IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PAMELA HERRINGTON, both individually and behalf of all other similarly situated persons, **Plaintiffs,** **v.** **WATERSTONE MORTGAGE CORPORATION,** **Defendant.**	**Case No.: 3:11-cv-00779**

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (DOC. 13)

The arbitration clause that WMC imposed on its employees as a condition of employment, states:

> This Agreement is made and entered into in the State of Wisconsin and shall in all respects be interpreted, enforced, and governed by and in accordance with the laws of the State of Wisconsin. In the event that the parties cannot resolve a dispute by the ADR provisions contained herein, any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement. Except as otherwise set forth herein, the parties will share equally in the cost of such Arbitration, and shall be responsible for their own attorneys' fees, provided that if the Arbitration is brought pursuant to any statutory claim for which attorneys' fees were expressly recoverable, the Arbitrator shall award such attorneys' fees and costs consistent with the statute at issue. Nothing herein shall preclude a party from seeing temporary injunctive relief in a court of competent jurisdiction to prevent irreparable harm, pending any ruling obtained through Arbitration. Further, nothing herein shall preclude or limit Employee from filing any complaint or charge with a State, Federal, or Comity agency. By execution of this Agreement, the parties are consenting to personal jurisdiction and venue in Wisconsin with respect to matters concerning the employment relationship between them.

This self-serving clause should not be enforced for at least 3 reasons. First, it imposes excessive costs on Plaintiffs Herrington who simply cannot afford to pay one half of all arbitral costs to advance her FLSA claims. Second, the clause prohibits employees from proceeding on a collective action basis, thereby subverting the enforcement scheme crafted by Congress in the FLSA. Third, the class and collective action waivers are unlawful bans on concerted activity in

violation of NLRA §7 and 8(a). This unlawful arbitration clause cannot be enforced by this Court.

POINT ONE

WMC'S REQUIREMENT THAT PLAINTIFFS INDIVIDUALLY PAY ½ OF EACH INDIVIDUAL ARBITRATION RENDERS THE ARBITRATION CLAUSE UNENFORCEABLE.

The arbitration clause drafted by WMC, Section 13 designates the American Arbitration Association (AAA) the arbitration provider. That section of the employment agreement also taxes Plaintiffs for one half of WMC's arbitration costs. The AAA's Employment Rules limit employee costs to $175 for "employer promulgated" arbitration clauses such as this one. Nevertheless, WMC insists that Plaintiffs pay half of all arbitral costs through Section 13, by writing its arbitration clause to say that "the parties will share equally in the cost of such Arbitration." By this clause, WMC effectively taxes employees for its own arbitral expenses. This insistence that employees pay for WMC's arbitral costs is unenforceable under the FAA, particularly against the sub-minimum wage earning Plaintiff here.

Under the AAA Employment Rules, the employer must pay the vast bulk of the filing fee ($975 for employer and $175 for an employee) and the employer must also pay the AAA's various fees as well as all of the arbitrator's various expenses and fees. *Ex. 1, AAA Employment Rules.* WMC, however, exempts itself from the AAA's requirements and shifts half its costs onto Plaintiffs. Thus, WMC taxes an employee for bringing claims against it, by requiring the employee to bear half of WMC's expenses. Not only that, WMC's clause effectively evades the AAA's hardship deferral and waiver processes, so that no matter how poor a claimant is, she will still have to pay half of the Bank's arbitration costs. Plaintiff Herrington cannot afford WMC's assessment of fees to bring this FLSA case.

A. Herrington Cannot Afford to Arbitrate Her Claims With Defendant's Taxation of Its Expenses.

Ms. Herrington is a poor person. She has significant debts, but has no savings, no income, no appreciable assets and no means by which to pay one-half of WMC's costs. *Herrington Declaration, Ex. 2 hereto.* In brief, Ms. Herrington, is a 64 year old woman, who is working, but not currently earning any income from that work. *Id., ¶1.* She is subsisting on food provided through the charity of friends. *Id., ¶2.* Her monthly expenses total approximately $2839 and she partially offsets those expenses through boarding a horse, allowing the sublease of a trailer, and through early withdrawal of social security (which together total $2,171), not enough to pay her monthly bills. *Id., ¶¶9-14.* She has unpaid debts of $4,000 to the IRS, $490 to the trash collection company, and $1820 in student loans. *Id., ¶¶12-14.* Working for sub-minimum wages for WMC depleted her savings. *Id.,¶15.* She now has $26.27 in her bank account and no retirement savings. *Id.,¶¶16-17.* Plaintiff Herrington cannot afford the expenses for arbitration that WMC's arbitration clause taxes to her. *Doc. 13-1, ¶13.*

WMC has no similar problems, to say the least. WMC operates in twelve states. According to its website,[1] WMC is "southeastern Wisconsin's largest mortgage lender with more than $1.1 billion in annual origination volume. We are a wholly owned subsidiary of WaterStone Bank SSB (NASDAQ: WSBF) with assets of more than $1.7 billion." Despite WMC's financial might, it intends to tax its subminimum wage earning workers to cover WMC's costs in the arbitral forum upon which it insists. Never mind that it would only cost all Plaintiffs a total of $350 to bring their class and collective action in court. In arbitration, WMC insists that the action be brought individually and that each such claimant must bear one-half of WMC's arbitral costs. Thus, through the arbitration clause, WMC makes the total cost of such claims far more expensive and then shifts half of these expenses onto the claimants. While WMC can clearly

[1] Ex. 3, http://www.waterstonemortgage.com/About-Waterstone-Mortgage/

withstand this increased cost, Plaintiff Herrington cannot. Like a rich poker player raising the stakes on a hapless opponent, WMC makes bringing a FLSA case too expensive for its sub-minimum wage earning employees to even consider. And so, WMC will have secured for itself immunity from prosecution for its FLSA minimum wage violations, which is exactly what it seeks to accomplish with its arbitration clause, its indemnification clause, and its claim for fees.

The Supreme Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum"—one with somewhat different and simplified rules—but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"). That said, the Supreme Court has also recognized that "[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000). In such cases, the underlying justification for sending parties to an arbitral forum is lost and such agreements are unenforceable under the FAA. *See, e.g., Circuit City v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (requiring employee to pay any portion of arbitrator's fees would deter employees from vindicating their rights rendering arbitration agreement unenforceable). As *Green Tree* makes clear, whether the fees are sufficiently great to deter litigants from vindicating their statutory rights is a question to be decided under the FAA principles; it is not, properly speaking, a question to be analyzed under the principles of unconscionability. *Id.*, 531 U.S. at 90-92; *see, e.g. Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 896 n. 2 (W.D. Va. 2001). The Seventh Circuit follows a case by case approach in determining when arbitration costs will render an arbitration clause unenforceable:

> While there is no bright line for when the costs associated with arbitration will be prohibitive, we have outlined the showing a party must make when it seeks to invalidate an arbitration agreement on those grounds. *James v. McDonald's Corp.*, 417 F.3d 672, 678–80 (7th Cir. 2005). In *James* we looked for evidence on two pertinent questions: first, how the party's financial situation will "be factored into an assessment of the arbitration costs under this hardship provision"; and second, how the costs will compare between litigating in the courts versus proceeding in arbitration. *Id.* at 679–80.

Baumann v. Finish Line, Inc. 421 Fed.Appx. 632, 635, 2011 WL 1627159, *3 (7th Cir. 2011); *James v. McDonald's Corp.*, 417 F.3d 672, 678-80 (7th Cir. 2005). Here, Plaintiffs' individual financial situations will not be "factored" in at all. *Id.* While the AAA has hardship cost deferral procedures, the AAA's employment rules cost provisions are supplanted by the arbitration clause here which taxes Plaintiffs for WMC's arbitration fees, regardless of financial situation.

Similar to the Seventh Circuit, many Courts have denied arbitration when an employer's clause would result in large arbitration costs vastly in excess of those that would obtain in Court. In *Morrison v. Circuit City Stores*, 317 F.3d 636, 669-670, 676-678 (6th Cir. 2003)(en banc), the Sixth Circuit held that arbitration was unenforceable when the costs of arbitration "would deter a substantial number of employees similarly situated . . . from seeking to vindicate their statutory claims." *Id.* at 669, 676. In *Paladino v. Avnet Computer Technologies Inc.*, 134 F.3d 1054 (11th Cir. 1998), the Court held arbitration invalid when employee may be liable for at least half of the "hefty" cost of arbitration with the AAA. In *Cole v Burns Internantional Sec. Svcs.*, 105 F.3d 1465 (DC Cir. 1997), the Court held employees could not be required to arbitrate statutory claims as a condition of employee if they would have to pay all or part of the arbitrator's fees or expenses and that fees of $500 to $1,000 per day would be prohibitively expensive for employees, when such amounts would be unlike anything they would have to pay in Court. *See also, Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999) (agreement that imposed costs of $1875 to $5000 on janitorial shift manager was

unenforceable).[2]

Under the Seventh Circuit's holdings in *Baumann v. Finish Line, Inc.*, 421 Fed.Appx. 632, 635, 2011 WL 1627159, *3 (7th Cir. 2011) and *James v. McDonald's Corp.*, 417 F.3d 672, 678–80 (7th Cir. 2005), as well as numerous other such cases around the country, the fact that each of the Plaintiffs must pay one half of all fees and costs necessary to pursue arbitrations individually, instead of paying only $350 to pursue all claims in Court, makes the arbitration clause unenforceable.

B. The Arbitration Expenses Will Be Significant and Beyond Herrington's Ability to Pay.

In the present case, the AAA's filing fees, administrative fees, and the arbitrator's deposit, daily rate and expenses are likely to be significant. Arbitrators in Wisconsin charge between $200 to $285 per hour. Ex. 4. Under the AAA's employment arbitration rules for employer promulgated plans, the total fees are likely to be as follows:

1. Filing fee: $1,100 ($925 due from the employer and $175 due from the employee).[3]

2. Hearing fee per day: $1,500 (5 days[4] at $300 per day).

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[2] Numerous District Courts reach the same result. *See e.g. Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 896-897 (W.D.Va. 2001)($2000 for filing fees held excessive, and even if waiver available, deposit, estimated at $600 to $4100, was enough to render the arbitration agreement unenforceable); *Wernett v. Service Phoenix, LLC*, No. 09-168-TUC-CKJ, 2009 WL 1955612, *7 (D.AZ July 6, 2009) (arbitration agreement that makes no provision for reducing or deferring fees for plaintiff of "limited income" is unenforceable); *Rodriguez v. Wet Ink, LLC*, No. 08-cv-00857-MSK-CBS, 2011 WL 1059541 (D.Colo. March 22, 2011) (agreement that required a plaintiff to pay more than she earns in a week for a single hour of arbitration is unenforceable); *Arnold v. Goldstar Financial*, No. 01 C 7694, 2002 WL 1941546 (N.D. Ill. Aug 22, 2002) ($2250 in costs is prohibitive for plaintiffs with debt problems); *Giordono v. Pep Boys*, No. CIV. A. 99–1281, 2001 WL 484360 (E.D.Pa. March 29, 2001) (where plaintiff earned $400/wk, requiring payment of $2000 filing fee and $600-$900 for a day of arbitration was "an easy case" for finding agreement unenforceable).

[3] AAA Empl. Arb. Rules attached as Ex. 1.

[4] Plaintiffs assume a 5 day hearing per individual, however this is speculative and could be higher. It is not possible to know how many days the employer will take for its case and a

3. Arbitrator's Daily rate: $19,950. This amount is calculated by assuming arbitrator rates of $285 per hour, for a 5 day hearing and assuming an equal amount for pre-hearing motion practice and post-hearing consideration and drafting time (7 hrs x $285/hr x 10 = $19,950).

4. Arbitrator's Expenses for room, transcripts, etc. $5,000 (counsel's estimate).

5. Final AAA fee of $300.

Using these figures leads to a total expected cost for both sides of $27,850, one half of which would be approximately $13,925. *Getman Decl. Ex. 5 hereto.* And of course, while the total costs could be lower than the estimated amount, they could also be higher and these costs actually cannot be known in advance. Thus, in order to have her claims heard, a Plaintiff must agree to stake the full amount, not even knowing just how high the charges will run. Every dispute generated by the employer costs the Plaintiffs more money. Plaintiff Herrington here has no money to put toward arbitration. Any amount she is required to pay means she simply cannot bring her case.

And the amount of the arbitral expense is disproportionate. Herrington has estimated her claims at approximately $17,000. *See* Pre-litigation demand, Ex. 4. Thus, WMC's arbitration clause demanding that Plaintiffs pay $13,925 or more is prohibitive. Obviously, no person in their right mind would risk $14,000 in expenses, merely to press a claim to obtain roughly $17,000 in damages. The high cost of this arbitration vastly exceeds the costs that Plaintiff must bear to bring her claims to court ($350). And in Court, Plaintiffs could resolve all of their claims collectively for the same $350 and achieve the cost savings for representation by a single attorney on a collective basis. "A collective action allows [FLSA] plaintiffs the advantage of

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Plaintiff going down the arbitration road, would have to advance the filing fees and arbitrator's deposit knowing only that an employer wishing to run up the costs could do so easily. Plaintiffs estimate five days as follows (a day for the Plaintiff herself, 2 half days for two other employee witnesses, and a day for the various employer's supervisors who would not allow correct entry of time. Additionally it is likely that several former supervisors will be called to testify as to the employer's pay practices.) Then Plaintiffs assume that the employer will call at least as many witnesses, and likely more. Thus a 5 day hearing is extremely optimistic.

lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)(ADEA case discussing same collective action rights within FLSA). Even if the arbitral costs were not out of proportion with the results she seeks, Plaintiff Herrington here simply cannot pay the arbitration costs WMC demands of her. She has no money to put to arbitration.

WMC's taxation of Plaintiffs with its arbitral costs renders this arbitration clause unenforceable. Arbitration is now not simply a different forum for hearing her claims – through WMC's taxation of costs, it is prohibitively expensive and therefor is an unavailable forum. *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 90 (2000); *Baumann v. Finish Line, Inc.*, 421 Fed.Appx. 632, 635, 2011 WL 1627159, *3 (7th Cir. 2011); *James v. McDonald's Corp.*, 417 F.3d 672, 678–80 (7th Cir. 2005). Because Herrington cannot afford to arbitrate her claims, she will likely have to dismiss them if she is sent to arbitration. WMC cannot obtain enforcement of an arbitration clause when to do so would mean that it obtains absolution from having claims made against it at all. *Baumann*, 421 Fed.Appx. at 635, 2011 WL 1627159, *3; *James*, 417 F.3d at 678–80.

POINT TWO

WMC'S COLLECTIVE ACTION WAIVER SUBVERTS THE CONGRESSIONAL PURPOSES UNDERLYING THE FLSA.

A. The FLSA Precludes An Employer "Negotiating" Terms Set By Law.

With the FLSA, enacted in 1938, Congress radically shifted the playing field for employees and employers.[5] For the first time, employment in the U.S. would not be left to the

[5] On June 25, 1938, Congress enacted the FLSA, creating a minimum standard for hourly wages and a maximum number of hours an employee could work without receiving overtime compensation. 29 U.S.C. §§ 206, 207. The FLSA was enacted to eliminate labor conditions that

unregulated negotiating power of employers and employees, with the resulting terms inevitably set by the more powerful employers. Employers and employees were no longer able to "bargain" over every term of employment. Instead, the FLSA set nationwide terms based on federal policy (relating to minimum wage, overtime, and child labor), all designed to remedy perceived inadequacies in the "marketplace" where labor and capital individually and collectively otherwise "bargained" over work terms. In practice, this meant that no longer would terms be set solely by an employer and presented to employees on a take it or leave it basis. *See e.g. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

Since the FLSA precludes negotiation between employers and employees about certain terms of employment, the Supreme Court has repeatedly found that FLSA rights may not be "waived" by an employee. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."); *D.A. Shulte, Inc. v. Gangi*, 328 U.S. 108 (1946). In Section 216, the very section that establishes the collective action and fee shifting processes, Congress specified that the only way an employee may waive her FLSA rights is to do so under supervision of the U.S. Department of Labor. 29 U.S.C. §216(c). In *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985), the Supreme Court noted that "the purposes of the [FLSA] require that it be applied even to those who would decline its protections" and continued:

> If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act.

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are detrimental to the health, efficiency, and general welfare of workers. 29 U.S.C. §202. The Act specifically forbids employers and employees to agree to terms which are deemed in violation of the minimum statutory requirements. In his message to Congress urging passage of the Act, President Roosevelt explained that the Act is intended to ensure workers "a fair day's pay for a fair day's work" because "[a] self-supporting and self-respecting democracy can plead no ... economic reason for chiseling workers' wages or stretching workers' hours." H.R. Rep. No. 101-260, at 8-9 (Sept. 26, 1989)(reprinted in 1989 U.S.C.C.A.N. 696, 696-97).

> *Cf. Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.

Id., at 302. Thus the Supreme Court, interpreting Congress's intentions as set forth in the FLSA, prohibits employees from declining statutory coverage. *Id.*

B. The Goals of the FLSA.

The Supreme Court has repeatedly stated that the FLSA's purpose is to make sure ALL covered workers are paid minimum wage and overtime for hours over forty. "**The principal congressional purpose in enacting the FLSA was to protect all covered workers** from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.'" *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981)(citations omitted and emph. added). The FLSA was designed "'to extend the frontiers of social progress' by '**insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.**' ..." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945)(emph. added). *See also U.S. v. Rosenwasser*, 323 U.S. 360, 363 (1945)("**no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.**")(emph. added). Applying the FLSA to "all" affected workers protects employees from being undercut by other employees willing to work for less and protects law abiding employers from being undercut by unscrupulous employers willing to violate the law. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

C. The Collective Action Process and Other FLSA Procedures Are Necessary To Implement the Goals of the Statute.

Over the years, Congress has established detailed procedures to make sure that enforcement measures are adequate to ensure that employer violations of the FLSA can be remedied by affected workers. To make sure that the law was followed, Congress adopted

several key provisions, allowing the Department of Labor to do administrative and Court enforcement, providing that employees can privately enforce violations of the FLSA, providing that employees can proceed with collective actions (a variant on class actions specific to the FLSA and ADEA) as a "private attorney general," requiring that an employer pay prevailing workers' attorneys' fees and costs,[6] and establishing that FLSA rights could not be waived except under the supervision of the Department of Labor. 29 U.S.C. §216(c). The procedural mechanisms by which FLSA enforcement is undertaken by "private attorneys general" are integral to the Congressional purposes. *Turner v. Perry Township*, No. 3:03-cv-0455, 2005 WL 6573783, *3 (S.D.Ohio Dec. 30, 2005) ("the Sixth Circuit has emphasized the private attorney general theory of fee recovery: the importance of bringing these [FLSA] cases, even if only nominal damages, are recovered to vindicate employee rights and Congressional policy.")

The collective action procedure in 29 U.S.C. §216(b) implements the Congressional purpose of comprehensive enforcement in at least two ways. First, the Supreme Court has noted that "A collective action allows [FLSA] plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The ability to bring a collective action under the FLSA also overcomes "'the problem that small recoveries do not

[6] *See United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n, Local 307 v. G & M Roofing and Sheet Metal Co., Inc.* 732 F.2d 495, 501 -502 (6th Cir. 1984), where the Court wrote:

> The design of the [FLSA] is intended to rectify and eliminate "labor conditions detrimental to the maintenance of the minimum standard living" for workers. 29 U.S.C. § 202(a). The availability*502 and award of attorney fees under § 216(b) must reflect the obvious congressional intent that the policies enunciated in § 202 be vindicated, at least in part, through private lawsuits charging a violation of the substantive provisions of the wage act. Moreover, the purpose of § 216(b) is to insure effective access to the judicial process by providing attorney fees for prevailing plaintiffs with wage and hour grievances; "[o]bviously Congress intended that the wronged employee should receive his full wages ... without incurring any expense for legal fees or costs".

provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *see also Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547, (S.D.N.Y. 2011) ("Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims." (internal quotations omitted)). By explicitly providing for the right to bring a collective action to enforce FLSA rights to unpaid overtime compensation, Congress recognized that collective actions are a unique remedy to redress unpaid overtime claims by employees against employers. *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 58 (1st Cir. 2007). Without this statutory right to band together with similarly situated persons, many employees would be deprived of compensation they have earned through their labor without any possibility of redress. *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011). The ability to bring collective actions also encourages attorneys to take FLSA cases for larger groupings of workers in situations where a single individual action for say a few thousand dollars, would seem to be an ill-advised use of limited attorney time. FLSA claims are generally small dollar claims for minimum hourly wage and overtime. Practically speaking, there are not sufficient attorneys to handle every small dollar FLSA claim for every individual worker who is cheated, were collective actions so easy to evade through arbitration clauses.

Second, FLSA collective actions allow workers to bring their claims while not being a named plaintiff. And this is perhaps even more important than the cost savings that accrue through joinder. As the Supreme Court has recognized, fear of employer reprisals will frequently chill employees' willingness to challenge employers' violations of their rights. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *see also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240

(1978) ("The danger of witness intimidation is particularly acute with respect to current employees ... over whom the employer, by virtue of the employment relationship, may exercise intense leverage.").

The collective action process allows workers to effectively sue their current employer and have their claims heard, without taking a visible role, and without being perceived as the ringleader, which the named plaintiff must do. That is why almost all FLSA cases are brought by former, rather than current employees. The Courts have long recognized the very real risks that Plaintiffs endure, not just with their current employer, but even with respect to an industry. Employees have a reasonable fear that sticking their necks out to collect the small sums due for minimum wage violations could kill their professional careers if it is known that they brought litigation against their employer. *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011); *Does I thru XXIII v. Advanced Textile Corp.* 214 F.3d 1058 (9th Cir. 2000)(permitting anonymous filings because of risks to FLSA plaintiffs).

The recent decision of Judge Sweet in *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011), thoughtfully discusses the importance of collective actions to FLSA enforcement:

> There are good reasons to hold that a waiver of the right to proceed collectively under the FLSA is per se unenforceable—and different in kind from waivers of the right to proceed as a class under Rule 23. Collective actions under the FLSA are a unique animal. Unlike employment-discrimination class suits under Title VII or the Americans with Disabilities Act that are governed by Rule 23, Congress created a unique form of collective actions for minimum-wage and overtime pay claims brought under the FLSA.
> * * *
> Although the right to sue under the FLSA is compensatory, "it is nevertheless an enforcement provision." *Id.* at 709. **Not the least integral aspect of this remedy is the ability of employees to pool resources in order to pursue a collective action, in accordance with the specific balance struck by Congress. The particular FLSA collective action mechanism was additionally a Congressional determination regarding the allocation of enforcement costs, as the ability of employees to bring actions collectively reduces the burden borne by the public fisc, … *See* 83 Cong. Rec. 9264. Moreover, prohibition of the waiver of the right to proceed collectively accords with the Congressional policy of uniformity with regard to the application of FLSA standards, *see* H. Rep. No. 2182, 75th Cong., 3d Sess. at 6–7, because an**

> **employer is not permitted to gain a competitive advantage because his employees are more willing to assent to, or his human resources department more able to ascertain, collective action waivers than those of his competitors. As the Supreme Court has noted, "the purposes of the Act require that it be applied even to those who would decline its protections."** ***Alamo Foundation v. Secretary of Labor,*** **471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985). It is not enough to respond that such a waiver should be upheld in the name of the broad federal policy favoring arbitration, simply because the waiver was included in an arbitration agreement. An otherwise enforceable arbitration agreement should not become the vehicle to invalidate the particular Congressional purposes of the collective action provision and the policies on which that provision is based.**[FN13]
>
> > FN13. Indeed, were employers beyond Citi to embrace these waivers, the deluge of individual wage and hour claims that would be arbitrated, notwithstanding those that would simply be forgone absent collectivization, would quite obviously run counter to the values of simplicity, expedience, and cost-saving that underlie the federal policy preference for arbitration. *See, e.g., Mitsubishi,* 473 U.S. at 3354.
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> In sum, a waiver of the right to proceed collectively under the FLSA is unenforceable as a matter of law in accordance with the *Gilmer* Court's recognition that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Gilmer,* 500 U.S. at 26.

Raniere v. Citigroup Inc., 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011).

D. The FLSA's Purposes Are Not "Trumped" By The FAA and Collective Action Waivers Are Not "Uniformly" Approved.

The Courts have never held that the FAA trumps FLSA rights. The Supreme Court has held that FLSA rights and the federal policy favoring arbitration are not inconsistent. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991)(ADEA claims arbitrable). But, the FLSA, as a federal remedial statute, enacted by Congress after the FAA, certainly cannot be read as being "trumped" by the earlier statute. Furthermore, the policy of the FAA to encourage arbitration as an alternative forum for hearing claims, does not mean that every self-serving term an employer wishes to impose on employees is bound to be enforced by a court, merely because the term is placed in an arbitration clause.

As set forth above, Congress crafted the FLSA to ameliorate the conditions that resulted when employers and employees were free to "bargain" regarding hourly pay, overtime work, and

child labor. The FLSA was first enacted 1938, twelve years after the Federal Arbitration Act (1925). The collective action process was installed in the FLSA in 1947.[7] Thus, as a matter of statutory construction, the collective action process of the FLSA, as a specific later-enacted provision, must be deemed to apply over any contrary provision of the FAA and not the other way around. *See Smith v. Robinson*, 468 U.S. 992, 1024 (1984).

Furthermore, there is no inherent incongruity between the FAA and the FLSA as the Supreme Court has noted in *Gilmer, supra.,* since FLSA cases can be heard in arbitration. The inconsistency here, however, is between WMC's limitation on Plaintiffs' FLSA rights in the arbitration clause it drafted and the enforcement scheme crafted by Congress in the FLSA. WMC may argue that striking the clause is contrary to the federal policy favoring arbitration. While that policy is broad, it does not extend to overriding remedial statutes enacted by Congress after the enactment of the FAA. There is nothing in the FAA that prohibits this Court from refusing to enforce an arbitration clause drafted by WMC that conflicts with the enforcement scheme Congress enacted in the FLSA. The mere fact that WMC put the class waiver into its arbitration clause does not render that clause effective.

WMC argues that collective action rights can be waived, as a matter of federal arbitration law, end of story. But the notion that the FAA permits WMC to subvert the FLSA at its discretion is a vast oversimplification based on several erroneous contentions. First, Defendant erroneously claims "all five Federal Circuit Courts that have considered agreements requiring individual employee arbitration have determined such provisions are enforceable." *Def. Brf. p. 5.* This is not true. Class action waivers have been struck by the First, Second, and Eleventh Circuits. (And the Ninth Circuit has invalidated class waivers on state unconscionability grounds.

[7] The FLSA must be given effect over any conflicting reading of the FAA, under "the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes. *Smith v. Robinson*, 468 U.S. 992, 1024 (1984).

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) *cert. den.* 540 U.S. 811.) These Courts look to the federal statutory purposes and determine on a case by case basis, whether a class waiver permits full vindication of the federal statute as required by the Supreme Court. *Gilmer, supra, Misubishi Motors, supra.* The Seventh Circuit has not yet ruled on the precise question, however, Seventh Circuit law on denying arbitration where it is too costly suggest that the Court is in accord with the First, Second, and Eleventh Circuits. Second, Defendant erroneously claims the Supreme Court in *Gilmer* held that the FAA permitted collective action waivers. *Def. Brf. p.6.* In fact *Gilmer* did not "hold" anything about class or collective action waivers, as the Supreme Court noted that "[t]he NYSE rules also provide for collective proceedings." *Gilmer,* 500 U.S. at 32. So that issue was not before the Court. Finally, the cases cited by the Defendant DO NOT suggest that the federal courts allow class or collective action waivers no matter what the circumstances.

The First, Second, and Eleventh Circuits have now held that class action waivers that interfere with the statutory enforcement scheme cannot stand. (And other Courts have invalidated class waivers for other reasons, such as that the clause is unconscionably one-sided. *Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2003) *cert. den.* 540 U.S. 811). In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir.2006), the First Circuit addressed the enforceability of arbitration agreements invoked by Comcast against a group of Boston subscribers suing Comcast for violations of state and federal antitrust law. *Id.* at 29. The Boston subscribers argued the arbitration agreement prevented them from vindicating their statutory rights by, among other things, prohibiting the use of the class mechanism. *Id.* at 37. In deciding whether the class action waiver was valid, the First Circuit first noted that "the legitimacy of the arbitral forum rests on the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights." *Id.* at 54 (internal quotation omitted). The court found that the bar on class arbitration threatens this presumption given the "complexity of an antitrust case generally, and the complexity and cost required to prosecute a case against Comcast specifically." *Id.* at 58.

"[W]ithout some form of class mechanism-be it class action or class arbitration-a consumer antitrust plaintiff will not sue at all." *Id.* at 58. The court struck down the class arbitration waiver, concluding that "Comcast [would] be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law." *Id.* at 61. "Plaintiffs [would] be unable to vindicate their statutory rights [and] the social goals of federal and state antitrust laws [would] be frustrated because of the 'enforcement gap' created by the de facto liability shield." *Id.* at 61.

In the Second Circuit, class or collective action waivers are also unenforceable when the practical effect of the waiver is to immunize the defendant from liability and preclude individuals from enforcing their statutory rights. *In re American Express Merchants Litig. (Amex I)*, 554 F. 3d 300, 321 (2d Cir. 2009) (denying enforcement of class waiver that precluded vindication of statutory rights), *jud. vac.* 130 S.Ct. 2401 (2010), r*eaffirmed, In re American Express Merchants Litig. ("Amex II")*, 634 F.3d 187, 189 (2d Cir. 2011) (upholding rejection of class waiver in *Amex I*)[8]; In the *Amex I* litigation, the Circuit identified five factors to be considered by Courts in deciding whether to enforce class waivers:

> [1] the fairness of the provisions, [2] the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's recovery, [3] the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, [4] the practical [e]ffect the waiver will have on a company's ability to engage in unchecked market behavior, and [5] related public policy concerns.

Amex I, 554 F.3d at 321. In *Amex I*, based in part on evidence showing that the plaintiffs' individual statutory claims ranged in potential recovery from a median of approximately $5,252 to a high end of $38,549, the Second Circuit determined that these claims could not reasonably be pursued as individual actions when taking into account the associated costs of litigation.

[8] *See also Sutherland v. Ernst & Young, LLP*, No. 10 Civ. 3332(KMW), 2011 WL 838900, *5-*7 (S.D.N.Y. March 3, 2011) (applying *Amex I* to invalidate collective action waiver that deprived employee of ability to enforce FLSA rights).

Amex I, 554 F.3d at 317, 321. In sum, the Circuit Court concluded that enforcement of the class waiver would grant the defendant "de facto immunity" by removing the plaintiffs' only reasonable means of recovery, reasoning:

> [P]laintiffs have demonstrated the necessity of some class mechanism in order to bring their claims against Amex. This demonstration . . . depends upon a showing that the size of recovery received by ***any*** individual plaintiff will be too small to justify the expenditure of bringing an individual action.

Id. at 320 (emphasis in original). The Court found that where the size of recovery of any potential member of the class would be too small to justify the expenditure of bringing an individual action, the class waiver is unenforceable as to the entire class.

In *Amex II*, the Second Circuit reaffirmed its holding that an arbitration class waiver cannot stand if it precludes enforcement of statutory rights.

> As we did earlier, we find "Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration." *In re Am. Express*, 554 F.3d at 319. We again conclude "that enforcement of the class action waiver in the Card Acceptance Agreement 'flatly ensures that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws.' " *Id*. Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) ("[p]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.")
>
> …
>
> **Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.** The two caveats we articulated in our original opinion still apply. *In re Am. Express*, 554 F.3d at 320. Our decision in no way relies upon the status of plaintiffs as "small" merchants. We rely instead on the need for plaintiffs to have the opportunity to vindicate their statutory rights. In this case, the record demonstrates that the size of any potential recovery by an individual plaintiff will be too small to justify the expense of bringing an individual action. Moreover, we do not conclude here that class action waivers in arbitration agreements are per se unenforceable. We also do not hold that they are per se unenforceable in the context of antitrust actions. Rather, we hold that each case which presents a question of the enforceability of a class action waiver in an arbitration agreement must be considered on its own merits, governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements."

Id., 634 F.3d at 199 (emph. added).

The Eleventh Circuit has reached a similar result as the First and Second Circuits in *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007). In *Dale*, the Court held:

> The cost of vindicating an individual subscriber's claim, when compared to his or her potential recovery, is too great. Additionally, because the Cable Act does not provide for the recovery of attorneys' fees or related costs for the violations alleged by the subscribers, and because state law allows fees and costs to be awarded only where bad faith is shown, it will be difficult for a single subscriber to obtain representation. This will allow Comcast to engage in unchecked market behavior that may be unlawful. Corporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims.

Id. The Eleventh Circuit then adopted the five factor test set forth in *Amex I.* While these cases do not deal with the FLSA specifically, they clearly suggest that a Court must evaluate whether the underlying statutory purposes can be served while enforcing a class waiver. In the present case, as set forth above, the FLSA's enforcement scheme would be severely undercut by enforcing an employer's collective action waiver. Few if any current employees would be willing to risk their jobs and few if any current or past employees of WMC would risk their careers to bring these claims. Few if any former employees would be willing to bring their claims individually without the benefits of cost pooling in a collective action and few if any lawyers are available for individual litigation against a company who has stacked the deck against employees in arbitration. The end result of this is that an employer such as WMC can engage in "unchecked market behavior" in derogation of the FLSA's remedial purposes and WMC can thereby undercut its competition.

The Seventh Circuit has not considered the question of whether the FLSA's remedial purposes forbid an employer to condition employment on the waiver of FLSA collective action rights. However, the Seventh Circuit's decisions in *Baumann v. Finish Line, Inc.* 421 Fed.Appx. 632, 635, 2011 WL 1627159, *3 (7th Cir. 2011) and *James v. McDonald's Corp.*, 417 F.3d 672, 678–80 (7th Cir. 2005), considering whether costs are prohibitive or even comparable to what

would obtain in Court, suggest that it would also apply the *Amex I* five factors (ensuring that statutory claims can be readily brought). Where individual arbitration costs would have the effect of precluding a remedy that Congress intended for the FLSA, Courts should not enforce the private employer's purposes in evading the law over Congress's goals that violations of the FLSA rights of all covered workers be remedied.

WMC ignores these cases, and instead contends that five Circuit Court decisions have permitted employers to mandate arbitration of FLSA claims on an individual basis.[9] But WMC has either overstated or misstated the holdings in each of these cases. In each of the five cases cited, the Courts found, as the Supreme Court had in *Gilmer, supra,* that arbitration of FLSA claims was required by the FAA. None of these cases even considered the Congressional purposes underlying the FLSA and the degree to which the collective action procedure of §216(b) is integral to enforcement of the statute. None of these cases evaluates whether a requirement that arbitrations be handled individually would in fact prevent the vast majority of such claims from being litigated. None of these cases evaluated the concerns expressed by the First, Second, and Eleventh Circuits, as described above.

In the *Horenstein v. Mortgage Market* and *Carter v. Countrywide* decisions cited by Defendant, the Courts found that since the Supreme Court had held FLSA claims were arbitrable and since an arbitration agreement necessarily waived collective action rights, that *ipso facto* class action waivers of FLSA claims are permitted by the Supreme Court. Interestingly, collective action procedures are not inherently incompatible with arbitration and at least some AAA arbitrators have approved collective actions and those decisions have been affirmed by the

[9]Defendant cites *Horenstein v. Mortgage Market, Inc.*, 9 Fed. Appx. 618 (9th Cir. 2001), *Carter v. Countrywide Credit Indus.*, 362 F.3d 294 (5th Cir. 2004), *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002)(class arbitration waiver supported by consideration), *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359 (11th Cir. 2005), *Vilches v The Travelers Companies, Inc.*, 413 Fed. Apx. 487 (3d Cir. 2011)(cll arbitration waiver not unconscionable).

Courts. *See Veliz v. Cintas*, No. C 03-1180, 2009 WL 1766691 (N.D.Cal. June 22, 2009). Thus, *Horenstein v. Mortgage Market* and *Carter v. Countrywide* are simply based on the faulty assumption that a collective action is inherently incompatible with arbitration, and thus if the Supreme Court approved FLSA cases being heard in arbitration, then collective action waivers must necessarily be permitted. The reasoning of *Horenstein* and *Carter* are therefore faulty. Neither case looks to the FLSA's statutory purposes or the history of the collective action process and its intended purposes.

Similarly in *Vilches*, and *Caley,* the Courts did not analyze whether the FLSA's enforcement scheme prohibited collective action waivers. The Courts in these cases only found that the class waivers there were not unconscionable under New Jersey and Georgia law respectively – state law questions that simply are not in issue here. In *Adkins v Labor Ready Inc.*, 303 F.3d 496, the Court only held that FLSA claims are arbitrable – a position not in dispute here.

Furthermore, the Eleventh Circuit's decision in *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007), significantly altered the earlier holding in *Caley* cited by WMC. In *Dale*, the Circuit held that "In *Caley*, we determined only that under the specific facts of that case, the DRP prohibiting class actions was enforceable, not that every class action waiver is enforceable under Georgia law. We did not consider a factual scenario in which a remedy was effectively foreclosed because of the negligible amount of recovery when compared to the cost of bringing an arbitration action." 498 F.3d at 1221. Thus, the Eleventh Circuit has now held that class waivers are not *per se* permitted, but rather must be evaluated on the same criteria that were adopted by the Second Circuit's *Amex* decisions and the First Circuit's *Kristian* decision:

> We thus conclude that the enforceability of a particular class action waiver in an arbitration agreement must be determined on a case-by-case basis, considering the totality of the facts and circumstances. Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys'

> fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns.

Id., 498 F.3d at 1224.

In the present case, applying the five factor test set forth in *Kristian, Amex I* and *Dale*, must result in denying enforcement of the arbitration clause. First, the provisions are not "fair" in that they preclude litigation of remedial statutory claims, in that they increase costs overall and then force a plaintiff to bear arbitral expenses that by AAA rules are expenses that should be borne by the vastly better funded employer, in that they require current employees to stick their necks out or forego their claims, in that they create an obstacle to group cooperation such as sharing witnesses, documents, costs. In sum, the arbitral process as established by WMC entirely in its interest, tips the playing field from how it was leveled by Congress.

Second, as set forth in detail in Point One, Plaintiff will need to pay $14,000 or more up front in order to collect her back pay. Plaintiff will be required to pay sums in advance far out of line with what would be required in Court – sums she does not have. And Plaintiff will not know, until the case is concluded, just how expensive arbitration will end up being for her.

Third, while Plaintiff has the ability to recover fees and other costs <u>if she prevails</u>, it is the risk of losing that makes arbitration prohibitively expensive. This alone makes arbitration an impermissible forum. However, a further aspect of the arbitral costs also renders the clause unenforceable. Without cost pooling, without the ability to engage in full discovery, without access to the many employee witnesses that comes with a collective action, without the possibility of a fee multiplier that could result from a common fund recovery, with the very real possibility that an arbitrator will award less than full fees for a small dollar recovery in an individual case, with litigation against a large, well funded bank that has crafted the playing rules in its favor, Plaintiffs' counsel believe there are few if any lawyers willing to bring claims even if any Plaintiffs are willing to engage an employer for fifteen to twenty thousand dollars each. So,

the practical effect of this waiver is to make this case entirely unattractive to the counsel who would normally bring such a case, thereby further precluding litigation against it. *Getman Decl. Ex. 5 hereto, ¶6.*

Fourth, it cannot be doubted that a collective action (and class action on state rights) will yield participation rates far higher than what will occur if each individual has to file an individual arbitration and pay the individual fees set forth above. Obviously, if individuals cannot or do not file individual arbitrations, then the company will be able to engage in "market behavior" not in conformity with the statute. Even if it can resolve the one or two claims that do get brought for a fraction of its cost savings, WMC will have evaded the FLSA's full effect and obtained an illicit advantage over its competitors at the expense of its employees.

Fifth, the FLSA's goal of comprehensive coverage will be lost in arbitration. WMC will be able to underpay its workforce, thereby gaining a competitive advantage over its law-abiding competitors, which will create a further incentive for them to violate the law. Mortgage companies throughout the U.S. will face similar pressure to short their loan officers' pay, thereby driving down wages and working conditions throughout the industry.

The First, Second, and Eleventh Circuit's decisions in *Kristian v. Comcast Corp.*, *Amex I*, *Amex II*, and *Dale v. Comcast Corp.* respectively, require a Court to evaluate the totality of the circumstances of whether a class waiver subverts the substantive Congressional purposes behind the statute being enforced. Here, WMC's class waiver clearly subverts application of the FLSA to "all" of WMC's loan officer workforce and thus allows it to impose substandard employment terms, contrary to the FLSA's remedial purposes and to the disadvantage of law-abiding competitors. *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15-*17 (S.D.N.Y. Nov. 22, 2011). The FLSA prohibits a private employer's subversion of the Congressional intent that all affected workers be able to bring an action that through the mechanism of a "private attorney general" collective action suit brought to collectively enforce employees' FLSA rights.

For this reason alone, the arbitration clause imposed by WMC must be stricken.

POINT THREE

AN EMPLOYER'S RESTRICTION OF EMPLOYEE CLASS AND COLLECTIVE ACTION RIGHTS IS PROHIBITED BY §7 AND §8 OF THE NLRA AND IS NOT ENFORCEABLE BY THIS COURT.

A. Prohibitions on Class or Collective Actions Addressing Wages and Working Conditions Violates the National Labor Relations Act.

Section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in ***other concerted activities*** for the purpose of collective bargaining or ***other mutual aid or protection***, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (emphasis added). Under Section 8 of the NLRA, it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . ." 29 U.S.C.A. §158(a)(1).

"[A] lawsuit **filed** in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 under the National Labor Relations Act." *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (emphasis in original) (citing *Mohave Elec. Co-op Inc. v. NLRB*, 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000); *Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973)). The NLRB has determined, and courts have agreed, that class actions constitute a form of concerted action by employees when those suits address wages or working conditions. *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975), *enfd. mem.* 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); *see also, United Parcel Service*, 252 NLRB 1015 (1980), *enfd.* 677 F.2d 421 (6th Cir. 1982), *Saigon Gourmet*,

353 NLRB 1063 (2009), *127 Restaurant Corp. D/B/A Le Madri Restaurant*, 331 NLRB 269 (2000), and others. Thus, an arbitration agreement or clause that, by its express or implied terms, precludes class actions by employees to enforce wage and hour laws is unlawful pursuant to Sections 7 and 8 of the NLRA. Such a ban would unlawfully prevent employees from engaging in concerted activity to improve their wages and/or working conditions. Because the object of such an arbitration agreement or clause is unlawful, it is void and unenforceable by any court.

1. Class Actions Constitute a Form of Concerted Activity for Mutual Aid and Protection Protected by the NLRA.

The NRLA protects all forms of concerted activity by employees to improve wages or working conditions:

> Section 7 of the Act extends to employee efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 thus specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Id*. at 566. The Court in *Eastex*, *supra*, underscored that the express language of Section 7 protects concerted activities for the broad purpose of "mutual aid or protection," in addition to concerted activity for "self-organization" and "collective bargaining." *Id*. at 565.

52nd St. Hotel Associates, 321 NLRB 624, 633 (1996). The broad rights conferred by Section 7 encompass pursuit of civil lawsuits. "It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith." *In Re 127 Rest. Corp.*, 331 NLRB 269, 275 (2000), citing *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975) and *Host International*, 290 NLRB 442, 443 (1988). As stated by the NLRB in *Trinity:*

> In regard to the Section 7 rights of employees filing civil actions against their employer, the Board in *Leviton Manufacturing Company, Inc*., reiterated the applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith.

Trinity, 221 NLRB 364, 365 (1975), *enfd. mem.* 567 F.2d 391 (7th Cir. 1977), *cert.*

denied 438 U.S. 914 (1978).[10] Employees may engage in concerted activities for their mutual aid or protection without the existence of a union. *Brady v. NFL*, 644 F.3d 661, 671 (8th Cir. 2011); *In Re 127 Rest. Corp*., 331 NLRB 269, 275 (2000).

Collective Action Suits under the Fair Labor Standards Act are one type of concerted activity recognized as protected by the NLRA to the same degree as class actions:

> The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is protected, concerted activity under Section 7 of the Act. See, e.g., *Moss Planing Mill Co*., 103 NLRB 414, 418-419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953); *Poultrymen's Service Corp*., 41 NLRB 444, 462-463 (1942), enfd. 138F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co*., 55 NLRB 798, 799 (1944), enfd. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Triangle Tool & Engineering*, 226 NLRB 1354, 1357 fn. 5 (1976); *Joseph De Rario, DMD, P.A.*, 283 NLRB 592, 594 (1987); and *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

52nd St. Hotel Associates, 321 NLRB at 633.

For the purposes of Section 7, class actions are treated no differently than collective actions under the FLSA. In *Harco Trucking, LLC and Scott Wood*, 344 NLRB 478, 479 (2005), the NLRB found that the respondent violated Section 8(a)(1) of the NLRA by refusing to hire Wood because he filed a class action lawsuit against Harco. *See also, Trinity Trucking*, 221 NLRB at 365 and *Host International*, 290 NLRB at 443.

Harco Trucking is but one in a long line of decisions, over many decades, finding that class, collective, and even individual actions in Court addressing wages constitute concerted

[10] The NLRB has repeatedly held that the filing of a civil action by or on behalf of a group of employees constitutes protected activity under section 7. *E.g., Harco Trucking, LLC*, 344 NLRB 478, 481 (2005) (class action filed by one employee); *In re 127 Restaurant Corp.*, 331 NLRB 269, 275-76 (1996) (joint action by 17 employees); *52 Street Hotel Assoc*, 321 NLRB 624, 633-636 (2000) (collective action); *Host International*, 290 NLRB 442, 443 (1988) (joint action by seven employees); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980) (class action filed by one employee); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1978) (civil action by three employees). T

activity protected by the NLRA. In *In Re 127 Rest. Corp. d/b/a Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000), the NLRB found that an employer unlawfully discharged employees for engaging in Section 7 activity, including filing a lawsuit in federal court on behalf of other employees, alleging violations of federal *and* state labor laws. In *Mohave Electric Cooperative*, 327 NLRB 13 (1998), enfd. 206 F.3d 1183 (D.C. Cir. 2000), the NLRB determined that two employees were engaged in protected concerted activity when, pursuant to a common concern for workplace safety, they both petitioned for injunctive relief against harassment. In *52nd Street Hotel Associates D/B/A Novotel New York*, 321 NLRB 624, 633-636 (1996), the NLRB found that an opt-in class action lawsuit alleging employer violations of the Fair Labor Standards Act was protected concerted activity. In *Host International*, 290 NLRB 442, 442-443, 445 (1988), the NLRB found that an employee's filing of a civil federal court lawsuit concertedly with other employees, claiming that their employer had physically assaulted, searched, detained and interrogated them in violation of their constitutional and statutory rights, constituted Section 7 activity. In *United Parcel Service*, 252 NLRB 1015, 1018, 1022, fn.26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), the NLRB found that the employer violated the Act by discharging an employee for filing a class action lawsuit regarding rest breaks. In *Saigon Gourmet*, 353 NLRB 1063, 1064 (2009), the Board found that concertedly asserting wage and hour claims is protected concerted activity. The overwhelming body of NLRB decisions leaves no doubt that class and collective actions constitute concerted action by employees to address wages or working conditions.

The foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests on a collective basis. A mandatory arbitration

agreement that prohibits all class, collective and/or joint employee efforts to obtain redress for violation of employment law necessarily inhibits protected concerted activity in violation of Section 7 of the NLRA.

2. Class and Collective Actions Are Quintessential Activities to be Protected by the NLRA.

Employees bring class, collective, and joint actions rather than individual cases for the same reason they engage in any other form of section 7 activity: When it comes to employer retaliation, there is safety in numbers. The risk of retaliation is especially poignant for the low-wage workers such as in this case, due to their dependence on each pay check and their tendency to work in low-skilled jobs where employers too frequently consider them expendable. Class actions protect employees who wish to challenge and improve their working conditions from the retaliation that often follows from pursuit of an individual action. Conte & Newburg, *Newburg on Class Actions,* § 24.61 (4* Ed. 2002). Courts have repeatedly recognized that employees who bring individual actions against their employers run a greater risk of retaliation than those who participate in class actions. *See, e.g., Ansoumana v. Gristede's Operating Corp.,* 201 F.R.D. 81, 85-86 (S.D.N.Y 2001); *Ingram v. Coca-Cola Co.,* 200 F.R.D. 685, 701 (N.D. Ga. 2001); *Adames v. Mitsubishi Bank Ltd.,* 133 F.R.D. 82, 89 (E.D.N.Y. 1989); *Slanina* v. *William Penn Parking Corp.,* 106 F.R.D. 419, 423-24 (W.D. Pa. 1984). This is because a class must be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). The breadth of employee participation in a class action affords class members a degree of anonymity and cover. An employee who sticks her neck out to bring an individual claim against his or her employer (either in court or in arbitration) makes a visible target. At least such employees perceive a risk of retaliation. That is why current employees very seldom participate in legal actions as a named

plaintiff.[11] The fear of retaliation and the stress of going to work every day in conflict with the employer is more than most current employees can bear. Class and collective actions help alleviate these concerns and allow current employees to bring their claims while not being in the spotlight. Class and collective actions are thus truly a form of "mutual aid and protection" under section 7.

Class actions educate and empower workers in the same way as other section 7 activities. Some individual workers may not be aware of their legal rights or understand their employer has violated those rights. *See, e.g., Gentry v. Superior Court,* 42 Cal. 4th 443, 461, 165 P.3d 556 (2007). These actions typically involve "notice" which summarizes workers' legal rights. A class or collective action may reveal a pattern of unlawful treatment that is not evident to a single employee. Wage and hour laws have complex rules regarding the classification of exempt and nonexempt employees that are difficult for many employees to understand. Indeed, an employer may falsely tell its workers that they are not entitled to overtime pay. *See Gentry,* 42 Cal. 4th at 461. Low -wage workers, in particular, may be unfamiliar with their rights because they lack higher education or have limited comprehension of English. *See Wang* v. *Chinese Daily News, Inc.,* 231 F.R.D. 602, 614 (CD. Cal. 2005).

Class actions also allow employees to pool their claims and resources for the greater collective good. *Phillips Petroleum v. Shutts,* 472 U.S. 797, 809 (1985). "[T]he class action is the only economically rational alternative when a large group of individuals . . . has suffered an alleged-wrong but the damages due to any single individual ... are too small to justify bringing an

[11] This is also why class action participation rates range near 99% and collective action opt-in rates (where an employee must sign her name to say she wishes to pursue her claims) range from 15-30%. According to one survey, the opt-in rate in FLSA collective actions not backed by a union is generally between 15 and 30 percent. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, Lab. Law. Winter/Spring 2005 311, 313-14. Rates are low for various reasons, including the logistics of opting-in. It is also well-understood that current employees fear retaliation and even former employees do not wish to risk their career in an industry on uncertain litigation. *Cf. Newberg on Class Actions,* §8:42.

individual action." *In re American Express Merchants Litigation*^ 634 F.3d 187, 194 (2d Cir. 2011); *Cf. Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)(collective actions permit pooling of resources).

While class actions often involve multiple named plaintiffs asserting claims on behalf of a group of employees, a class action initiated by a single worker is no less *per se* protected activity under section 7. The Board and the courts have long recognized that concerted activity includes the actions of one individual if undertaken on behalf of a group of employees or in preparation for subsequent group action. *See, e.g., International Transp. Sev,, Inc.* v. *NLRB,* 449 F.3d 160, 166 (D.C. Cir. 2006); *Citizens Inv. Servs, Corp. v. N.L.R.B.*, 430 F.3d 1195, 1199 (D.C. Cir. 2005); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003). Indeed, the Board has repeatedly recognized that a single plaintiff class action constitutes concerted activity within the meaning of section 7. *Harco*, 344 NLRB at 441; *UPS*, 252 NLRB at 1018. The filing of a class action by a single employee is necessarily *on behalf of a,* group of employees and *in preparation for* a subsequent group action intended to be certified by the court under Rule 23. Such a class action therefore is by definition concerted action within the meaning of section 7.

C. A Contract That Interferes with Concerted Activity in Violation of the NLRA Is Void.

Unlawful contracts that violate federal law cannot be enforced as a matter of federal common law:

> There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:
>
> > "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the

> illegal contract in order to maintain the action, courts will not enforce it...." *Id*., at 654, 19 S.Ct., at 845.
>
> "[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id*., at 669, 19 S.Ct., at 851.

The rule was confirmed in *Continental Wall Paper Co. v. Louis Voight & Sons Co*., 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Id*., at 262, 29 S.Ct., at 292.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-78 (1982). *See also, California v. U.S*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable").

Indeed, even the most blatant breach of a contract does not allow enforcement of an unlawful contract contrary to the law:

> The Court cannot enforce the parties' subcontract, even though CLS through Barbara Moore, its principal officer, has blatantly violated the terms and conditions of the subcontract with MGC, for it is plainly contrary to law. *See Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc*., 988 F.2d 288, 290 (1st Cir.1993); *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 790 (4th Cir.1987). The Court further finds that MGC is barred from injunctive relief by the doctrine of unclean hands.
>
> *See Johnson v. Yellow Cab Transit Co*., 321 U.S. 383, 387, 64 S.Ct. 622, 88 L.Ed. 814 (1944) ("[A] federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law."); *United States v. Felici*, 208 F.3d 667, 670-71 (8th Cir.2000) ("The doctrine of unclean hands is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.").

Morris-Griffin Corp. v. C & L Serv. Corp., 731 F. Supp. 2d 488, 489-90 (E.D. Va. 2010). *See also* Williston On Contracts, §12:1; Restatement, Second, of Contract, §178.

The foregoing principles of federal common law apply to arbitration agreements. For example, in *U-Haul Company of California, Inc*., 347 NLRB 375, 377-78 (2006), enfd. 2007 WL

4165670 (D.C. Cir. 2007), the employer violated the NLRA by maintaining a mandatory arbitration policy that would reasonably be construed as prohibiting an employee from filing an unfair labor practice charge with the Board. The NLRB explained why even an implied suggestion that the arbitration provision supplanted rights under the NLRA was unlawful:

> [T]he breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy.

U-Haul Co. of California, 347 NLRB at 377.

With respect to activity subject to Sections 7 or 8 of the NLRA, courts normally defer to the exclusive competence of the NLRB. However, when enforcement of a contract would violation of the NLRA, that rule of deference to the NLRB does not apply:

> As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). *See also Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165-166, 98 L.Ed. 228 (1953). It is also well established, however, that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 853, 92 L.Ed. 1187 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83-84 (1982). In other words, because the courts cannot be used as tools to enforce illegal contracts, they must be able to refuse to enforce private agreements that violate the NLRA. In *Kaiser*, the Supreme Court succinctly explained why the primary jurisdiction of the NLRB yields to the judicial obligation to abstain from enforcement of illegal agreements:

> While only the Board may provide affirmative remedies for unfair labor practices, a court

> may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86 (1982).[12]

The NLRA was first enacted 1935, ten years after the Federal Arbitration Act. As more fully argued above, the later enacted NLRA must be given effect over any conflicting reading of the earlier enacted FAA, under "the familiar principle of statutory construction that conflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes. *Smith v. Robinson*, 468 U.S. 992, 1024 (1984). There is nothing in the FAA that prohibits this Court from refusing to enforce an unlawful arbitration clause drafted by WMC.

Because the NLRA §§7 and 8 prohibit class and collective action waivers and because federal law forbids enforcement of a contract that violates the NLRA, the arbitration clause drafted by WMC is unlawful and may not be enforced by this Court.

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[12] Even state courts determine whether enforcement of a contractual provision would violate the NLRA:

> Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel*, 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield*, 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Commc'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 199 (Ind. Ct. App. 1987). To find otherwise would lead to a result abhorrent to preservation of the robust, employee-protective goals of the NLRA.

POINT FOUR

THE REMEDY FOR DEFENDANT'S INVALID ARBITRATION CLAUSE IS TO REFUSE ENFORCEMENT OF THE CLAUSE.

The Supreme Court has said that the "primary purpose" of the FAA is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. Of Trustees,* 489 U.S. 468, 479 (1989). Thus, if an agreement to arbitrate cannot be enforced according to its terms, a court should refuse to enforce it. When a corporation drafts an unenforceable contract of adhesion it is not the responsibility of a court to rewrite the contract, and thereby find a legal way for the drafter to enjoy the otherwise unobtainable results it sought. As a comment to the Restatement (Second) of Contracts states, "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." *Id.,* Sec. 184, Comment b (1981). The Sixth Circuit has held that there is a federal policy that courts should not rewrite or otherwise fix arbitration clauses that contain illegal terms:

> "To sever the costs and fees provision and force the employee to arbitrate a Title VII claim despite the employer's attempt to limit the remedies available would reward the employer for its actions and fail to deter similar conduct by others." *Perez v. Globe Airport Sec. Servs.,* 253 F.3d 1280, 1287 (11th Cir.2001), *vac'd by* 294 F.3d 1275 (11th Cir.2002). *But see Gannon v. Circuit City Stores,* 262 F.3d 677, 683 n. 8 (8th Cir.2001) (questioning *Perez*). Under the contrary approach, an employer "will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreement it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter."

Cooper v. MRM Investment Co., 367 F.3d 493,512 (6th Cir. 2004).

A number of other circuit courts have also refused to rewrite or enforce arbitration clauses that had one or more unconscionable or otherwise unenforceable provisions, or when the unenforceable provisions are an integrated part of the clause. *See Alexander v. Anthony Int'l Ltd. Partnership,* 341 F.3d 256, 271 (3d Cir. 2003) ("The cumulative effect of such illegality prevents

us from enforcing the arbitration agreement. Because the sickness has infected the trunk, we must cut down the entire tree."); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (when the improper provisions of an arbitration clause are "by no means insubstantial," Court permits canceling agreement); *Graham Oil Co. v. ARCO Products Co., a Div. of Atl. Richfield Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) ("Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden… Such a blatant misuse of the arbitration procedure serves to taint the entire clause."); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) ("While it is within this court's discretion to sever unconscionable provisions, because an 'insidious pattern' exists in Circuit City's arbitration agreement 'that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees,' we conclude that the agreement is wholly unenforceable" (citations omitted)); *Paladino v. Avnet Computer Tecnologies, Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998) ("the presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation").

While the Court of Appeals for the Seventh Circuit has not addressed this issue, many courts within the Seventh Circuit have similarly refused to rewrite or enforce arbitration clauses that had one or more unconscionable or otherwise unenforceable provisions, or when the unenforceable provisions are an integral part of the clause. *See*, *Popovich v. McDonald's Corp.*, 189 F.Supp.2d 772 (N.D. Ill. 2002) (refusing to enforce arbitration agreement because provision that waived plaintiff's right to recover arbitration costs would make arbitration prohibitively expensive for plaintiff; also refusing to rewrite agreement to allow defendant to pay costs); *Plattner v. Edge Solutions, Inc.*, 2004 WL 1575557 (N.D. Ill. April 1, 2004) (refusing to enforce arbitration agreement or rewrite by severing unconscionable provisions); s*ee also, Geiger v.*

Ryan's Family Steak Houses, Inc., 134 F.Supp.2d 985 (S.D.Ind. 2001).

The federal appeals courts and the District Courts within the Seventh Circuit that have severed unenforceable provisions within arbitration clauses and compelled arbitration have generally done so when only a single ancillary provision was unenforceable. Here, on the other hand, there are several clauses that together combine to "taint" the agreement as a whole. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) ("insidious pattern" within arbitration agreement 'that functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees,' [leads to conclusion] that the agreement is wholly unenforceable") First, is the class and collective action waiver. Second is the costs provision that having chosen the arbitral forum which is more expensive to the employer, then shifts WMC's arbitral costs onto Plaintiffs. Third is the purported indemnity clauses in paragraphs 8 and 16, which are unilaterally applicable to making Plaintiffs responsible for Defendant's legal fees, but which do not operate bilaterally. Also, for the reasons set forth above, and in Plaintiffs' Motion to Strike, Docs. 15 and 16, these indemnity provisions impermissibly interfere with the FLSA. These invalid provisions individually and collectively so tilt the playing field in WMC's favor that this Court simply cannot enforce the arbitration clause "according to [its] terms." *Volt Info. Sciences, Inc. v. Bd. Of Trustees,* 489 U.S. 468, 479 (1989).

POINT FIVE

COSTS AND FEES CANNOT BE ASSESSED AGAINST PLAINTIFFS FOR FILING THIS SUIT.

Plaintiffs incorporate by reference the full argument against the assessment of costs and fees for filing this suit, as set forth in Plaintiffs' Motion to Strike, Doc. 19.

CONCLUSION

WMC's arbitration agreement cannot be enforced because it imposes excessive costs on

Plaintiffs, because it impermissibly interferes with the FLSA's remedial purposes, and because it violates the NLRA. For each of these reasons, WMC's motion to dismiss should be denied.

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Respectfully Submitted,

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