Benjamin Schonbrun, SBN 118323
SCHONBRUN DESIMONE SEPLOW
HARRIS HOFFMAN & HARRISON LLP
723 Ocean Front Walk
Venice, California 90291
Telephone: (310) 396-0731
Facsimile: (310) 399-7040

Dan Getman, Esq. (*pro hac vice*)
Dgetman@GetmanSweeney.com
GETMAN & SWEENEY, PLLC
9 Paradies Lane
New Paltz, NY 12561
Telephone: (845) 255-9370
Facsimile: (845) 255-8649

Susan Martin (*pro hac vice*)
Jennifer Kroll (*pro hac vice*)
MARTIN & BONNETT, PLLC
1850 N. Central Ave., Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
Facsimile: (602) 240-2345

Edward Tuddenham
228 W. 137th St.
New York, New York 10030
Telephone: (212) 234-5953
Facsimile: (512) 532-7780

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

GABRIEL CILLUFFO, KEVIN SHIRE, and BRYAN RATTERREE individually and behalf of all other similarly situated persons,

Plaintiffs,

vs.

CENTRAL REFRIGERATED SERVICES, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES,

Defendants.

Case No. ED CV 12-00886 VAP (OPx)
Honorable Virginia A. Phillips, Dept. 2

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants' motion to dismiss should be denied for two reasons: First, the court lacks authority to compel arbitration under both the Federal Arbitration Act (FAA) and the Utah Arbitration Act (UAA). Second, even if the court had authority to compel arbitration, the class and consolidated action waiver in the arbitration clause is unenforceable because it abridges the non-waivable right to engage in concerted activity (such as filing class actions for forced labor and collective actions for wages) guaranteed by the National Labor Relations Act (NLRA), the Norris-LaGuardia Act (NLA), and the Fair Labor Standards Act (FLSA). Because the class and consolidated action provision is unenforceable, by its own terms the arbitration agreement precludes sending this controversy to arbitration.

FACTUAL BACKGROUND

Central Refrigerated Service, Inc. and Central Leasing, Inc. (collectively "CRS") lure truck drivers into signing a Lease and Contract Agreement which, although it labels them independent contractors, places them under Defendants' exclusive control for a period of years. See Exs. A-G to Baer Decl., Def. Mot. to Compel (Docs. 26-1 – 26-7); Exs. A-G to Baker Decl., Def. Mot. to Compel (Docs. 27-1 – 27-7).[1]

CRS exercises total control over the drivers' work and does not allow them to work for other companies during the term of the Contract. The Contract specifically states that, **"COMPANY shall assume complete responsibility for the operation of the Equipment during such time."** Exs. A-G to Baker Decl. (Docs. 27-1 – 27-7), Contract ¶ 5A. Plaintiffs are not permitted to haul goods for third parties. *Id.*; *See e.g.*

---

[1] Under the FLSA, a company is an "employer" notwithstanding its designation of workers as "contractors", when it "suffers or permits" the putative employee to perform work. "Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA. *See Rutherford Food Corp. v. McComb,* 331 U.S. 722, 729 (1947).

Cilluffo Decl. at ¶¶ 9, 23, 24. CRS controls what jobs Plaintiffs do, how much work they do, what hours they work, how much money they can make, their departure and arrival times, the routes they take, where they gas, and the speed they drive. *See e.g.* Shire Decl. at ¶¶ 12-16.

CRS enforces their control over Plaintiffs' work through their ability to terminate a driver at will (Contract ¶ 14) which is a driver "default" under the lease (Lease ¶ 12(g)), at which point CRS can repossess the truck and all remaining lease payments become immediately due and owing. (Lease ¶ 13(b)). The "default" is reported to the driver's DAC report and the amount due on the lease is reported to a credit agency, ruining drivers' ability to drive. *See, e.g., Shire Decl.* at ¶¶ 24, 26, 28-29, 32-33. Because CRS can terminate a driver and impose financial ruin at will, CRS exerts total practical control over drivers. Plaintiffs do the primary work that CRS performs in the market – trucking goods for CRS's customers – and are not "in business for themselves" any more than the regular employee drivers for CRS.

Despite long hours of work, Plaintiffs regularly receive no weekly pay for their work and often owe CRS for having worked. *See e.g. Cilluffo Decl.* at ¶¶ 18-19. Plaintiffs may work for months at subminimum wages. *See e.g.* Perkins Decl. at ¶ 31(a). Plaintiffs often go deeper in debt the longer they work. *Id.* at ¶¶ 22, 31(c).

ARGUMENT

I. THE FAA DOES NOT APPLY TO THIS DISPUTE

Section 1 of the FAA states unequivocally that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Plaintiffs assert that they fall squarely within this exemption. As interstate truck drivers, they are "workers engaged in foreign or interstate commerce" as defined by §1, *Harden v. Roadway Package Sys. Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001), and their complaint alleges that they were employees of CRS. Those allegations are further supported by each of the Plaintiffs' declarations in support of this brief.

Where, as here, a complaint alleges a claim to the §1 exemption, the Ninth Circuit requires the district court to resolve the exemption question before it can even consider a request to compel arbitration under the §4 of the FAA. *In Re Van Dusen*, 654 F.3d 838 (9th Cir. 2011). This is so because, unless and until that exemption question is resolved, the Court has no authority to invoke the power conferred by §4 of the Act. In *Van Dusen*, as in this case, interstate truck drivers, labeled independent contractors in their work agreement, alleged, *inter alia*, that they were employees entitled to damages under the FLSA and federal forced labor statutes. The defendants moved to compel arbitration, and the drivers responded, as Plaintiffs do here, by arguing that the court had to resolve the FAA §1 exemption question before considering the motion to compel arbitration under §4. The district court disagreed, ordering arbitration and leaving it to the arbitrator to determine whether the exemption applied. Van Dusen then filed a mandamus petition to compel the court to resolve the §1 issue. In its mandamus opinion, the Ninth Circuit held on no uncertain terms that a district court may not compel arbitration under §4 unless it first determines that the "agreement for arbitration is of the kind that §§1 and 2 have brought under federal regulation." *Id.* at 844. As the Court succinctly put it, to apply §4 of the Act without first resolving the §1 exemption question "puts the cart before the horse." *Id.*

Defendants argue that the holding in *Van Dusen* was dicta because the Court ultimately did not grant mandamus, concluding that the district court had committed error, but not "clear error." The Ninth Circuit's reluctance to cite a district court for "clear error" and understandable desire to allow the district court to correct its own mistake on remand hardly renders the Court's careful analysis of the §1 exemption dicta. Defendants citation to *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011), is equally unpersuasive. Aside from the fact that *Green* is not binding on this Court and *Van Dusen* is, it is clear that the *Green* court gave the §1 issue only cursory consideration. Among other things it did not cite, let alone discuss, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), and *Prima Paint Corp. v. Flood &*

Conklin Mfg. Co., 388 U.S. 395, 401 (1967), the two cases that the Ninth Circuit found controlling. *Van Dusen*, 654 F.3d at 844-845.[2]

Thus, pursuant to *Van Dusen*, this Court may not consider Defendants' motion to compel arbitration under the FAA until it resolves the antecedent question of whether Plaintiffs fall within the §1 exemption to the FAA.

II. THE COURT HAS NO AUTHORITY TO COMPEL ARBITRATION UNDER UTAH LAW

A. The §1 Exemption Left Federal Courts Without Authority To Order Specific Performance of Exempt Contracts

If this Court concludes that this case is excluded from the FAA by the § 1 exemption, then the Court not only lacks authority to compel arbitration under §4 of the FAA, it also lacks authority to specifically enforce arbitration under the UAA.

While it is commonplace to say that the FAA evinces a Congressional policy favoring arbitration, that is only true with respect to claims covered by the FAA. The FAA evinces no such policy in favor of arbitration with respect to contracts which Congress explicitly excluded from FAA coverage, including contracts of employment of transportation workers such as the ones at issue here. To the contrary, "the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if

---

[2] Defendants also argue (Doc. 25,p.25 of 33) that Plaintiffs cannot rely on Federal Interstate Motor Carrier Act regulations as a basis for asserting that they are employees citing *Port Drivers Fed. 18 Inc. v. All Saints Express, Inc*, 757 F.Supp2d 463 (D.N.J. 2011). Plaintiffs disagree with the holding in that case; regardless, Plaintiffs' claim that they are employees is based on the totality of the circumstances of their employment—precisely the basis asserted by the drivers in *In re Van Dusen*, 654 F.3d at 841. The exemption clearly applies where the totality of the circumstances demonstrate the existence of an employee relationship. *See, e.g. Bell v. Atlantic* , 2011 WL 4730564 (M.D. Fla. Dec. 7, 2009) (concluding that totality of circumstances demonstrated employee status and denying motion to arbitrate); *Gagnon v. Service Trucking Inc.*, 266 F.Supp.2d 1361, 1365-1367 (M.D. Fla. 2003) (same).

the [Federal] Arbitration Act had never been enacted." *Palcko v. Airborne Express Inc.*, 372 F.3d 588, 596 (3d Cir. 2004).

If the FAA had not been enacted, the prior law would remain in existence – i.e. "the general common-law rule against specific enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part). *See, e.g., Hamilton v. Home Ins. Co.*, 137 U.S. 370 (1890) (failure to comply with arbitration agreement is not a bar to federal suit); *Haskill v. McClintic-Marshall Co.*, 289 F. 485 (9th Cir. 1923) ("It was a settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction, and that rule has been consistently adhered to by the federal courts."); *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926) (refusing to enforce arbitration agreement); *Mitchell v. Dougherty*, 90 F. 639 (3d Cir. 1898) (same).

Even where, as here, an arbitration agreement recited that it was to be controlled by the law of a jurisdiction that deemed arbitration clauses enforceable, prior to the FAA federal courts remained powerless to compel arbitration. For example, in *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y 1921) aff'd 5 F.2d 218 (2d Cir. 1924), Atlantic Fruit sued Red Cross Line in federal district court for non-payment of shipping hire and expenses. The shipping contract on which the suit was based contained a choice of law provision in favor of New York law and specifically required arbitration of any dispute pursuant to the New York Arbitration Act, enacted in 1920. Just as defendants do here, Red Cross Line raised the arbitration clause as a defense to the federal claim, but the district court held it lacked authority to enforce the agreement and eventually entered judgment against Red Cross. *Id*, 276 F. at 321-324. The Second Circuit affirmed, holding unequivocally that it had no power to compel arbitration. The court noted that "for a generation or so . . . any agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted." *Id.* 5 F.2d at 220. While the Second Circuit recognized that the New York Arbitration Act was valid

and enforceable in state court, neither that Act nor the parties' agreement could confer power to compel arbitration on the federal courts. *Id.* at 219. *See also U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915) (federal court lacked authority to compel specific performance of arbitration agreement). *Cf. Berkovitz v. Aribib & Houlberg Inc.*, 230 NY 261, 270 (1921) (Cardozo, J.) (refusing to enforce an arbitration agreement unenforceable under New York law because "the common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. . . . The rule to be applied is the rule of the forum.").

Prior to the FAA, Federal courts even lacked power to enforce arbitration clauses in diversity cases, despite the fact that such clauses would have been enforced had the claim been brought in state court. *Cal. Prune & Apricot Growers' Assn. v. Catz Amer. Co.*, 60 F.2d 788 (9th Cir. 1932) (federal courts are without jurisdiction to enforce arbitration clause under the California Arbitration Act); *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926) (refusing to order arbitration under N.Y. Arbitration Act in diversity action). *See Southland Corp.*, 465 U.S. at 34 (O'Connor, J. dissenting) ("By 1925 several major commercial states had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases.").

While the passage of the FAA in 1925 changed this law, making agreements **within its purview** "valid, irrevocable, and enforceable," 9 U.S.C. § 2, the FAA pointedly did NOT change the law with respect to contracts excluded from the FAA, including contracts of employment of transportation workers. 9 U.S.C. §1. As to those contracts "the effect of Section 1 is merely to leave the arbitrability of disputes . . . as if the [Federal] Arbitration Act had never been enacted." *Mason-Dixon Lines Inc. v. Local Union No. 560*, 443 F.2d 807, 809 (3d Cir. 1971). That is, the exemption left in place the common law rules precluding federal courts from compelling arbitration. Those common law rules have not changed, nor have there been any statutory changes that

would subject the Plaintiffs in this case to compelled arbitration.[3] Accordingly, if this court finds that the §1 exemption applies, the case law cited above makes clear that the court lacks authority to compel arbitration under the UAA.

It is important to stress that this argument is not a preemption argument. Preemption questions arise only *after* a court decides that it has authority to enforce two conflicting statutes at which point the court must determine which of the two statutes takes precedence. The argument outlined above addresses the antecedent question: in a federal action resting on federal question jurisdiction that is exempt from the FAA, does the court have authority to specifically enforce an arbitration provision under state law? Because the §1 exemption left in place federal law as it existed at the time the FAA was adopted -- law that precluded federal courts from granting specific performance of arbitration clauses (even where they would be enforceable in state court under a state arbitration statute) – the preemption question is never presented. Rather, the fact that state law enforces such agreements is simply irrelevant in light of the law prohibiting federal courts from granting specific enforcement of such agreements.

That preemption is not the issue is precisely where the court in *Palcko v. Airborne Express Inc.*, 372 F.3d 588 (3d Cir. 2004), the case relied upon by Defendants, went astray. Unlike this case, the *Palcko* case raised *both* federal and state claims on behalf of transportation workers. The contract contained an arbitration clause that stated Washington State law would apply if the FAA were determined to be inapplicable. The district court refused to compel arbitration, but the Court of Appeals reversed. The Court of Appeals agreed that the plaintiff was exempt under §1 of the FAA, and recognized that "the effect of Section 1 is merely to leave the arbitrability of

---

[3] Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *et. seq.* passed after the FAA, gives federal courts authority to compel arbitration in cases involving collective bargaining agreements, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), including, presumably, those of transportation workers. But that statutory change has no applicability here since no collective bargaining agreement is at issue.

disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted." *Id.* at 596. But rather than consider what the law would be in the absence of the FAA, the Court simply assumed, erroneously, that in the absence of the FAA, federal courts had authority to specifically enforce arbitration agreements under state statutes. Having assumed that it had authority to grant specific enforcement under the state arbitration clause, the only remaining question was whether the FAA exemption preempted the exercise of that assumed authority. Concluding that the exemption did not preempt the state statute, the court compelled arbitration under the state act. Plaintiffs discuss the flaws in the *Palcko* court's preemption analysis below, but before turning to preemption, the initial problem with the *Palcko* decision is its incorrect assumption based on no analysis, that the law in existence "as if the FAA had never been enacted," gave it authority to specifically enforce the arbitration agreement under the Washington State statute. As shown above, however, that assumption was wrong. If the FAA had not been enacted, federal courts would lack authority to enforce arbitration agreements under state law, even where a specific state law allowed such enforcement. *Atlantic Fruit Co.*, 276 F. 319, aff'd 5 F.2d 218. That authority is still lacking with respect to contracts excluded under §1 and, thus, no preemption question is presented. The Fifth Circuit fell into the same error in *Davis v. EGL Eagle Global Logistics LP*, 243 F.Appx. 39 (5th Cir. 2007) (in a diversity action finding that, because the FAA did not preempt the Texas Arbitration Act, arbitration could be compelled under the Texas Act even though the workers were exempt from the FAA). In both cases state law claims had been asserted and the courts simply assumed that the FAA and state arbitration clauses applied concurrently when it is clear that that was not the case at the time the FAA was passed and is still not the case with respect to cases, like this one, that are exempt from the FAA and raise only federal statutory claims.

By excluding contracts of employment of transportation workers from the FAA, the federal common law rule that arbitration agreements are unenforceable—including agreements that specify valid non-federal arbitration acts -- continued to govern such

contracts. Nothing has changed that common law principal since 1925. Accordingly, this Court lacks authority to compel arbitration under the UAA.[4]

B. The FAA §1 Exemption Preempts Utah's Arbitration Statute

Even if the court were to disagree with the above analysis, the court would still have to consider whether the FAA exemption preempts enforcement under the state act. The *Palcko* court reasoned that it did not, but it reached that conclusion solely on the basis that the Washington State Act "does not contradict any of the language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." *Palcko*, 372 F.3d at 596. That reasoning is plainly flawed, however, because the FAA evinces no such policy favoring arbitration with respect to contracts excluded from the FAA. To the contrary, as the Supreme Court has stated, the policy of the FAA with respect to seamen, rail and transportation worker contracts of employment is that they should not be subject to orders compelling arbitration, save for specific federal legislation that applied or would apply in the future. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). The §1 exemption for transportation workers was adopted:

> precisely because of Congress' undoubted authority to govern the employment relationships at issue by the enactment of statutes specific to them. . . It is reasonable to assume that Congress excluded 'seamen' and 'railway employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.
>
> As for the residual exclusion of "any other class of workers" engaged in foreign or interstate commerce," Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage to the two specific, enumerated types of workers identified in the proceeding portion of the sentence. It would be rational for Congress to ensure that workers in general would be covered by the

---

[4] In passing the FAA, Congress deliberately chose not to change the common law hostility to arbitration with respect to a small set of contracts. Unless and until Congress decides to change that law, the courts have no authority to do so.

> provisions of the FAA, **while reserving for itself** more specific legislation for those engaged in transportation.

Id. Given that the purpose of §1 was to reserve for Congress the right to control arbitration as it applied to excluded workers, and to ensure that States did not interfere with "established or developing statutory dispute resolution schemes" applicable to such workers, state laws that purport to regulate arbitration of such exempted contracts are preempted. Even before *Circuit City*, the Supreme Court made clear that "§§ 1 and 2 [of the FAA] are applicable in state as well as federal court." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989) (citing *Southland*, 465 U.S. at 12). The exemption language in §1 is an indivisible part of §1 and by making it applicable to state courts, the Supreme Court has made clear that any state attempt to ignore or circumvent the §1 exemption is preempted.[5]

III. THE CONTRACT VIOLATES THE NLRA

Even if the arbitration agreement were otherwise enforceable under the FAA or the UAA – which it is not for the reasons set forth above -- the arbitration provision's

---

[5] The contract's citation of Utah law would, in any event, be irrelevant in this proceeding, because it asserts purely federal claims governed by federal law and federal law expressly exempts these workers from court ordered arbitration. *See, e.g.*, *CBS v. FCC*, 532 F.3d 167, 191 (3d Cir. 2008) (holding that federal common law governs determination of the employer/employee relationship for federal regulatory purposes despite a New York choice of law provision in the parties' contract); *Robbins v. Iowa Rd. Builders Co.*, 828 F.2d 1348, 1352-53 (8th Cir. 1987) (finding contractual choice of law provision inapplicable in case asserting purely a federal cause of action); *Owner Operator Independent Drivers Association v. CR England*, 325 F. Supp. 2d. 1252, 1259 (D. Utah 2004) (finding Utah arbitration law inapplicable and distinguishing *Palcko, inter alia*, because unlike *Palcko*, there were no state law claims asserted). See also *Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1129 (9th Cir. 1993) (court upheld choice of law provision on question of which state's statute of limitations should be borrowed noting, "the choice of Massachusetts law **for all state law questions** was fair and reasonable") (emphasis supplied). Here, in contrast to *Wang*, the FLSA and the forced labor claims are based exclusively on federal law.

prohibition on class and consolidated actions violates § 7 of the NLRA.[6] The NLRA was enacted by Congress to address "the inequality of bargaining power between employers and employees." 29 U.S.C. § 151. The NLRA guarantees the right of employees to join together to protect and improve their wages, hours and other terms and conditions of employment. 29 U.S.C. § 157. §7 of the NLRA provides that employees have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id*. This right includes steps taken "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). §8(a)(1) of the NLRA prohibits employers from taking action to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1).

Defendants' insistence on a waiver of the right to maintain a class or consolidated action as a condition of employment directly conflicts with these rights guaranteed under the NLRA. The National Labor Relations Board ("NLRB") and the

---

[6] The class and consolidated arbitration waiver clearly applies to Plaintiffs' forced labor claims, which are asserted as a class. Plaintiff believes that under established principles of contract interpretation including the doctrine of *expressio unius est exclusio alterius*, *see, e.g.*, *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992), the arbitration provision permits FLSA collective actions since a provision limiting class action arbitrations does not encompass collective actions. *See, e.g.*, *Chapman v. Lehman Bros.*, 279 F.Supp.2d 1286 (S.D. Fla. 2003) (arbitration clause prohibiting class actions did not prohibit collective actions). An FLSA action is not a "consolidated action" governed by Fed. R. Civ. P. 42. *See Mork v. Loram Maint. of Way, Inc.*, 844 F. Supp. 2d 950, 2012 WL 38628, at * 5 (D. Minn. Jan. 9, 2012) (discussing difference between collective action under FLSA and consolidation under Fed. R. Civ. P. 42). If the Court disagrees with Plaintiffs and finds that the arbitration provision waives arbitration of Plaintiffs' FLSA claims as a collective action, the arbitration provision is unenforceable as an unlawful waiver of FLSA statutory rights as well as the rights secured by the NLRA and the NLA.

courts have long held that the right to bring class actions to address wages, hours or working conditions constitutes concerted activity protected by the NLRA. *See*, *e.g.*, *Saigon Gourmet*, 353 NLRB No. 110 (2009) (concerted assertion of wage and hour claims is protected activity); *2nd Street Hotel Associates D/B/A Novotel New York*, 321 NLRB 624, 633-636 (1996) (collective action under FLSA was protected concerted activity); *Harco Trucking, LLC and Scott Wood*, 344 NLRB 478, 479 (2005) (retaliation for filing a class action violated the NLRA).[7]

Moreover, the NLRB has made clear that the right to engage in concerted activity through class and collective actions may not be waived through an arbitration agreement. In *D.R. Horton, Inc. and Michael Cuda*, 357 N.L.R.B. No. 184 (2012), the Board held that class and collective action waivers in employment agreements violate and are prohibited by the NLRA. Consistent with prior court and Board decisions, the Board stated that "clearly, an individual who files a class or collective action regarding wages, hours or working conditions…is engaged in conduct protected by Section 7." *Id.*; 29 U.S.C. § 151 *et seq.* The Board went on to hold that an arbitration provision that deprives employees of their right to engage in concerted activity by prohibiting class or collective actions violates the NLRA:

> we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.[…W]e find that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which

---

[7] *See also Trinity Trucking*, 221 NLRB 364, 365 (1975); *In Re 127 Rest. Corp. d/b/a Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000); *Mohave Electric Cooperative*, 327 NLRB 13 (1998), *enf'd* 206 F.3d 1183 (D.C. Cir. 2000); *Host International*, 290 NLRB 442, 442-443, 445 (1988)); *United Parcel Service*, 252 NLRB 1015, 1018, 1022, fn.26 (1980), *enf'd* 677 F.2d 421 (6th Cir. 1982).

> generally makes employment-related arbitration agreements judicially enforceable.

Id. The NLRB's interpretation of the NLRA set forth in *D.R. Horton* is entitled to "the greatest deference." *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 (1994). *See also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (agency's reasonable construction of ambiguous statute is controlling even if reading differs from what the court believes is the best statutory interpretation) (citing *Chevron U.S.A. v Natural Res. Def. Council*, 467 U.S. 837, 843-44 & n. 11 (1984)).

Following *D.R. Horton*, several courts have agreed that arbitration provisions that purport to waive the right to bring class or collective actions are unenforceable. *See Owen v. Bristol Care, Inc.*, 11-04258-CV-FJG, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) ("an arbitration clause may not be enforced if it precludes the vindication of substantive rights afforded by statute. These rights include the right to bring a class or collective action in the employment context.") (citing *Chen–Oster v. Goldman, Sachs & Co.*, 785 F.Supp.2d 394, 406, 403-410 (S.D.N.Y. 2011)); *Herrington v. Waterstone Mortg. Corp.*, 11-CV-779-BBC, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012) ("Accordingly, because the Board's interpretation of the NLRA in *D.R. Horton,* is "reasonably defensible," *Sure–Tan v. NLRB,* 467 U.S. 883, 891 (1984), I am applying it in this case to invalidate the collective action waiver in the arbitration agreement.").[8]

The Supreme Court has held that courts may not enforce a contract provision that violates the NLRA. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1981). *See also Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. 2010) ("employees cannot

---

[8] *Herrington* held the illegal arbitration provision was severable and that plaintiff "must be allowed to join other employees to her case." Here, it is immaterial whether the provision banning class arbitration is severable because the arbitration agreements provide: "If a court or arbitrator decides for any reason not to enforce this ban on consolidated or class arbitrations, the parties agree that this provision, in its entirely, will be null and void and any disputes between the parties will be resolved by court action, not arbitration." Defs' Br., Doc. 25, at p. 10 (citing Baer Decl. Exs. A-G).

waive the protections of the FLSA, nor may labor organizations negotiate provisions that waive employees' statutory rights under the FLSA.") (citation omitted).

Defendants' reliance on *Morvant v. P.F. Chang's China Bistro, Inc.*, 11-CV-05405 YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012), (pp. 20-21 n. 18), is clearly misplaced. The *Morvant* court erroneously relied on *AT & T Mobility LLC v. Concepcion*,131 S. Ct. 1740 (2011), and the FAA's policy favoring arbitration as somehow overriding national labor policy as embodied in the later enacted FLSA, NLRA and NLA. There are several errors in the *Morvant* court's reasoning. First, that FAA policy is inapplicable here because these contracts are exempt from the FAA's coverage. (See pp. 2-4, *supra*) Accordingly, there is no federal policy favoring arbitration of the exempt class of contracts at issue here. To the contrary, the federal policy is the opposite – that these contracts are not subject to arbitration orders by any federal courts.

Second, even if the FAA policy favoring arbitration were applicable to these exempt workers, that general policy could not override the specific national labor policy guaranteeing the right to concerted activity embodied in the later enacted NLRA. *See Smith v. Robinson*, 468 U.S. 992, 1024 (1984) ("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"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one."); *Chevron*, 726 F.2d at 490 n. 8. The guarantee of the right to concerted activity in the NLRA also preempts the UAA to the extent its prohibition on "order[ing] consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation" is applicable to labor claims such as this one. Utah Code Ann. § 78B-11-111. *See San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *N. L. R. B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("The purpose of the

[NLRA] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'") (quoting *Garner v. Teamsters Chauffeurs and Helpers Local Union*, 346 U.S. 485, 490 (1971)); *Smart v. Int'l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 724 (7th Cir.2002) ("Section 301 is of course more than a jurisdictional and procedural statute; the Supreme Court has held that it is a directive to the courts to create a federal common law of collective bargaining contracts. The Federal Arbitration Act has no particular reference to such contracts and so if there were a conflict between the two statutes we would resolve it in favor of Section 301.")). Because the arbitration agreement abridges the right to engage in concerted action regarding wages guaranteed by the NLRA, it is unenforceable.[9]

IV. THE CLASS WAIVER VIOLATES THE NORRIS-LAGUARDIA ACT

In addition to running afoul of the NLRA, the arbitration provision also violates the Norris-LaGuardia Act (NLA), 29 U.S.C. § 101 *et. seq*. That Act, which was passed in 1932, seven years after the FAA, deprives the federal courts of jurisdiction to grant legal or equitable relief that would interfere with the right of employees to engage in concerted activities. Its broad findings and declaration of policy presage the type of unconscionable terms of employment at issue in this case:

> Whereas…the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment…, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, … and that he shall be

---

[9] *See Herrington*, 2012 WL 1242318 (*Concepcion v. AT & T Mobility* "is not on point because the class action waiver in that case did not conflict with the substantive right of a federal statute. Rather, the question was whether the FAA preempted a ruling under state law by the California Supreme Court."); *Owen*, 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012) ("Nonetheless, in the employment context, *Concepcion*, is not controlling. In the employment context, waivers of class arbitration are not permissible.").

> free from the interference, restraint, or coercion of employers of labor, or their agents, …in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 102.

Under the NLA, "any undertaking or promise in conflict with the public policy declared in § 102... shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. § 103. Courts are deprived of jurisdiction to prohibit any person or persons from engaging "whether singly or in concert" in "aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State" 29 U.S.C. § 104(d).

Defendants again rely on *Morvant* to argue the NLA does not apply here. But the *Morvant* court's conclusion that the NLA is not applicable to arbitration agreements is based on that court's assumption that the statute only applies to "contracts not to join a union or to quit employment if one joins a union." Id. 2012 WL 1604851 at *10. Such a narrow reading of the NLA is in direct conflict with the clear language of the statute and Supreme Court precedent. In *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 202 (1962), the Supreme Court confirmed that the NLA is not limited to union disputes. The Court stated that § 2 of the NLA:

> does not purport to limit the Act to the protection of collective bargaining but, instead, expressly recognizes the need of the anti-injunction provisions to insure the right of workers to engage in 'concerted activities for the purpose of collective bargaining *or other mutual aid or protection*.' Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself.

Id., (emphasis added) overruled on other grounds, *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).[10] *See also D.R. Horton*, 357 NLRB No. 184

---

[10] *Boys Market* recognized that the NLA must be accommodated to the subsequently enacted provisions of §301 of the Labor Management Relations Act, adopted in 1947, (footnote continued)

(The NLA "protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer."). §§103 and 104 of the NLA make clear that outlawing yellow-dog contracts is merely one of a series of acts, both enumerated and non-enumerated, that are subject to the prohibition on the exercise of jurisdiction by courts in the context of a labor dispute. *See* § 103 (prohibiting injunctions, legal or equitable relief against "any undertaking or promise in conflict with the public policy declared in § 102") and § 104 (depriving courts of jurisdiction to prohibit persons participating or interested in a labor dispute from acting in concert with respect to nine enumerated activities including prosecuting an action in state or federal court). *See, e.g., Milk Wagon Drivers' Union, Local No. 753, Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am. v. Lake Valley Farm Products*, 311 U.S. 91, 101 (1940) (reversing grant of injunction under federal antitrust laws, stating "[t]he Norris-LaGuardia Act-considered as a whole and in its various parts-was intended drastically to curtail the equity jurisdiction of federal courts in the field of labor disputes."); *Sperry Gyroscope Co, Div. of Sperry Rand Corp v. Hall*, 185 F. Supp. 64, 65 (S.D.N.Y. 1960) ("There is no ground and no authority for limiting Section 104(b) to 'yellow dog' contracts, as the plaintiff urges. By its terms, it embraces more than such contracts. Even Section 103, to which it refers, deals with other kinds of restrictive contracts.").

Contrary to the authority relied on by Defendants, there can be no question that this case involves a labor dispute governed by the NLA. The definitional section of the statute makes this clear. A case is held to grow out of a labor dispute when "the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interest therein or who are employees of the same employer… or "when the case involves any conflicting or competing interests in a 'labor dispute'…"

---

which permits an injunction in aid of arbitration in a suit by or against a labor organization.

29 U.S.C. § 113 (a). "Labor dispute," is defined in § 13(c) to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

Further, the NLA, adopted seven years after the FAA expressly repealed "[a]ll acts and parts of acts in conflict with the provisions of this chapter…" 29 U.S.C. § 115. Accordingly, even if the FAA could be found to apply in this case, Defendants request for specific performance of the bar on class or consolidated actions in the arbitration agreement would still be barred by the NLA.

V. THE FLSA GRANTS WORKERS THE "RIGHT" TO COLLECTIVE ENFORCEMENT[11]

A. The FLSA is Designed to Protect All Covered Workers

The FLSA was adopted to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C.A. § 202, and to "secure for the lowest paid segment of the nation's workers a subsistence wage", *D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108, 116 (1946), because "[e]mployees receiving less than the statutory minimum are not likely to have sufficient resources to maintain their well-being and efficiency…", *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. at 708-09.

---

[11] If the Court finds that the arbitration agreement allows Plaintiffs to proceed in arbitration on a collective action basis because it does not explicitly exclude "collective actions," then the argument set forth in this section is unnecessary. However, if the Court finds the arbitration agreement's prohibition on "consolidated or class arbitrations" precludes all forms of collective enforcement of Plaintiffs FLSA rights, then the Court should address the argument that the FLSA precludes enforcing a waiver of collective action rights which are fundamental to the statute.

To achieve these goals, the FLSA is designed to make sure "all" covered workers are paid minimum wage and overtime for hours over forty. *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981)(emph. added); *Brooklyn Sav. Bank*, 324 U.S. 697, 710 (1945).[12] Payment of the minimum wage to "all" workers also prevents substandard wages from being used as "an unfair method of competition" against law-abiding competitors. 29 U.S.C. § 202(a)(3); *see Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir.1948) ("Rights granted to employees under the Fair Labor Standards Act ... are 'charged or colored with the public interest.'"); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (allowing employees to contract out of FLSA protections would result in an impermissible downward pressure on wages across the market); H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6-7 ("No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors".)

The FLSA is fundamentally a limitation on the right to contract. *Brooklyn Sav. Bank*, 324 U.S. at 706-07 ("The [FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their

---

[12] Low-wage workers such as Plaintiffs are particularly hard hit by violations of wage and hour laws. One study of 4,387 workers in low-wage industries in Los Angeles, New York, and Chicago, found that 26% were paid less than the minimum wage in the previous work week. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2 (2009), *available at* http://www.unprotectedworkers.org/index.php/broken_laws/index (last visited on August 8, 2012). For low-wage workers who had come to work early or stayed late, 70% were not paid for work they performed outside their scheduled shift. *Id.* at 3. The Plaintiffs in this case document months of sub-minimum wages and a cycle of increasing debt owed to the company, despite working full time as truckers for the largest refrigerated truckload carrier in the U.S. *See., e.g., Costlow Decl.* at ¶ 26(a); *Perkins Decl.* at ¶¶ 22, 31(a), 31(c).

part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir.1987) (Easterbrook, J., concurring) (The FLSA was "designed to defeat rather than implement contractual arrangements"). As a result, "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine*, 450 U.S. at 740-741 (*citations omitted).*

The collective action provision in 29 U.S.C. §216(b), which was labeled a "right" by Congress, is integral to FLSA's comprehensive remedial scheme,[13] and encourages private attorneys' general to take meritorious FLSA cases.[14] Congress used the phrase "The **right** provided by this subsection to bring an action by or on behalf of any employee" in 29 U.S.C. §216(b).The Supreme Court has noted the important purpose fulfilled by the collective action section:

> …§ 16(b), expressly authorizes employees to bring collective … actions "in behalf of ... themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982 ed.). Congress has stated its policy that … plaintiffs should have the opportunity to proceed collectively. A collective action allows… plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.

---

[13] In 2007, there were 6,825 FLSA cases filed in federal court, but only 138 of these were filed by the DOL. *Judicial Business of the United States Courts, 2010 Annual Report of the Director* 146 (Table C-2), http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf (last visited on Aug. 9, 2012). Minimum wage claims handled by DOL average only $392 per worker. http://www.dol.gov/ whd/statistics/2008FiscalYear.pdf (last visited on Aug. 8, 2012).

[14] Plaintiffs' counsel will not take this case in individual arbitration. Counsel are aware of no competent attorneys that would take this case. *See Getman Decl.* at ¶ XX; *see also Sutherland*, 768 F.Supp.2d 547 ("[J]ust as no rational person would expend hundreds of thousands of dollars to recover a few thousand dollars in damages, 'no attorney (regardless of competence) would ever take such a case on a contingent fee basis.'"). This fact is not lost on Defendants, but it certainly is contrary to the incentive Congress intended to create with collective actions. *Hoffman-La Roche, supra.*

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989)(ADEA collective action). Thus, Congress and the Supreme Court have recognized that only through collective actions can small minimum wage violations be effectively remedied. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). It would make little sense for Congress to have established such a detailed and comprehensive enforcement system and yet allow companies to bypass the system whenever they wish. Collective actions, like liquidated damages and attorneys' fees are "implicates not left to employers' discretion; they are a fundamental statutory "right."

B. The FLSA Right To Concerted Enforcement Is Not Waivable

In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, (1981), long after enactment of the FAA, the Supreme Court noted that FLSA rights are unwaivable *by contract* or otherwise, citing numerous prior decisions which recognized FLSA rights as unwaivable, even in collective bargaining situations:

> This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. **Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement. "The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts.... Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."**

Barrentine, 450 U.S. at 740-741 (voluminous cites omitted). The non-waivability of FLSA rights, includes the rights set forth in §216(b) of the statute as the Supreme Court has recognized. *Brooklyn Sav. Bank*, 324 U.S. at 704-07 (prohibiting waiver of §216(b) right to liquidated damages and noting that to allow such waiver would "thwart the

legislative policy the FLSA was designed to effectuate"); *Yue Zhou v. Wang's Rest.*, No. 05-c-0279, 2007 WL 2298046, at *1 (N.D. Ca. August 8, 2011). Thus, the right to proceed collectively on behalf of "similarly situated" workers, which is literally a "right" guaranteed by §216(b) is similarly unwaivable. The Congressional purpose behind the FLSA, and the specific language of the statute used show that the "right" to proceed on a collective basis is a specific statutory right, fundamental to the FLSA and thus unwaivable.

C. The FAA Does Not Permit Violation Of Unwaivable Statutory Rights

Although the FAA clearly reflects a congressional policy to encourage arbitration (for workers covered by the FAA), the principle that arbitration cannot preclude the vindication of federal statutory rights is a bedrock principle of FAA interpretation. *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). The Supreme Court has made clear that Federal statutory rights cannot be eviscerated under the guise of an arbitration clause. *Id.* at 637 n. 19 (noting "that in the event the [provisions of the arbitration agreement] operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). Where, as here, Congress' intent to preclude waiver of statutory rights and remedies can be discerned from "the statute's text, legislative history or from an inherent conflict between arbitration and the statute's underlying purpose," a waiver of such rights in an arbitration agreement will be unenforceable. *Shearson/American Exp. v. McMahon*, 482 U.S. 220, 227 (1987) (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632-637 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1984) (FAA can be overridden by congressional command "[l]ike any statutory directive" and which may be "discernible from the text, history, or purposes of the statute")). Because the arbitration clause at issue here explicitly requires workers to waive their non-waivable right to proceed collectively, the arbitration clause is unenforceable. *CompuCredit*

Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) (FAA "requires courts to enforce agreements to arbitrate according to their terms. … even when the claims at issue are federal statutory claims, **unless the FAA's mandate has been 'overridden by a contrary congressional command.'**")(emphasis added). And the FLSA was enacted twelve years after the FAA. *Smith v. Robinson*, *supra*.

Defendants cite *Concepcion*, 131 S. Ct. 1740 (2011) in support of the validity of its class action waiver. But *Concepcion* does not address the issue raised here. *Concepcion* merely held that California's judicially made *Discover Bank* rule holding class action waivers unconscionable violated the FAA but it did not address the right to concerted activity protected by federal statutes. Defendants' citation to *Morvant v. P.F. Chang's Bistro, Inc.*, 2012 WL 1604851 *7 (N.D.Ca. 2012), is also inapplicable to this issue since that case did not address the class of contracts at issue here which are exempt from the FAA and did not address a competing federal statutory right such as the FLSA right to bring a collective action. Plaintiffs' claim is controlled by *Gilmer*, 500 U.S. at 28; *Shearson*, 482 U.S. at 227; *Mitsubishi Motors Corp.*, 473 U.S. at 632-637; and *Dean Witter Reynolds, Inc.*, 470 U.S. 213 (1984). There is nothing in *Concepcion* suggesting that the Supreme Court intended to overrule those prior decisions with respect to vindication of federal statutory claims.

Although some federal decisions have allowed employers to demand employees waive their collective action rights,[15] other federal decisions have found that the

---

[15] For example, in *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), the Court approved a collective action waiver on the basis of state unconscionability law, without ever analyzing whether the FLSA precludes waiver of collective actions. In *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002), the Court found that the plaintiff "points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute." Plaintiffs here respectfully submit that they have made such a showing and that Congress did intend to prevent employers from demanding their employees waive their collective action rights. *Lu v. AT & T Services, Inc.*, No. C 10– (footnote continued)

collective action "right" in § 216(b) cannot be waived by an employer's pre-employment arbitration clause. In *Raniere v. Citigroup Inc.*, 827 F.Supp.2d 294, 314 (S.D.N.Y. 2011), the court made a thorough and exhaustive analysis of the Congressional purposes in enacting the FLSA, along with the Supreme Court's FLSA decisions and concluded that,

> 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. 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, 111 S. Ct. 1647.

Id., 827 F.Supp.2d at 314. *See also Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547 (S.D.N.Y. 2011) (denying enforcement of class waiver in FLSA case).[16] This court should follow Raniere and Sutherland and hold that the class waiver in this case is unenforceable as contrary to the FLSA.

05954 SBA, 2011 WL 2470268, *3 (N.D. Cal. 2011), is distinguishable because the form in which concerted activity takes place– whether through class or collective action – is procedural, but the right to proceed in concert is plainly a substantive right.

[16] *See also Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (antitrust claims); *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 antitrust statutory rights), *jud. vac*. 130 S. Ct. 2401 (2010), *reaffirmed on remand, In re American Express Merchants Litig. ("Amex II")*, 634 F.3d 187, 189 (2d Cir. 2011); *In re American Exp. Merchants' Litigation ("Amex III")*, 667 F.3d 204 (2d Cir. 2012); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007).

CONCLUSION

For all of the foregoing reasons the Defendants' motion must be denied.

DATED: August 10, 2012 GETMAN & SWEENEY, PLLC

By: */s/ Dan Getman*
Dan Getman (*Pro Hac Vice*)
Attorneys for Plaintiffs