does not restrict employees' rights to file charges with the Board.

As an additional remedy for the unfair labor practices alleged in paragraphs 4, 5(b), and 5(d), Respondent should be ordered to notify all applicants and current and former employees on a nationwide basis who were required to sign the Arbitration Agreement in any form that the Arbitration Agreement has been rescinded or revised, and if revised, provide them with a copy of the revised agreement. Further, in view of the fact that Respondent has, on a nationwide basis, promulgated to employees and required employees to sign the Arbitration Agreement, General Counsel seeks that Respondent be required to post at its retail store in Concord, California, and at

all of its other retail stores in the United States, any Notice to Employees that may issue in this proceeding.

The General Counsel further seeks, as a remedy for the unfair labor practices alleged in paragraphs 4, 5(b), and 5(d), that Respondent be required to reimburse Warner for any litigation expenses, including attorneys' fees, directly related to opposing the Petitions to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in the Superior Court in the State of California for the County of Contra Costa, or any other legal action taken to enforce the Arbitration Agreement's prohibition of class, collective, and concerted representative actions. In addition, the General Counsel seeks an order requiring Respondent to file a Motion to Vacate the March 11, 2015, Order Granting Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052 in the Superior Court in the State of California for the County of Contra Costa, provided that a Motion to Vacate can still be timely filed.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before February 8, 2016, or postmarked on or before February 7, 2016.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number,

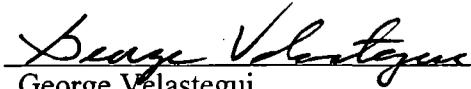
and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on February 16, 2016, at 9:00 a.m. at 1301 Clay Street, Suite 300-N, Oakland, California 94612-5224, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the

right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 24th day of November 2015.



George Velastegui
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS, INC.

and

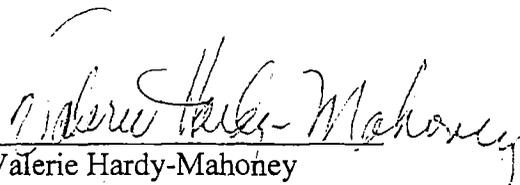
Case 32-CA-156938

ALEXANDER WARNER, an Individual

ERRATA TO COMPLAINT AND NOTICE OF HEARING

The Complaint and Notice of Hearing that issued on November 24, 2015 set forth incorrect answer dates. The answer must be received by this office **on or before December 8, 2015, or postmarked on or before December 7, 2015.**

DATED AT Oakland, California this 27th day of November 2015.


Valerie Hardy-Mahoney
Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

and

Case 32-CA-156938

ALEXANDER WARNER, an Individual

AMENDED COMPLAINT AND NOTICE OF HEARING

This Amended Complaint and Notice of Hearing is based on a charge filed by Alexander Warner, an Individual (Warner or Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that FRY'S ELECTRONICS, INC. (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by the Charging Party on July 27, 2015, and a copy was served on Respondent by U.S. mail on July 27, 2015 by the Charging Party and on July 29, 2015 by Region 32.

2.

(a) At all material times, Respondent, a California corporation with its corporate office located in San Jose, California, has been engaged in the retail sale of electronics and other household goods at retail stores nationwide, including a retail store in Concord, California.

(b) In conducting its operations during the 12-month period ending November 30, 2014, Respondent derived gross revenues in excess of \$500,000.

(c) During the period of time described above in paragraph 2(b), Respondent purchased and received at its Concord, California retail store facility goods valued in excess of \$5,000 directly from points outside the State of California.

3.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

(a) At all material times since at least January 27, 2015, and continuing to date, Respondent, on a nationwide basis, has required employees to sign at the time of their hire an “Agreement to Arbitrate Disputes Regarding Employment” (the Arbitration Agreement). A copy of the Arbitration Agreement is attached hereto as Exhibit A.

(b) The Arbitration Agreement specifically informs Respondent’s employees that they are bound to the Arbitration Agreement as a condition of their employment with Respondent.

(c) At all material times since at least January 27, 2015, and continuing to date, Respondent has maintained and/or enforced the Arbitration Agreement as to its employees nationwide, including Warner.

(d) The Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation.

(e) The Arbitration Agreement interferes with employees’ access to the Board and its processes because it contains language which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

5.

(a) On about November 6, 2014, Warner filed a class action wage and hour law suit in the Superior Court in the State of California for the County of Contra Costa in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052.

(b) On about November 21, 2014, Respondent sought enforcement of the Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action claims on an individual basis.

(c) On about December 23, 2014, Warner filed a first amended complaint in Case No. MSC14-02052, adding, *inter alia*, a claim for civil penalties under the Private Attorney's General Act (PAGA).

(d) On about January 27, 2015, Respondent renewed its demand to enforce the Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and concerted representative PAGA claims on an individual basis.

6.

By the conduct described above in paragraphs 4 and 5(d), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

7.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as a part of the remedy for the unfair labor practices alleged in paragraphs 4 and 5(d), Respondent should be ordered to rescind the Arbitration Agreement in all of its forms on a nationwide basis to make clear to employees that the Arbitration Agreement does not constitute a waiver of their right to maintain employment-related class or collective actions in all forums, and that it does not restrict employees' rights to file charges with the Board.

As an additional remedy for the unfair labor practices alleged in paragraphs 4 and 5(d), Respondent should be ordered to notify all applicants and current and former employees on a nationwide basis who were required to sign the Arbitration Agreement in any form that the Arbitration Agreement has been rescinded or revised, and if revised, provide them with a copy of the revised agreement. Further, in view of the fact that Respondent has, on a nationwide basis, required employees to sign the Arbitration Agreement, General Counsel seeks that Respondent be required to post at its retail store in Concord, California, and at all of its other retail stores in the United States, any Notice to Employees that may issue in this proceeding.

The General Counsel further seeks, as a remedy for the unfair labor practices alleged in paragraphs 4 and 5(d) that Respondent be required to reimburse Warner for any litigation expenses, including attorneys' fees, directly related to opposing the January 27, 2015 Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in the Superior Court in the State of California for the County of Contra Costa,

or any other legal action taken to enforce the Arbitration Agreement's prohibition of class, collective, and concerted representative actions.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Amended Complaint. The answer must be **received by this office on or before December 21, 2015, or postmarked on or before December 20, 2015.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

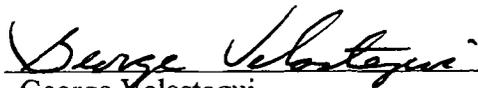
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a

pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **February 16, 2016**, at **9:00 a.m.** at 1301 Clay Street, Suite 300-N, Oakland, California 94612-5224, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Amended Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 7th day of December 2015.



George Velastegui
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

(Must be Sent To the Benefits Services Department at the Home Office Via Courier Mail)

AGREEMENT TO ARBITRATE DISPUTES REGARDING EMPLOYMENT

1. Agreement To Arbitrate - "Associate" (identified below) and Fry's Electronics, Inc., hereinafter referred to as "Employer," hereby agree that any and all disputes and/or controversies that Associate has with Employer or Employer has with Associate (and disputes and/or controversies between Associate and other current or former employees or agents of Employer and entities legally related to Employer) arising from or in any way related to Associate's employment by Employer, including but not limited to claims for damages and violations of state, federal and/or local laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims which as a matter of law may not be the subject of arbitration), shall be determined and decided by final and binding arbitration pursuant to the substantive and procedural provisions of the Federal Arbitration Act, and state law to the extent state law would otherwise be applicable, is consistent with the Federal Arbitration Act, and does not preclude or delay arbitration or apply to void or invalidate this Agreement or any portion of this Agreement. This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity. This Agreement is not intended to prevent Associate from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government. However, this Agreement is intended to cover such complaints and claims to the extent such coverage is permitted by law. In order to fully benefit from the arbitration process, Associate and Employer understand that they are waiving all rights to a court or jury trial and to a government administrative process for all disputes covered by this Agreement. Venue for the arbitration shall be in Santa Clara County, California, or if Associate lives more than 50 miles from said county, within 50 miles of the location at which Associate last worked for Employer. Venue may be different as necessary in multi-party cases.
2. Initiating the Arbitration To initiate an arbitration, a requesting party shall submit a written notice ("Demand") to the other party. The Demand shall be submitted to Associate at his/her last address on file with Employer's Benefits Services Department, and to Employer at the following address: Fry's Electronics, Inc.; Legal Department; 600 E. Brokaw Road; San Jose, CA 95112. Alternatively, the Demand may be submitted to an attorney representing the opposing party regarding the dispute. Submission of a Demand may be made by personal or mail delivery and is effective upon delivery. A Demand from a party asserting a claim shall include the names, addresses, and telephone numbers of the parties, a statement of the nature of the dispute, and the remedy sought. A party asserting a claim shall submit the Demand within one year of the date when the claim arose. However, if the claim arises under a statute or regulation providing for a longer time to file a claim, the limitations period applicable to that statute or regulation shall govern if the afore-stated one-year period is not enforceable under applicable law. Litigating or otherwise pursuing a claim in a forum other than arbitration does not satisfy the requirement of submitting a Demand and shall not toll any time limits set forth herein, unless applicable law requires otherwise. If a claim covered by this Agreement is asserted in a forum other than arbitration under this Agreement, the party against whom the claim is made shall submit the Demand within the time permitted by law. Claims may only be brought and maintained in a party's individual capacity, and not as a plaintiff, claimant or class or collective action member in any purported class or representative proceeding or Fair Labor Standards Act ("FLSA") collective action, provided that such restrictions apply only to the extent applicable law permits them.
3. Pleadings and Procedures - A matter covered by this Agreement shall be resolved by a single neutral arbitrator. The Arbitrator shall be selected by agreement of Associate and Employer, or by order of the court if Associate and Employer cannot agree. The Arbitrator may not preside over any form of a representative or class proceeding or FLSA collective action otherwise prohibited by this Agreement without the express written consent of the parties. Neither this Agreement nor an agreement to arbitrate before a particular arbitration provider shall be interpreted to constitute such written consent. A party may respond to a claim by filing an Answer, Demurrer, Motion to Strike, Motion to Dismiss, and/or Counterclaim. The Arbitrator shall rule on

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

And

Case 32-CA-156938

ALEXANDER WARNER, an Individual

SECOND AMENDED COMPLAINT AND NOTICE OF HEARING

This Second Amended Complaint and Notice of Hearing is based on a charge filed by Alexander Warner, an Individual (Warner or Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that FRY'S ELECTRONICS, INC. (Respondent) has violated the Act as described below.

1.

The charge in this proceeding was filed by the Charging Party on July 27, 2015, and a copy was served on Respondent by U.S. mail on July 27, 2015 by the Charging Party and on July 29, 2015 by Region 32.

2.

(a) At all material times, Respondent, a California corporation with its corporate office located in San Jose, California, has been engaged in the retail sale of electronics and other household goods at retail stores nationwide, including a retail store in Concord, California.

(b) In conducting its operations during the 12-month period ending November 30, 2014, Respondent derived gross revenues in excess of \$500,000.

(c) During the period of time described above in paragraph 2(b), Respondent purchased and received at its Concord, California retail store facility goods valued in excess of \$5,000 directly from points outside the State of California.

3.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4.

(a) At all material times, since at least January 27, 2015, and continuing to date, Respondent, on a nationwide basis, has maintained and/or enforced, an “Agreement to Arbitrate Disputes Regarding Employment,” that it required employees, including Warner, to sign, as a condition of their employment, between approximately September 2012 and February 2014. A copy of the Arbitration Agreement Respondent required employees to sign between approximately September 2012 and February 2014 (the 2012 Arbitration Agreement) is attached hereto as Exhibit A.

(b) The 2012 Arbitration Agreement interferes with employees’ Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation.

(c) The 2012 Arbitration Agreement interferes with employees’ access to the Board and its processes because it contains language which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

5.

(a) On about November 6, 2014, Warner filed a class action wage and hour law suit in the Superior Court in the State of California for the County of Contra Costa in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052.

(b) On about November 21, 2014, Respondent sought enforcement of the 2012 Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action claims on an individual basis.

(c) On about December 23, 2014, Warner filed a first amended complaint in Case No. MSC14-02052, adding, *inter alia*, a claim for civil penalties under the Private Attorney's General Act (PAGA).

(d) On about January 27, 2015, Respondent renewed its demand to enforce 2012 the Arbitration Agreement in the Superior Court in the State of California for the County of Contra Costa by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and concerted representative PAGA claims on an individual basis.

6.

(a) At all material times since at least January 27, 2015, and continuing to date, Respondent, on a nationwide basis, has required employees to sign, as a condition of their employment, an "Agreement to Arbitrate Disputes Regarding Employment." A copy of the

Arbitration Agreement in effect from approximately February 2014 to the present (the 2014 Arbitration Agreement) is attached hereto as Exhibit B.

(b) At all material times since at least January 27, 2015, and continuing to date, Respondent has maintained the 2014 Arbitration Agreement as to its employees nationwide.

(c) The 2014 Arbitration Agreement interferes with employees' Section 7 rights to engage in collective legal activity by binding employees to a waiver of their rights to participate in collective and class litigation.

(d) The 2014 Arbitration Agreement interferes with employees' access to the Board and its processes because it contains language which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board.

7.

By the conduct described above in paragraphs 4, 5(d), and 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

8.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as a part of the remedy for the unfair labor practices alleged in paragraphs 4, 5(d), and 6, Respondent should be ordered to rescind the 2012 Arbitration Agreement and the 2014 Arbitration Agreement in all of their forms on a nationwide basis to make clear to employees that 2012 Arbitration Agreement and the 2014 Arbitration Agreement do not constitute a waiver of their right to maintain employment-related class or collective

actions in all forums, and that they do not restrict employees' rights to file charges with the Board.

As an additional remedy for the unfair labor practices alleged in paragraphs 4, 5(d) and 6, Respondent should be ordered to notify all applicants and current and former employees on a nationwide basis who were required to sign the 2012 Arbitration Agreement and the 2014 Arbitration Agreement in any form that the 2012 Arbitration Agreement and the 2014 Arbitration Agreement have been rescinded or revised, and if revised, provide them with a copy of the revised agreements. Further, in view of the fact that Respondent has, on a nationwide basis, required employees to sign the 2012 Arbitration Agreement and the 2014 Arbitration Agreement, General Counsel seeks that Respondent be required to post at its retail store in Concord, California, and at all of its other retail stores in the United States, any Notice to Employees that may issue in this proceeding.

The General Counsel further seeks, as a remedy for the unfair labor practices alleged in paragraphs 4 and 5(d) that Respondent be required to reimburse Warner for any litigation expenses, including attorneys' fees, directly related to opposing the January 27, 2015 Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry's Electronics, Inc., et al.*, Case No. MSC14-02052, in the Superior Court in the State of California for the County of Contra Costa, or any other legal action taken to enforce the 2012 Arbitration Agreement's prohibition of class, collective, and concerted representative actions.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Second Amended Complaint. The answer must be **received by this office on or before February 8, 2016, or postmarked on or before February 8, 2016.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

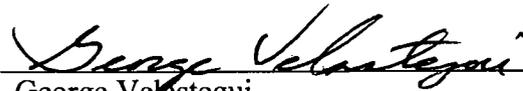
An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or

if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Second Amended Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **February 29, 2016**, at **9:00 a.m.** at 1301 Clay Street, Suite 300-N, Oakland, California 94612-5224, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this Second Amended Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 25th day of January 2016.



George Velastegui
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

(Must be Sent To the Benefits Services Department at the Home Office Via Courier Mail)

AGREEMENT TO ARBITRATE DISPUTES REGARDING EMPLOYMENT

1. Agreement To Arbitrate - "Associate" (identified below) and Fry's Electronics, Inc., hereinafter referred to as "Employer," hereby agree that any and all disputes and/or controversies that Associate has with Employer or Employer has with Associate (and disputes and/or controversies between Associate and other current or former employees or agents of Employer and entities legally related to Employer) arising from or in any way related to Associate's employment by Employer, including but not limited to claims for damages and violations of state, federal and/or local laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims which as a matter of law may not be the subject of arbitration), shall be determined and decided by final and binding arbitration pursuant to the substantive and procedural provisions of the Federal Arbitration Act, and state law to the extent state law would otherwise be applicable, is consistent with the Federal Arbitration Act, and does not preclude or delay arbitration or apply to void or invalidate this Agreement or any portion of this Agreement. This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity. This Agreement is not intended to prevent Associate from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government. However, this Agreement is intended to cover such complaints and claims to the extent such coverage is permitted by law. In order to fully benefit from the arbitration process, Associate and Employer understand that they are waiving all rights to a court or jury trial and to a government administrative process for all disputes covered by this Agreement. Venue for the arbitration shall be in Santa Clara County, California, or if Associate lives more than 50 miles from said county, within 50 miles of the location at which Associate last worked for Employer. Venue may be different as necessary in multi-party cases.

2. Initiating the Arbitration To initiate an arbitration, a requesting party shall submit a written notice ("Demand") to the other party. The Demand shall be submitted to Associate at his/her last address on file with Employer's Benefits Services Department, and to Employer at the following address: Fry's Electronics, Inc.; Legal Department; 600 E. Brokaw Road; San Jose, CA 95112. Alternatively, the Demand may be submitted to an attorney representing the opposing party regarding the dispute. Submission of a Demand may be made by personal or mail delivery and is effective upon delivery. A Demand from a party asserting a claim shall include the names, addresses, and telephone numbers of the parties, a statement of the nature of the dispute, and the remedy sought. A party asserting a claim shall submit the Demand within one year of the date when the claim arose. However, if the claim arises under a statute or regulation providing for a longer time to file a claim, the limitations period applicable to that statute or regulation shall govern if the afore-stated one-year period is not enforceable under applicable law. Litigating or otherwise pursuing a claim in a forum other than arbitration does not satisfy the requirement of submitting a Demand and shall not toll any time limits set forth herein, unless applicable law requires otherwise. If a claim covered by this Agreement is asserted in a forum other than arbitration under this Agreement, the party against whom the claim is made shall submit the Demand within the time permitted by law. Claims may only be brought and maintained in a party's individual capacity, and not as a plaintiff, claimant or class or collective action member in any purported class or representative proceeding or Fair Labor Standards Act ("FLSA") collective action, provided that such restrictions apply only to the extent applicable law permits them.

3. Pleadings and Procedures - A matter covered by this Agreement shall be resolved by a single neutral arbitrator. The Arbitrator shall be selected by agreement of Associate and Employer, or by order of the court if Associate and Employer cannot agree. The Arbitrator may not preside over any form of a representative or class proceeding or FLSA collective action otherwise prohibited by this Agreement without the express written consent of the parties. Neither this Agreement nor an agreement to arbitrate before a particular arbitration provider shall be interpreted to constitute such written consent. A party may respond to a claim by filing an Answer, Demurrer, Motion to Strike, Motion to Dismiss, and/or Counterclaim. The Arbitrator shall rule on

(Must be Sent To the Benefits Services Department at the Home Office Via Courier Mail)

AGREEMENT TO ARBITRATE DISPUTES REGARDING EMPLOYMENT

1. **Agreement To Arbitrate** -- "Associate" (identified below) and Fry's Electronics, Inc., hereinafter referred to as "Employer," hereby agree that any and all disputes and/or controversies that Associate has with Employer or Employer has with Associate (and disputes and/or controversies between Associate and Employer's current or former employees, agents, or related legal entities) arising from or in any way related to Associate's employment by Employer, including but not limited to claims for damages and violations of state, federal and/or local laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims which as a matter of law may not be the subject of arbitration), shall be determined and decided by final and binding arbitration pursuant to the substantive and procedural provisions of the Federal Arbitration Act, and state law to the extent state law would otherwise be applicable, is consistent with the Federal Arbitration Act, and does not preclude or delay arbitration or apply to void or invalidate this Agreement or any portion of this Agreement. This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity. This Agreement is not intended to prevent Associate from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government. However, this Agreement is intended to cover such complaints and claims to the extent such coverage is permitted by law. In order to fully benefit from the arbitration process, Associate and Employer understand that they are waiving all rights to a court or jury trial and to a government administrative process for all disputes covered by this Agreement. Venue for the arbitration shall be in Santa Clara County, California, or if Associate lives more than 50 miles from said county, within 50 miles of the location at which Associate last worked for Employer. Venue may be different as necessary in multi-party cases.
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3. **Pleadings and Procedures** – A matter covered by this Agreement shall be resolved by a single neutral arbitrator. The Arbitrator shall be selected by agreement of Associate and Employer, or by order of the court if Associate and Employer cannot agree. The Arbitrator may not preside over any form of a representative or class proceeding or FLSA collective action otherwise prohibited by this Agreement without the express written consent of the parties. Neither this Agreement nor an agreement to arbitrate before a particular arbitration provider shall be interpreted to constitute such written consent. A party may respond to a claim by filing an Answer; and/or a Demurrer, Motion to Strike, Motion to Dismiss, Motion for Judgment on the Pleadings, and/or similar motion; and/or a Counterclaim. The Arbitrator shall rule on any Demurrer, Motion to Strike,

Exhibit B

Motion to Dismiss, Motion for Judgment on the Pleadings, and/or similar motion within 15 calendar days of completion of the briefing and oral argument, if any. A party shall be permitted to file a motion for summary judgment, summary adjudication, and/or similar motion. The motion shall be decided no later than 15 days before the deadline to cancel the arbitration and receive a full refund of unused fees. The parties shall be permitted to file any other motions as may be necessary or are otherwise permitted by the Arbitrator. Affirmative defenses (including but not limited to those based on untimeliness, a statute of limitations, failure to exhaust administrative remedies and pre-emption based on workers' compensation law) shall be available to the parties. The Arbitrator shall set all filing deadlines and hearing dates in consultation with the parties.

- 4. Discovery – Each party shall be permitted discovery sufficient to adequately arbitrate the parties' claims and defenses. The Arbitrator shall also have the authority to rule on all discovery disputes and/or discovery motions.
- 5. Arbitrator's Award - The Arbitrator shall be permitted to award only those remedies requested by the parties, supported by credible evidence, and authorized by the law applicable to the trial court in the venue where the dispute arises. The Arbitrator shall issue a written award and statement of decision specifying the applicable factual and legal findings and conclusions on which the award is based. Notwithstanding any preceding provision in this Agreement, and unless otherwise required by law, the Arbitrator shall not have the power to commit errors of law or legal reasoning, and, therefore, the award may be vacated or corrected for any such error on request to a court of competent jurisdiction to the extent permitted by state law.
- 6. Severability - In the event that any term or provision of this Agreement is determined to be illegal, invalid, or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions hereof shall continue in full force and effect.
- 7. Employment-At-Will - Nothing in this Agreement shall override the respective rights of Associate and Employer to sever the employment relationship at will.
- 8. Integration - This Agreement supersedes any and all prior arbitration agreements between Associate and Employer. This Agreement contains the entire understanding between Associate and Employer with regard to the matters set forth herein, and is intended to be and is a final integration thereof. There is no representation, arrangement, agreement, warranty, or undertaking, oral or written, between Associate and Employer relating to this Agreement that is not fully expressed herein.

PLEASE READ THE STATEMENT BELOW BEFORE SIGNING THIS PAGE:

I, THE ASSOCIATE IDENTIFIED BELOW, HAVE RECEIVED BOTH PAGES OF THIS "AGREEMENT TO ARBITRATE DISPUTES REGARDING EMPLOYMENT" AND HAVE HAD AN OPPORTUNITY TO THOROUGHLY READ IT BEFORE SIGNING.

"ASSOCIATE"

Printed Name of Associate	Associate #	Store #
---------------------------	-------------	---------

Associate Signature	Date
---------------------	------

"EMPLOYER" – FRY'S ELECTRONICS, INC.

Printed Name of Store/Asst. Store Manager, Like Level or Above	Signature
--	-----------

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

and

ALEXANDER WARNER, an Individual

Case 32-CA-156938

Date: January 25, 2016

**AFFIDAVIT OF SERVICE OF SECOND AMENDED COMPLAINT
AND NOTICE OF HEARING**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

John P. Castro, Esq.
Legal Department
Fry's Electronics, Inc.
600 E Brokaw Rd.
San Jose, CA 95112-1006
VIA CERTIFIED MAIL
7015 0920 0001 7784 5257

David S. Durham, Esq.
DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105
VIA REGULAR MAIL

Eileen B. Goldsmith, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108-4733
VIA REGULAR MAIL

Christopher M. Foster, Attorney
DLA Piper LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105-2933
VIA REGULAR MAIL

Alexander Warner
c/o Eileen B. Goldsmith, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108-4797
VIA REGULAR MAIL

National Labor Relations Board
Division of Judges
901 Market St., Suite 300
San Francisco, CA 94103
E-FILE

January 25, 2016

Date

Ida Lam, Designated Agent of NLRB

Name



Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

and

Case: 32-CA-156938

**ALEXANDER WARNER, an
Individual**

RESPONDENT'S ANSWER TO AMENDED COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's ("Board" and "NLRB") Rules and Regulations, Respondent Fry's Electronics, Inc. ("Respondent" and "Company") hereby answers, as follows, the Amended Complaint issued by Region 32 of the NLRB ("Complaint") based on the unfair labor practice charge filed by Alexander Warner ("Warner").

GENERAL DENIAL

Except as otherwise expressly stated herein, the Company denies each and every allegation contained in the Complaint, including, without limitation, any allegation contained in the preamble, headings, or subheadings of the Complaint. The Company specifically denies that it violated the National Labor Relations Act ("NLRA" or the "Act") in any of the matters alleged in the Complaint or in any other manner.

Averments in the Complaint to which no responsive pleading is required shall be deemed as denied. The Company expressly reserves the right to seek to amend and/or supplement its Answer as may be necessary.

RESPONSE TO STATED ALLEGATIONS OF THE COMPLAINT

1. Admit.
- 2 (a). Admit.
- 2 (b). Admit.

2 (c). Admit.

3. Admit.

4 (a). Respondent denies the allegations of Paragraph 4(a) except to admit that from approximately September 2012 to February 2014, the Respondent presented an “Agreement to Arbitrate Disputes Regarding Employment” (“Arbitration Agreement” – a copy of which was signed by Warner and is attached hereto as Exhibit A) to employees at the time of hire.

4 (b). Deny.

4 (c). Respondent denies the allegations of Paragraph 4(c) except to admit that from approximately September 2012 to February 2014, the Respondent presented the Arbitration Agreement to employees at the time of hire and has taken actions, on occasion, to effectuate its terms, including in proceedings involving Alexander Warner.

4 (d). Deny.

4 (e). Deny.

5 (a). Admit.

5 (b). Admit.

5 (c). Admit.

5 (d). Respondent denies the allegations of Paragraph 5(d) except to admit that on or about January 27, 2015, Respondent renewed its demand to enforce the Arbitration Agreement in the Superior Court of California for the County of Contra Costa (“Court”) by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry’s Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and California Labor Code Private Attorney General Act of 2004 derived claims on an individual basis.

6. Deny.

7. Deny.

RESPONSE TO REQUESTED REMEDIES

In response to the remedies requested in the Complaint, the Company does not understand that any response is required, but to the extent one is required, the Company denies that the NLRB, the NLRB's General Counsel, Warner, or anyone else is entitled to any of the relief described and sought therein. Further, the requested remedies are impermissibly punitive, would cause undue hardship, and would not effectuate the purpose and policies of the Act.

DEFENSES

Without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of the claims alleged in the Complaint, the Company asserts the following defenses:

1. Some or all of the claims asserted in the Complaint are barred by the six-month statute of limitations set forth in Section 10(b) of the NLRA.
2. The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.
3. The terms of the Arbitration Agreement do not conflict with the NLRA.
4. The Complaint and its claims are not based on protected concerted activity by Warner or anyone else.
5. The NLRA does not provide a procedural or substantive right to pursue class and collective actions in state or federal courts.
6. Assuming, *arguendo*, the NLRA provides a right to pursue class and collective actions in state or federal courts, Section 7 of the NLRA confers the right to "refrain" from participating in such activities.
7. Section 9 of the NLRA empowers employees to present and adjust grievances on an individual basis.

8. The NLRA does not prohibit an employee from accepting neutral, individual arbitration that replaces access to the judicial system and its procedural mechanisms, including class actions.

9. The Complaint and its claims for relief are barred by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

10. The NLRB lacks jurisdiction to adjudicate a dispute subject to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

11. The NLRB lacks jurisdiction to dictate how state or federal courts must adjudicate non-NLRA claims.

12. The Complaint and its claims for relief interfere with and/or unduly burden the Respondent's First Amendment rights under the US Constitution to, among other things, access state and federal courts and enforce its rights.

13. The Complaint and its claims for relief interfere with and/or unduly burden the Respondent's Fifth Amendment rights under the US Constitution to procedural and substantive due process.

14. The NLRB is entitled to no deference in interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

15. The Complaint and its claims for relief are barred by the strong federal policy favoring arbitration agreements.

16. The Arbitration Agreement, itself and contextually, is not reasonably interpreted as precluding activity protected by Section 7 of the NLRA.

17. The Arbitration Agreement expressly provides, *inter alia*, that it excludes coverage of "claims which as a matter of law may not be the subject of arbitration", it "does not prohibit [an employee] from engaging in concerted activity with other employees as protected by law," and it "is not intended to prevent [an employee] from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government."

18. To the extent that any portion of the Arbitration Agreement is deemed illegal, invalid, or unenforceable, such limited portion alone is severable and the remaining portions “shall be enforced to the extent permissible under the law and all remaining terms and provisions hereof shall continue in full force and effect” under the express terms of the Arbitration Agreement.

19. The NLRB is entitled to no deference in interpreting what constitutes “reasonable interpretation” by any party of contractual language.

20. The NLRB is entitled to no deference in interpreting what constitutes “reasonable interpretation” by any party of contractual language contrary to expert testimony otherwise.

21. The Complaint and its claims for relief are barred by binding Supreme Court precedent, including, but not limited to, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

22. The Complaint and its claims for relief and requested remedies unduly interfere with state court proceedings.

23. The requested remedies are impermissibly punitive or retroactive because their alleged legal basis represents a radical, arbitrary, capricious, and/or not reasonably anticipated departure from NLRB and court precedent.

24. The requested remedies are impermissible because they do not seek a restoration of the status quo.

25. The requested remedies are not authorized under the US Constitution, NLRA, or the Administrative Procedures Act.

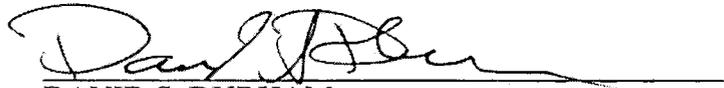
* * *

Respondent reserves the right to raise any additional defenses not asserted which Respondent may become aware through investigation, as may be appropriate at a later time.

Dated: December 21, 2015

Respectfully submitted,

DLA PIPER LLP (US)

A handwritten signature in black ink, appearing to read "David S. Durham", written over a horizontal line.

DAVID S. DURHAM
CHRISTOPHER M. FOSTER
Attorneys for Respondent
FRY'S ELECTRONICS, INC.

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(Must be Sent To the Benefits Services Department at the Home Office Via Courier Mail)

AGREEMENT TO ARBITRATE DISPUTES REGARDING EMPLOYMENT

1. Agreement To Arbitrate - "Associate" (identified below) and Fry's Electronics, Inc., hereinafter referred to as "Employer," hereby agree that any and all disputes and/or controversies that Associate has with Employer or Employer has with Associate (and disputes and/or controversies between Associate and other current or former employees or agents of Employer and entities legally related to Employer) arising from or in any way related to Associate's employment by Employer, including but not limited to claims for damages and violations of state, federal and/or local laws and regulations related to harassment, wrongful termination, and/or discrimination (excluding claims which as a matter of law may not be the subject of arbitration), shall be determined and decided by final and binding arbitration pursuant to the substantive and procedural provisions of the Federal Arbitration Act, and state law to the extent state law would otherwise be applicable, is consistent with the Federal Arbitration Act, and does not preclude or delay arbitration or apply to void or invalidate this Agreement or any portion of this Agreement. This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity. This Agreement is not intended to prevent Associate from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government. However, this Agreement is intended to cover such complaints and claims to the extent such coverage is permitted by law. In order to fully benefit from the arbitration process, Associate and Employer understand that they are waiving all rights to a court or jury trial and to a government administrative process for all disputes covered by this Agreement. Venue for the arbitration shall be in Santa Clara County, California, or if Associate lives more than 50 miles from said county, within 50 miles of the location at which Associate last worked for Employer. Venue may be different as necessary in multi-party cases.
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3. Pleadings and Procedures - A matter covered by this Agreement shall be resolved by a single neutral arbitrator. The Arbitrator shall be selected by agreement of Associate and Employer, or by order of the court if Associate and Employer cannot agree. The Arbitrator may not preside over any form of a representative or class proceeding or FLSA collective action otherwise prohibited by this Agreement without the express written consent of the parties. Neither this Agreement nor an agreement to arbitrate before a particular arbitration provider shall be interpreted to constitute such written consent. A party may respond to a claim by filing an Answer, Demurrer, Motion to Strike, Motion to Dismiss, and/or Counterclaim. The Arbitrator shall rule on

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS, INC.

and

Case: 23-CA-156938

ALEXANDER WARNER, an Individual

CERTIFICATE OF SERVICE

I certify that a copy of the Respondent's Answer to Amended Complaint in the above-captioned matter was electronically served on December 21, 2015 to the following parties:

George P. Velastgui
Regional Director
National Labor Relations Board, Region 32
george.velastgui@nlrb.gov

Eileen Goldsmith
Altshuler Berzon LLP
Counsel for Alexander Warner
egoldsmith@altshulerberzon.com

DATED this 21st day of December, 2015


Joanne Caruso
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105
Joanne.caruso@dlapiper.com

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

FRY'S ELECTRONICS, INC.

and

Case: 32-CA-156938

**ALEXANDER WARNER, an
Individual**

RESPONDENT'S ANSWER TO SECOND AMENDED COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's ("Board" and "NLRB") Rules and Regulations, Respondent Fry's Electronics, Inc. ("Respondent" and "Company") hereby answers, as follows, the Second Amended Complaint issued by Region 32 of the NLRB ("Complaint") based on the unfair labor practice charge filed by Alexander Warner ("Warner").

GENERAL DENIAL

Except as otherwise expressly stated herein, the Company denies each and every allegation contained in the Complaint, including, without limitation, any allegation contained in the preamble, headings, or subheadings of the Complaint. The Company specifically denies that it violated the National Labor Relations Act ("NLRA" or the "Act") in any of the matters alleged in the Complaint or in any other manner.

Averments in the Complaint to which no responsive pleading is required shall be deemed as denied. The Company expressly reserves the right to seek to amend and/or supplement its Answer as may be necessary.

RESPONSE TO STATED ALLEGATIONS OF THE COMPLAINT

1. Admit.
- 2 (a). Admit.
- 2 (b). Admit.

2 (c). Admit.

3. Admit.

4 (a). Admit.

4 (b). Deny.

4 (c). Deny

5 (a). Admit.

5 (b). Admit.

5 (c). Admit.

5 (d). Respondent denies the allegations of Paragraph 5(d) except to admit that on or about January 27, 2015, Respondent renewed its demand to enforce the Arbitration Agreement in the Superior Court of California for the County of Contra Costa (“Court”) by filing a Petition to Compel Arbitration in *Alexander Warner, et al. vs. Fry’s Electronics, Inc., et al.*, Case No. MSC14-02052, in which Respondent argued that the Arbitration Agreement required Warner to arbitrate his class action and California Labor Code Private Attorney General Act of 2004 derived claims on an individual basis.

6 (a). Admit.

6(b). Admit.

6(c). Deny.

6(d). Deny

7. Deny.

8. Deny.

RESPONSE TO REQUESTED REMEDIES

In response to the remedies requested in the Complaint, the Company does not understand that any response is required, but to the extent one is required, the Company denies that the NLRB, the NLRB’s General Counsel, Warner, or anyone else is entitled to any of the relief described and sought therein. Further, the requested remedies are

impermissibly punitive, would cause undue hardship, and would not effectuate the purpose and policies of the Act.

DEFENSES

Without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of the claims alleged in the Complaint, the Company asserts the following defenses:

1. Some or all of the claims asserted in the Complaint are barred by the six-month statute of limitations set forth in Section 10(b) of the NLRA.
2. The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.
3. The terms of the Arbitration Agreement do not conflict with the NLRA.
4. The Complaint and its claims are not based on protected concerted activity by Warner or anyone else.
5. The NLRA does not provide a procedural or substantive right to pursue class and collective actions in state or federal courts.
6. Assuming, *arguendo*, the NLRA provides a right to pursue class and collective actions in state or federal courts, Section 7 of the NLRA confers the right to “refrain” from participating in such activities.
7. Section 9 of the NLRA empowers employees to present and adjust grievances on an individual basis.
8. The NLRA does not prohibit an employee from accepting neutral, individual arbitration that replaces access to the judicial system and its procedural mechanisms, including class actions.
9. The Complaint and its claims for relief are barred by the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*
10. The NLRB lacks jurisdiction to adjudicate a dispute subject to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

11. The NLRB lacks jurisdiction to dictate how state or federal courts must adjudicate non-NLRA claims.

12. The Complaint and its claims for relief interfere with and/or unduly burden the Respondent's First Amendment rights under the US Constitution to, among other things, access state and federal courts and enforce its rights.

13. The Complaint and its claims for relief interfere with and/or unduly burden the Respondent's Fifth Amendment rights under the US Constitution to procedural and substantive due process.

14. The NLRB is entitled to no deference in interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

15. The Complaint and its claims for relief are barred by the strong federal policy favoring arbitration agreements.

16. The Arbitration Agreement, itself and contextually, is not reasonably interpreted as precluding activity protected by Section 7 of the NLRA.

17. The Arbitration Agreement expressly provides, *inter alia*, that it excludes coverage of "claims which as a matter of law may not be the subject of arbitration", it "does not prohibit [an employee] from engaging in concerted activity with other employees as protected by law," and it "is not intended to prevent [an employee] from filing complaints and/or claims with government agencies, commissions, boards and/or other bodies of the government."

18. To the extent that any portion of the Arbitration Agreement is deemed illegal, invalid, or unenforceable, such limited portion alone is severable and the remaining portions "shall be enforced to the extent permissible under the law and all remaining terms and provisions hereof shall continue in full force and effect" under the express terms of the Arbitration Agreement.

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21. The Complaint and its claims for relief are barred by binding Supreme Court precedent, including, but not limited to, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

22. The Complaint and its claims for relief and requested remedies unduly interfere with state court proceedings.

23. The requested remedies are impermissibly punitive or retroactive because their alleged legal basis represents a radical, arbitrary, capricious, and/or not reasonably anticipated departure from NLRB and court precedent.

24. The requested remedies are impermissible because they do not seek a restoration of the status quo.

25. The requested remedies are not authorized under the US Constitution, NLRA, or the Administrative Procedures Act.

* * *

Respondent reserves the right to raise any additional defenses not asserted which Respondent may become aware through investigation, as may be appropriate at a later time.

Dated: January 25, 2016

Respectfully submitted,

DLA PIPER LLP (US)



DAVID S. DURHAM
CHRISTOPHER M. FOSTER
Attorneys for Respondent
FRY'S ELECTRONICS, INC.

WEST\266661869.6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS, INC.

and

Case: 23-CA-156938

ALEXANDER WARNER, an Individual

CERTIFICATE OF SERVICE

I certify that a copy of the Respondent's First Amended Answer to Amended Complaint in the above-captioned matter was electronically served on January 26, 2016 to the following parties:

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DATED this 26nd day of January, 2016



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

FRY'S ELECTRONICS, INC.

and

ALEXANDER WARNER, an Individual

Case: 32-CA-156938

Date: January 29, 2016

**AFFIDAVIT OF SERVICE OF MOTION TO TRANSFER CASE TO THE
BOARD AND MOTION FOR SUMMARY JUDGMENT**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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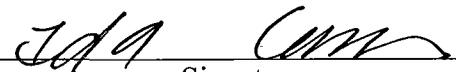
Office of the Executive Secretary
1015 Half Street SE
Washington, DC 20570-0001
VIA E-FILE

January 29, 2016

Date

Ida Lam, Designated Agent of NLRB

Name



Signature