Drew R. Hansen, Esq. (State Bar No. 218382)
dhansen@tocounsel.com
Suzanne Cate Jones, Esq. (State Bar No. 157496)
sjones@tocounsel.com
Kenneth E. Johnson, Esq. (State Bar No. 115814)
kjohnson@tocounsel.com
THEODORA ORINGHER PC
535 Anton Boulevard, Ninth Floor
Costa Mesa, California 92626-7109
Telephone: (714) 549-6200
Facsimile: (714) 549-6201

Attorneys for Defendants CENTRAL REFRIGERATED SERVICE, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES

THEODORA ORINGHER COUNSELORS AT LAW

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL ARBITRATION, AND TO DISMISS OR IN THE ALTERNATIVE STAY ACTION

[Filed concurrently with Supplemental Declaration of Bill Baker and Evidentiary Objections]

Date: September 17, 2012
Time: 2:00 p.m.
Crtrm.: 2

Date Action Filed: June 1, 2012

Discovery Cutoff: None Set
Motion Cutoff: None Set
Trial Date: None Set

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The bulk of Plaintiffs' arguments seeking to avoid the written arbitration agreements they signed are directly at odds with multiple recent decisions issued by the Supreme Court. Their remaining arguments regarding the Federal Arbitration Act ("FAA") and Utah Uniform Arbitration Act ("UUAA") have been specifically rejected by courts in this and other circuits. Plaintiffs' arguments concerning the National Labor Relations Act ("NLRA"), Norris-LaGuardia Act ("Norris") and the FLSA – which seek to invalidate the parties' agreements prohibiting class-wide arbitrations – are also contrary to the weight of the law and unavailing. Accordingly, pursuant to the plain language of the parties' agreements to arbitrate, the Court must order these disputes to arbitration in Utah, on an individual basis under the FAA or alternatively the UUAA.

II. This Dispute Is Subject To Arbitration Under The FAA

A. Whether Plaintiffs Are Employees Or Independent Contractors Is An Issue For The Arbitrator To Resolve, Not This Court

Plaintiffs do not dispute that they entered into agreements to arbitrate with Defendants or that their claims fall squarely within the ambit of the arbitration clauses. Plaintiffs likewise do not claim the arbitration agreements are unconscionable. Nor do they challenge the notion that the parties agreed to delegate the issue of arbitrability.

Far from asserting any bona fide defenses to enforcement of the arbitration agreements, Plaintiffs' Opposition primarily hinges upon the single contention that the parties' agreements to arbitrate should not be enforced because they were employees, not independent contractors or lessees as stated in the contracts they signed with CRS and Central Leasing, respectively. Only if Plaintiffs are ***employees*** does the narrow exemption under Section 1 of the FAA have any application. Yet — as discussed in Defendants' moving papers — Central Leasing was simply a lessor of equipment and never Plaintiffs' employer. Similarly, CRS, the defendant with whom Plaintiffs entered into an agreement to provide transportation services, also was never Plaintiffs'

employer during the time period upon which Plaintiffs base their claims. Defendants vigorously dispute Plaintiffs' contention that they were "misclassified" as independent contractors or lessees, and the determination of this issue, which is a highly individualized and fact-specific inquiry with respect to each Plaintiff, goes to the heart of Plaintiffs' substantive claims. Plaintiffs' contention that this key issue (inseparable from the underlying merits of their claims and a threshold prerequisite for finding liability) must be resolved ***by the Court before arbitration can be compelled*** is simply wrong. This ultimate issue is an issue for the arbitrator to resolve — not the Court — since the parties specifically agreed it is to be decided by the arbitrator.

Plaintiffs' arguments opposing arbitration under the FAA disregard clear Supreme Court precedent. Indeed, relying (as anticipated) on *dicta* in *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011), and ignoring the parties' agreement delegating these types of issues to the arbitrator, Plaintiffs incorrectly argue that ***the Court*** must first resolve Plaintiffs' claim that their dispute falls under the FAA's Section 1 exemption before it may compel arbitration under the FAA. Plaintiffs are wrong. The parties agreed that all arbitrability issues would be delegated to the arbitrator, and such delegations are fully enforceable. *See Green v. Supershuttle*, 653 F.3d 766, 769 (8th Cir. 2011) (FAA § 1 exemption is gateway or "threshold" arbitrability question; parties can agree to have arbitrators decide threshold questions of arbitrability); *Howsam v. Dean Witter Reynolds,* 537 U.S. 79, 83-85 (2002) (parties may agree to submit issues of substantive arbitrability to arbitrator, such as whether parties have submitted particular dispute to arbitration); *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772, 2777 (2010) ("arbitrability" encompasses "threshold" or "gateway" issues of whether a matter can be arbitrated). "This line of cases merely reflects the principle that arbitration is a matter of contract." *Rent-A-Center* at 2777 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (parties may agree to submit arbitrability question itself to arbitration)); *see also Volt Info. Sciences v. Bd. of Trustees*, 489 U.S. 468, 479 (1989) (courts must "rigorously enforce" arbitration

agreements according to their terms"). Supreme Court precedent further instructs that:

> [t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

United Steelworkers of Amer. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960). Thus, the Court's function here is to interpret each of the arbitration agreements "on its face" to determine whether the parties agreed that the arbitrator would decide the disputed issue. There is no question they did, since the arbitration clauses incorporate the AAA Rules. *See Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed.Cir. 2006) (incorporating AAA Rules evidenced unmistakable intent to delegate issue of determining arbitrability to arbitrator); *Valley Power Sys., Inc. v. Gen. Elec. Co.*, 2012 WL 665977, *5 (C.D.Cal. Feb. 27, 2012) (incorporation of AAA rules "'is clear and unmistakable'" intent to delegate issue of arbitrability to arbitrator); *Madrigal v. New Cingular Wireless Serv., Inc.*, 2009 WL 2513478, *5 (E.D. Cal. Aug. 17, 2009) (same).

As anticipated and without any authority, Plaintiffs incorrectly assert that the Eighth Circuit's recent decision in *Green v. SuperShuttle* was wrongly decided. To the contrary, it is directly on point and correct in its analysis.[1] 653 F.3d 766. The plaintiffs there asserted that they were misclassified as franchisees rather than employees, and

---

[1] *Van Dusen* was decided a month before *Green*, and thus identifies the legal issue presented as "one of first impression in the federal courts of appeal." 654 F.3d at 845. That statement is no longer true, since *Green* specifically rejected Plaintiffs' argument. Moreover, the *Van Dusen* panel expressly acknowledged that the district court's decision (refusing to resolve plaintiffs' claimed exemption from arbitration under Section 1 of the FAA) ***may be upheld on appeal***, and that it was not "clearly erroneous." *Id.* at 846. While Plaintiffs claim the *dicta* in *Van Dusen* is dispositive here, they fail to point out that the question they claim was decided in *Van Dusen* is once again pending before the Ninth Circuit. Indeed, after the writ was denied, the *Van Dusen* district court certified the question for appellate review. Plaintiffs are thus arguing that the *dicta* from *Van Dusen* panel controls the outcome here, even though the statements are not even controlling in the Van Dusen matter itself. (Plaintiffs' counsel here, Dan Getman, is aware of the appeal since he is plaintiffs' counsel in *Van Dusen*.)

argued the court lacked jurisdiction to compel arbitration because Section 1 of the FAA exempts transportation workers. *Id.* at 769. Rejecting that argument, the Eighth Circuit reasoned that because the parties specifically incorporated the AAA Rules (which provide "that an arbitrator has the power to determine his or her own jurisdiction over a controversy"), they had "agreed to allow the arbitrator to determine threshold questions of arbitrability." *Id.* The same result was reached in other recent decisions, including *Reid v. SuperShuttle Int'l, Inc.*, 2012 WL 3288816 (E.D.N.Y. Mar. 22, 2010).[2]

Plaintiffs do not dispute that they agreed to delegate the issue of arbitrability to the arbitrator, nor do they attack the delegation clause. Therefore, pursuant to *Rent-A-Center,* all questions of substantive arbitrability, including whether this dispute is exempted from the FAA under Section 1, must be decided by the arbitrator. 130 S.Ct. at 2779 (party must specifically challenge delegation clause if a party wants a court to decide the issue rather than an arbitrator). Plaintiffs cite no cases in which the Section 1 exemption issue was decided by a court where, as is the case here, the parties had agreed to delegate arbitrability or jurisdiction to the arbitrator. Indeed, neither of the cases Plaintiffs cite as purported support (in addition to *Van Dusen*) — *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (see Opp. at 3) — even involve parties who delegated the issue of arbitrability to an arbitrator.

---

[2] The *Van Dusen* panel treated the parties' § 1 exemption dispute as one of "jurisdiction." 654 F.3d at 844. In the Ninth Circuit, jurisdiction is considered a question of arbitrability. *See Fadal Mach. Cen. v. Compumachine*, 2011 WL 6254979, *2 (9th Cir. 2011)(arbitration clause "clearly and unmistakably" delegated question of arbitrability to arbitrator by incorporation of AAA Rules, which provide that "arbitrator shall have the power to rule on his or her own jurisdiction"). Jurisdiction is a question of arbitrability, and an arbitrator can be authorized to determine his or her own jurisdiction. *See, e.g., Ariza v. Autonation, Inc.*, 317 F. App'x. 662, 664 (9th Cir. 2009). The parties here evinced their intention to grant the arbitrator authority to determine jurisdictional questions by incorporating the AAA Commercial Rules into their arbitration agreements. *See* AAA Rule 7: "arbitrator shall have the power to rule on his or her own jurisdiction, including . . . with respect to the . . . scope . . . of the arbitration agreement."

B. Plaintiffs' Argued Approach Contradicts Supreme Court Precedent

Plaintiffs' approach would also impermissibly require the Court to decide the ultimate issue in the case before sending the claims to arbitration: *i.e.*, whether Plaintiffs should be classified as employees or independent contractors. It is well-settled that courts are not to resolve the merits of the case in determining arbitrability. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649-450 (1986).

Plaintiffs' suggested approach is also directly contrary to the rule announced in *Prima Paint*, 388 U.S. 395. Specifically, Plaintiffs' misclassification argument attacks the Lease and Contractor Agreements as a whole, as opposed to being a narrowly tailored challenge to the arbitration clauses. Since their substantive theories attack the entire agreements (not just the arbitration clauses alone), the *Prima Paint* rule mandates that the arbitrator decides this issue, not the Court. The *Prima Paint* rule, which involves the notion that a party may be bound by an arbitration clause in a contract that ultimately may be invalid, reflects a judgment that the national policy favoring arbitration outweighs the interest in preserving a judicial forum for questions of arbitrability — but only when questions of arbitrability are bound up in the underlying dispute. When the two are so bound up, there is actually no gateway matter at all: The question "who decides" is the entire ball game. Here, the questions of arbitrability are plainly bound up in the underlying dispute. As in *Prima Paint*, in order to decide the antecedent question of the validity of the arbitration clauses here, the Court would also need to decide the merits of the underlying dispute. This is precisely what the Supreme Court has prohibited. Arbitration should be compelled under the FAA.[3]

---

[3] The Contractor Agreement here provides that each Plaintiff "shall be considered an independent contractor and not an employee of COMPANY." Federal courts have relied upon similar language to conclude that cases filed by drivers who lease their equipment and provide services as independent contractors are subject to arbitration under the FAA. (See Motion at pp. 17-18.) Plaintiffs' contrary arguments based on Florida district court decisions such as the discredited *Gagnon v. Serv. Trucking Inc.*, 266 F. Supp. 2d 1361 (M.D. Fla. 2003) are wrong.

III. Arbitration Alternatively May Be Compelled Under The UUAA

As discussed in Defendants' moving papers, if the Court declines to order arbitration under the FAA, arbitration should be compelled under the UUAA. Plaintiffs do not dispute that the explicit language in the parties' agreements specifically provides for this alternative basis upon which to enforce the arbitration agreements. Instead, they assert two unavailing arguments concerning why the Court should not compel arbitration under the UUAA. First, they argue that the UUAA is preempted by the FAA. Plaintiffs are wrong, as many courts, including in the Ninth Circuit, already have ruled. Alternatively, they make the preposterous argument that if the FAA is found not to apply, district courts cannot enforce arbitration agreements under state law but must resort instead to pre-1925 federal law which holds arbitration agreements to be unenforceable. This latter argument, which relies on an illogical and unsupported misinterpretation of language from a Third Circuit decision, fails.

It is well-established that where, as here, a contract specifically refers to state law as an applicable alternative to the FAA, the Court should enforce the agreement to arbitrate under the state law specified in the contract if it concludes that the FAA does not apply. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3rd Cir. 2004). Contrary to Plaintiffs' arguments, *Palcko* is not "flawed" or "erroneous" but well reasoned and reflects the majority view. *See, e.g., OOIDA Litigation and the Arbitration of Motor Carrier Owner-Operator Disputes*, 32 Transp.L.J. 175, 191 (2005)*; see also Shanks v. Swift Transp. Co., Inc.*, 2008 WL 2513056, *3 (S.D.Tex. 2008); *Nunez v. Weeks Marine, Inc.*, 2007 WL 496855, *6-*7 (E.D.La.2007); *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 527 (S.D. N.Y. 2003).

Palcko specifically considered Plaintiffs' preemption arguments here and rejected them. 372 F.3d at 595-96 (citing *Volt*, 489 U.S. 477 and *Bernhardt*, 350 U.S. at 198). Courts in the Central District of California likewise have rejected Plaintiffs' arguments. *See, e.g., Luong v. Circuit City*, 2001 WL 935317, *4 (C.D.Cal. Mar.28,2001)(Stotler, J.). In *Luong*, plaintiff argued arbitration could not be compelled

under either the FAA — because it fell within the FAA's Section 1 exemption — or under state law (the Virginia Arbitration Act ("VAA")), because the FAA supposedly "preempted" the VAA. Rejecting plaintiffs' preemption argument, the Central District held that even if the FAA did not apply, it would not preclude state arbitration laws from applying. "[T]he FAA does not conflict with the VAA, because the VAA promotes, rather than undermines, the goals and policies of the FAA, and Congress left to the states legislation applying arbitration to employment contracts." *Id.* at *4.

Valdes (cited in Defendants' Motion) is likewise instructive. While Plaintiffs ignore *Valdes*, Plaintiffs' counsel is very familiar with its analysis because he represented the plaintiff in that case. In *Valdes*, plaintiff's arguments, which relied on the *Palcko* district court decision (***reversed on appeal*** in *Palcko,* 372 F.3d 588), were similar to those Plaintiffs make here. *Valdes* rejected these arguments, finding them against the weight of authority, and stating:

> The conclusion urged . . . is untenable — that arbitration provisions in employment contracts exempt from the FAA, *i.e.*, transportation workers' employment contracts, are entirely unenforceable even where state law provides otherwise. This conclusion flouts the principle that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration". . . [M]ost importantly, it essentially re-writes what is merely an exemption providing that the FAA does not apply into a substantive pronouncement that such clauses in transportation workers' contracts are unenforceable.

Valdes, 292 F.Supp.2d at 529. Plaintiffs' preemption arguments fail.

Plaintiffs also make the wholly unsupported argument that, to the extent the FAA does not apply, the Court must then apply pre-1925 federal law (not the state arbitration act). Therefore, according to Plaintiffs, courts must always deny the motion since pre-1925 law makes arbitration agreements unenforceable. (See Opp. at pp. 4-9.) This is the exact sort of "untenable" result the *Valdes* court explicitly rejected — *i.e.*, that arbitration provisions in employment contracts exempt from the FAA are entirely unenforceable even where state law provides otherwise. Not a single case cited by Plaintiffs supports their argument. Instead, Plaintiffs' argument relies upon their deliberate misinterpretation of a sentence in *Palcko*, which the Third Circuit was

quoting from *Mason-Dixon Lines, Inc. v. Local Union No. 560,* 443 F.2d 807, 809 (3rd Cir.1971). *Palcko*, 372 F.3d at 596. Plaintiffs do not cite a single court decision where the phrase was interpreted as Plaintiffs argue here, and Defendants are aware of none. ***Moreover, as Plaintiffs admit***, the *Palcko* court itself cited the proposition in this phrase for a contrary conclusion — that agreements exempted from the FAA should then be enforced under state law. *Palcko*'s interpretation is no different than all of the cases and legal commentators who subsequently have cited this phrase. *Mason-Dixon* itself certainly does not support Plaintiffs' bizarre interpretation that courts must turn to *pre-1925 anti-arbitration law* whenever the FAA does not apply. To the contrary, when the *Mason-Dixon* court found the FAA did not apply, it relied on other (post-1925) authority to enforce the arbitration provision — not pre-1925 law. 443 F.2d at 809. Plaintiffs' argument is also directly refuted by the Supreme Court's decision in *Bernhardt*, 76 S.Ct. 273 (FAA did not apply and thus Court looked to state arbitration law to determine enforceability of the arbitration clause). If the Court concludes that the FAA does not apply to this dispute, it should order arbitration under the UUAA.

IV. The Parties' Class Arbitration Prohibition Is Enforceable

A. The Arbitration Agreement Does Not Violate The NLRA

Plaintiffs' argument that the arbitration agreements violate the NLRA — based entirely upon a National Labor Relations Board ("NLRB") decision in *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012) — has been rejected by a multitude of federal[4] and

---

[4] *See DeLock v. Securitas Sec. Serv. USA, Inc.*, 2012 WL 3150391, at *4 (E.D.Ark. Aug.1, 2012); *Luchini v. Carmax, Inc.*, 2012 WL 2995483 , at *7 (E.D.Cal. July 23, 2012); *Jasso v. Money Mart Expr., Inc.*, 2012 WL 1309171, at *7-10 (N.D.Cal. Apr.13, 2012); *De Oliveira v. Citicorp N. Am., Inc.*, 2012 WL 1831230 (M.D.Fla. May 18, 2012); *Morvant v. P.F. Chang's*, 2012 WL 1604851, at *8-12 (N.D.Cal. May 7, 2012); *Sanders v. Swift Transp. Co.*, 843 F. Supp.2d 1033, 1036 fn. 1 (N.D.Cal. Jan.17, 2012); *LaVoice v. UBS Fin. Serv., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012).

state[5] courts, including in the Ninth Circuit. (*Horton* itself is now under review by the Fifth Circuit. See *D.R. Horton, Inc. v. NLRB*, No. 12-60031.) Like the other courts that have considered this argument, the Court should likewise reject this argument here.

Indeed, the decisions holding that *Horton* is wrong identify several flaws to its reasoning which are ignored by Plaintiffs. For example, contrary to *Horton*, it has long been understood that "an employee's statutory right to pursue a wage claim as part of a collective action [under the FLSA] could be waived in favor of individual arbitration." *DeLock, supra,* at *1. This rule is reflected in federal court decisions which pre-date *Concepcion*. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2004); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001). *Horton* ignores this rule.

Horton also erroneously concludes that recent Supreme Court decisions, such as *Concepcion* and *Stolt-Nielsen*, do not apply to employment disputes.[6] However, the growing number of decisions cited above disagree, correctly recognizing there is no principled basis to exempt FLSA and other employment disputes from the Supreme Court's clear mandate to enforce arbitration agreements as written. The courts rejecting *Horton* also correctly recognize that nothing in the NLRA prohibits class arbitration waivers, and that the NLRB has no expertise in interpreting the FAA. Accordingly, the NLRB cannot trump the Supreme Court's clear command that class-wide arbitration is not allowed unless authorized by the arbitration agreement. *See, e.g., Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1775 (2010) (party may

---

[5] *Nelson v. Legacy Partners Res., Inc.*, 207 Cal.App.4th 1115, 1133 (2012); *Iskanian v. CLS Transp.*, 206 Cal. App. 4th 949, 962-64 (2012); *Truly Nolen of Am., v. Superior Court*, 2012 WL 3222211, at *21 (Cal.Ct.App. Aug. 9, 2012).

[6] The court decisions rejecting *Horton* usually involve "employees" within the meaning of the NLRA. Plaintiffs' argument fails here on the additional ground that Plaintiffs are independent contactors and lessees. The NLRA only applies to employees. 29 U.S.C. § 152(3).

not be compelled to submit to class arbitration unless party agreed to do so).[7]

B. Plaintiffs' Novel Norris-LaGuardia Act Argument Fails

Plaintiffs make the novel argument that the Norris-LaGuardia Act ("Norris") which was enacted to prevent federal courts from enjoining strikes or other self-help measures taken during a labor dispute) deprives this Court of jurisdiction to grant the Motion. Plaintiffs cite no case where any court has accepted such a remarkable proposition and to Defendants' knowledge none exists. This argument therefore fails.

Specifically, Plaintiffs assert that any type of employment litigation constitutes a "labor dispute" under Norris. (Opp. at 17.) Under Plaintiffs' analysis, therefore, no federal court would ever have the authority to order any employment dispute to arbitration. This unsupported argument is directly undermined by numerous cases holding that employment disputes (whether arising under the FLSA or other employment statutes) are subject to final and binding arbitration. *See. e.g.*, *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 27-29 (1991); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996). Similarly, Plaintiffs are wrong that the enactment of Norris in 1932 "expressly repealed" the FAA. (Opp. at 18.) To the contrary, the FAA was reenacted in 1947, many years after Congress passed Norris, and after reenacting the NLRA. *DeLock, supra,* at *5. Nor is there any statutory conflict between the FAA and Norris. The purpose of Norris was "to forbid blanket injunctions against labor unions." *Virginian Ry. Co. v. System Fed. No. 40*, 300 U.S. 515, 563 (1937). By contrast, the FAA mandates enforcement of arbitration agreements arising outside the collective bargaining process, such as those at issue here.

Federal courts have rejected challenges, based upon Norris, to other employment laws which authorize injunctive relief, even when a labor union is a party to the dispute.

---

[7] Plaintiffs incorrectly argue that a provision limiting class and consolidated actions does not encompass collective actions. Collective in this context means the same as class and consolidated. Moreover, under *Stolt-Nielsen*, Plaintiffs' distinction is irrelevant.

E.g., U.S. v. Building & Constr. Trades Council, 271 F. Supp. 447, 453-54 (E.D. Mo. 1966) (regarding jurisdiction to enjoin Civil Rights Act violations). Plaintiffs' argument, if accepted, would deprive the Court of the power to exercise the express statutory power created by the Civil Rights Act and other employment statutes which authorize injunctions and other forms of equitable relief. Clearly that is not the law.

Plaintiffs' argument also fails to recognize that the statutory withdrawal of federal court enforcement authority extends only to certain injunctions. 29 U.S.C. § 101. Issuing a stay of litigation, so that arbitration can proceed, is not an injunction and thus outside the scope of Norris's restriction. Even cases that arise from labor disputes between union and management recognize that arbitration agreements can and should be enforced, and for that reason the federal courts retain jurisdiction to enjoin strikes, picketing, or forms of self-help when the underlying labor dispute is within the scope of a valid arbitration agreement. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Simply put, there is no basis for arguing that Norris bars this Court from enforcing the arbitration agreements here.

C. <u>There Is No "Unwaivable" FLSA Right To Collective Enforcement</u>

Plaintiffs incorrectly argue that lawsuits brought under the FLSA are somehow exempt from the recent Supreme Court decisions holding that collective arbitration is not permitted unless expressly authorized by the arbitration agreement itself. (Opp. at 18.) Plaintiffs' argument, which is based upon cases decided before the 1991 decision in *Gilmer*, is directly refuted by *Gilmer*. The Supreme Court made it clear in *Gilmer* that such cases reflected a "mistrust of the arbitral process" and were no longer good law, at least outside the collective bargaining arena. *Gilmer*, 500 U.S. at 34 n. 5.

Moreover, Plaintiffs' argument that the employment rights created by the FLSA are "not waivable" (Opp. at 21) is incorrect. As the Ninth Circuit has held, although a covered employee's substantive right to be paid minimum wage may not be waived, the ***procedural right*** to pursue that claim in court, or through the procedural mechanism of a collective action, can be waived through a valid arbitration agreement. *See*

Horenstein, 9 F.App'x at 619 ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute"); *see also CompuCredit Corp. v. Greenwood*, _ U.S. _, 132 S. Ct. 665, 671 (2012) ("It takes a considerable stretch to regard the nonwaiver provision as a 'congressional command' that the FAA shall not apply").

Plaintiffs grudgingly acknowledge the relevant legal test: the law "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 overriden by a contrary congressional command," (Opp. at 23), but ignore that there is no "congressional command" within the FLSA to refuse to enforce the arbitration agreements here. *DeLock, supra,* at *4 ("Nothing in the FLSA's text or legislative history indicates that Congress excepted those claims from the FAA's mandate").

Plaintiffs ultimately concede their argument has been accepted by only two courts: *Raniere v. Citigroup, Inc.*, 827 F. Supp. 2d 294 (S.D.N.Y. 2011) and *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D.N.Y. 2011). (Opp. at 25.) Both rely on pre-*Concepcion* law. Moreover, *Horton* relied upon these very same two decisions to reach its incorrect and highly criticized result. Plaintiffs cannot rescue their argument by relying upon these two out of circuit cases which adopt the same, unpersuasive, reasoning as *Horton*, an NLRB decision. *See LaVoice,* 2012 WL 124590, *6-*9 (expressly declining to follow *Raniere* or *Sutherland*; *Concepcion* precluded any argument that FLSA's collective action provisions trumped FAA).

V. Conclusion

For all of the reasons set forth above, Defendants respectfully request that the Court dismiss the Complaint, or alternatively stay further proceedings pending the conclusion of individual arbitrations for each of the named and opt-in Plaintiffs.

DATED: August 31, 2012 THEODORA ORINGHER PC

By: /s/ Drew R. Hansen
Drew R. Hansen, Attorneys for All Defendants