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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' MOTION FOR RECONSIDERATION OF NOVEMBER 8, 2012 MINUTE ORDER RE CLARIFICATION OF ORDER COMPELLING ARBITRATION

Date: December 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

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TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 17, 2012, at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 2 of the above-entitled Court located at 3470 Twelfth Street, Riverside, California, 92501, defendants Central Refrigerated Service, Inc., Central Leasing, Inc., Jon Isaacson, and Jerry Moyes (collectively "Defendants"), will move, and hereby do move, for reconsideration of the Court's November 8, 2012 Minute Order re Clarification of Order Compelling Arbitration.

Defendants move for reconsideration of the Court's decision because the November 8 Minute Order is clearly erroneous, demonstrably wrong and manifestly unjust. *See Smith v. Massachusetts*, 543 U.S. 462, 475, 125 S.Ct. 1129, 160 L.Ed. 2d 914 (2005) (motion for reconsideration appropriate when order under question is demonstrably wrong; court has "inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment"); *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993) (reconsideration proper if court "committed clear error" or decision was "manifestly unjust").

This Motion is made pursuant to Local Rule 7-18 on the ground that the Court manifestly failed to consider material facts presented to it before such decision, and pursuant to the Court's inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment. Even when Local Rule 7-18 prerequisites are not met, the Court still has inherent authority to reexamine its prior decisions prior to the entry of judgment. *Network Signatures, Inc. v. ABN–AMRO, Inc.*, 2007 WL 7601871, *2 (C.D.Cal.April 10, 2007) (Selna, J.) (even though movant failed to satisfy Local Rule 7-18 requirements, and failed to demonstrate "highly unusual circumstances, clear error, or manifest injustice," court had "inherent authority to reexamine its prior decisions prior to the entry of judgment").

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently-filed Request for Judicial

Notice, all other papers, pleadings and records on file herein, and on such other matters as may properly come before the Court at oral argument or otherwise.

This Motion is made following the conference of counsel pursuant to L.R. 7-3 which took place beginning on November 9, 2012, and also on November 13, 2012 with multiple telephone conversations between counsel.

DATED: November 15, 2012 THEODORA ORINGHER PC

By: /s/ Drew R. Hansen
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Suzanne Cate Jones
Kenneth E. Johnson
Attorneys for Defendants CENTRAL REFRIGERATED SERVICE, INC., CENTRAL LEASING, INC., JON ISAACSON, and JERRY MOYES

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1
MEMORANDUM OF POINTS AND AUTHORITIES

2
I. Introduction

3 Defendants respectfully submit that the Court failed to consider material facts
4 before it and controlling precedent from the U.S. Supreme Court in ordering that
5 Plaintiffs' Fair Labor Standards Act ("FLSA") claims "shall be collectively arbitrated"
6 as part of its November 8, 2012 Minute Order "Re: Clarification of Order Compelling
7 Arbitration" (hereafter, "November 8 Minute Order"). Specifically, Defendants move
8 for reconsideration of the Court's decision because the November 8 Minute Order is
9 demonstrably wrong and manifestly unjust.[1]

10 The Court's decision that Plaintiffs' FLSA claims "shall be collectively
11 arbitrated" is clear error for multiple reasons. First, the Court's conclusion that
12 Plaintiffs' FLSA claims "shall be collectively arbitrated" is in direct conflict with the
13 recent Supreme Court decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, __
14 U.S. __, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010), as well as other recent Supreme
15 Court precedent and applicable law. The Court's September 24, 2012 Order Granting
16 Defendants' Motion to Compel Arbitration (hereafter, "September 24 Order Granting
17 Arbitrations") stated that it considered these Supreme Court authorities (which were
18 cited in Defendants' moving and reply papers) before concluding that Defendants'
19 Motion to Compel Arbitration seeking individual arbitrations should be **granted**. (See
20 Docket No. 53 [September 24 Order Granting Arbitrations]). Yet, misled by Plaintiffs'
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22 [1] *See, e.g., Smith v. Massachusetts*, 543 U.S. 462, 475, 125 S.Ct. 1129, 160 L.Ed. 2d
23 914 (2005) (motion for reconsideration appropriate when order under question is
24 demonstrably wrong; court has "inherent power to reconsider and modify its
interlocutory orders prior to the entry of judgment"); *School Dist. No. 1J, Multnomah*
25 *County, Or. v. ACandS, Inc.* , 5 F.3d 1255, 1263 (9th Cir.1993) (hereafter, "*ACandS,*
Inc.") (reconsideration proper if court "committed clear error" or decision was
26 "manifestly unjust"); *see also* Local Rule 7-18 (reconsideration appropriate upon
27 showing of a manifest failure to consider material facts presented to Court before such
decision).
28

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Statement filed on October 26, 2012,[2] (see Docket No. 59), the November 8 Minute Order erroneously concludes that "[t]he Prohibition [in the instant arbitration agreement] only prohibits consolidated or class arbitrations. Therefore, the Prohibition does not prohibit collective arbitration of Plaintiffs' FLSA claims; Plaintiffs' FLSA claims should be collectively arbitrated." [Docket No. 61 (November 8 Minute Order) at 4.]

This analysis is directly contrary to Supreme Court precedent: In *Stolt-Nielsen*, the Supreme Court emphasized that a group-wide arbitration is a matter of consent, and that courts *cannot* interpret an arbitration agreement to allow arbitrations to proceed collectively ***unless the parties have specifically agreed to do so***, because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen*, 130 S.Ct. at 1773-76 (party may not be compelled to submit to class arbitration "unless the parties *agreed to authorize* class arbitration") (emphasis in original). Here, the parties' agreement to arbitrate does not *authorize* any type of collective or class arbitration proceeding of any kind. The Court's focus in its November 8 Minute Order on whether the agreement's "Prohibition" *does not prohibit*

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[2] Plaintiffs' assertion in their October 26, 2012 Statement that "it is clear that the September 24th decision did not address the question of whether collective arbitrations under the FLSA are permitted under Defendants' arbitration agreement," (see Docket No. 59 at 3:6-8), is just wrong. The Court did address that question in its September 24 Order Granting Arbitrations, since, among other things, it resolved the arguments raised by Plaintiffs in Section V of their Opposition to Defendants' Motion to Compel Arbitration. (See Docket No. 53 (September 24 Order Granting Arbitrations) at 13-14 [discussing and rejecting Plaintiffs' Section V arguments]). Indeed, Plaintiffs had instructed the Court *not to consider* the arguments set forth in Section V of their Opposition to Defendants' Motion to Compel Arbitration unless it found that the arbitration agreement at issue precluded "all forms of collective enforcement." (Docket No. 40 (Opposition to Motion to Compel Arbitration) at p. 18, fn. 11.) By addressing Plaintiffs' Section V arguments in its September 24 Order Granting Arbitrations, (see Docket No. 53 at 13-14), the Court left ***no doubt*** that it had concluded the agreement ***precludes all forms of collective enforcement of Plaintiffs FLSA rights.***

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"collective" arbitration is simply wrong, and an approach specifically rejected by *Stolt-Nielsen*. Accordingly, the decision is clear error and must be corrected.

The Court's November 8 Minute Order is also directly contrary to its correctly-decided September 24 Order Granting Arbitrations. Defendants' Motion to Compel Arbitration specifically requested "[a]n order compelling all of the Plaintiffs and Opt-In Plaintiffs to arbitrate their claims *on an individual basis*,"[3] and the Court *granted* that Motion, without any limitations. Consequently, there is no ambiguity about what relief was requested by Defendants (and thus granted) by the Court's September 24 Order Granting Arbitrations. It is equally clear that this Court considered Plaintiffs' argument regarding "collective arbitration" as part of Defendants' Motion to Compel Arbitration and rejected it. Indeed, before the Court granted Defendants' Motion to Compel Arbitration, Plaintiffs argued in a footnote in their Opposition that their FLSA claims must proceed collectively, (see Docket No. 40 at p.11, fn. 6), challenging Defendants' request that Plaintiffs' claims be ordered to proceed on an *individual* basis in arbitration. Defendants' papers in reply to Plaintiffs' argument correctly explained why Plaintiffs' argument seeking to proceed collectively failed. (*See, e.g.*, Docket No. 45 at 10, fn. 7.) After considering these arguments, the Court **granted** Defendants' Motion to Compel Arbitration and explicitly stated in its September 24 Order that it had "*considered all the papers filed in support of, or in opposition to, the Motion*." (*See* Docket No. 53 (September 24 Order Granting Arbitrations) at 1). Given that the Court already considered Plaintiffs' collective-action argument and rejected it, the November 8 Minute Order must be corrected because it is not simply a "clarification" of the Court's September 24 Order but rather a ruling that is ***in direct conflict with it***.

Finally, compliance with the November 8 Minute Order will result in substantial inefficiency and greatly increase the number of required proceedings. If this error is

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[3] *See* Docket No. 25 (Motion to Compel Arbitration), at page 2 of the Notice of Motion.

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not corrected, the parties will be required to resolve Plaintiffs' claims against Defendants through two separate proceedings — a collective arbitration for Plaintiffs' FLSA claims, and then an individual arbitration for each particular Plaintiff against Defendants involving his or her forced labor claim. This makes no sense. The Court should reconsider its decision, and order instead that each Plaintiff must individually arbitrate all of his/her claims against Defendants in a single arbitration for each respective plaintiff.

II. Factual Background

A. Defendants' Motion to Compel Arbitration

On July 16, 2012, Defendants filed a motion to compel "all of the Plaintiffs and Opt-In Plaintiffs to arbitrate their claims *on an individual basis* in Utah." (See Docket No. 25 (Motion to Compel Arbitration) at page 2 of the Notice of Motion (emphasis in original).) Citing the recent Supreme Court decisions in *Stolt-Nielsen* and other applicable law, Defendants' Motion to Compel Arbitration concluded by asking the Court to "order Plaintiffs to arbitrate their claims *on an individual basis*." (*Id.* at 19-21 (emphasis added).) The Motion further explained that the Utah Uniform Arbitration Act "expressly provides that contractual prohibitions against consolidated arbitrations are enforceable," citing Utah Code Ann. § 78B-11-111(3) (court may not order consolidation of claims of party to arbitration agreement if agreement prohibits consolidation), and provided Utah case law confirming that class action waivers in arbitration agreements are enforceable. (See Docket No. 25 (Motion to Compel Arbitration) at 22-23.) In their Motion, Defendants also requested a stay of court proceedings, making clear they were seeking only *individual arbitrations*: "Section 3 of the FAA permits this Court to stay this action pending the conclusion of *individual arbitrations* between the Plaintiffs and Defendants." (*Id.* at 25 (emphasis added).)

B. Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration

On August 10, 2012, Plaintiffs filed their "Memorandum of Points and Authorities in Opposition to Defendants' Motion to Compel Arbitration" (hereafter,

"Plaintiffs' Opposition"). (See Docket No. 40). Plaintiffs opposed Defendants' request for individual arbitrations. Moreover, beginning on page 10 of Plaintiffs' Opposition, and continuing through page 25, Plaintiffs argued against individual arbitrations and (incorrectly) asserted, among other things, that "the arbitration provision permits FLSA collective actions since a provision limiting class action arbitrations does not encompass collective actions." (See Docket No. 40 (Plaintiffs' Opposition) at p. 11, fn 6.) [This is the same exact argument Plaintiffs repeated again in their October 26, 2012 position "Statement."][4]

Plaintiffs' Opposition to Defendants' Motion to Compel Arbitration also included the following instructions:

> If the Court finds that arbitration agreement allows Plaintiff 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 ["V. The FLSA Grants Workers The 'Right' To Collective Enforcement"] 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 a waiver of collective action rights which are fundamental to the statute*."

(Docket No. 40 (Plaintiffs' Opposition) at p. 18, fn. 11 (emphasis added).) Because the Court unquestionably addressed Plaintiffs' Section V arguments as part of its September 24 Order Granting Arbitrations (see Docket No. 53 (discussing and rejecting Plaintiffs' Section V arguments) at 13-14), it necessarily concluded—consistent with

[4] The full title of Plaintiffs' Statement is "Plaintiffs' Statement and Memorandum Re Court's September 27, 2012 Order." (See Docket No. 59).

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Plaintiffs' instructions in their Opposition—that ***"all forms of collective" arbitration were prohibited by the arbitration agreement***.

Plaintiffs further advised the Court in their Opposition that: "[their] counsel will not take this case in individual arbitration," (see Docket No. 40 (Plaintiffs' Opposition) at p. 20, fn. 14), underscoring that Plaintiffs plainly understood that Defendants were seeking arbitrations on an individual basis as part of their Motion to Compel Arbitration.

C. Defendants' Reply in Support of Their Motion to Compel Arbitration

On August 31, 2012, Defendants filed their Reply in Support of their Motion to Compel Arbitration (hereafter, "Reply"). (See Docket No. 45). In their Reply brief, Defendants repeated the relief they were seeking: "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." (*Id.* at 1 (emphasis added).). In support of their request for individual arbitrations, and with respect to why the parties' class arbitration prohibition is enforceable, Defendants specifically addressed Plaintiffs' inaccurate argument that "a provision limiting class action arbitrations does not encompass collective actions." Indeed, Defendants stated that "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." (*Id.* at p. 10, fn. 7). Defendants further presented multiple other legal authorities in support of their request for *individual* (not collective or class-wide) arbitrations. (*Id.* at 8-12).

D. The Hearing on Defendants' Motion to Compel Arbitration

At the September 17, 2012, hearing on Defendants' Motion to Compel Arbitration, the parties presented their respective positions via oral argument. In advance of oral argument, each side was permitted to review the Court's written tentative ruling, which granted Defendants' Motion to Compel Arbitration. Counsel for

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Plaintiffs presented a lengthy oral argument seeking to change the Court's tentative. At no time during oral argument did Plaintiffs' counsel ever present any further argument concerning Plaintiffs' theory that "a provision limiting class and consolidated actions does not encompass collective actions," nor did he address Defendants' argument in their Reply that Plaintiffs' "collective action" distinction was irrelevant because, pursuant to *Stolt-Nielsen,* the focus is not on whether there was an express prohibition, but rather on *whether the parties had agreed to collectively arbitrate*. (See Transcript of Sept. 17, 2012 Hearing at 3– 5 (Request for Judicial Notice, Exh.1).)

E. The Court's September 24 Order Granting Arbitrations

On September 24, 2012, the Court issued an order granting Defendants' Motion to Compel Arbitration without limitation.[5] In its Order, the Court stated that it had "consider[ed] all papers filed in support of, and in opposition to, the Motion, and the arguments put forth at the hearing" before issuing its ruling. (See Docket No. 53 (September 24 Order Granting Arbitrations), at 1.)

Defendants respectfully submit that the Court failed to consider these material background facts before issuing its November 8 Minute Order.

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[5] Defendants continue to object to the Court's *dictum* in its September 24, 2012 Order Granting Arbitrations concluding, based on the Complaint's allegations, that Plaintiffs are employees as opposed to independent contractors. As defense counsel noted at the September 17, 2012 hearing, Defendants vehemently disagree with that conclusion but recognize that the Court's statements were based on the allegations of the Complaint alone, and not dispositive in any way of the ultimate issue in this case (*i.e.*, whether Plaintiffs are correctly categorized as independent contractors). Moreover, the employee/independent contractor issue is irrelevant under the UUAA (since that statute does not have a "transportation worker" exemption), thus the Court could have granted Defendants' Motion to Compel Arbitration without addressing it. Whether Plaintiffs are independent contractors must be determined through each individual arbitration and through plenary trial on the merits, with full consideration of relevant evidence and not simply on the basis of allegations in pleadings. At the conclusion of that process, Defendants are confident that the arbitrators appointed to handle each individual arbitration will conclude Plaintiffs are indeed independent contractors.

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III. Courts Have Inherent Power To Reconsider And Modify Their Interlocutory Orders Prior To Entry Of Judgment

A Court has inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment. *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir.1982) ("district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment"). A motion for reconsideration is also proper when a court has "committed clear error" or a decision was "manifestly unjust." *ACandS, Inc.*, 5 F.3d at 1263 (reconsideration proper if highly unusual circumstances, clear error, or manifest injustice).

Local Rule 7-18 addresses Motions for Reconsideration, stating in relevant part:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Even when Local Rule 7-18 prerequisites are not met, the Court still has inherent authority to reexamine its prior decisions prior to the entry of judgment. *Network Signatures, Inc. v. ABN–AMRO, Inc.*, 2007 WL 7601871, *2 (C.D.Cal.April 10, 2007)(Selna, J.) (even though movant failed to satisfy Local Rule 7-18 requirements, and failed to demonstrate "highly unusual circumstances, clear error, or manifest injustice," court had "inherent authority to reexamine its prior decisions prior to the entry of judgment").

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IV. Argument

A. The November 8 Minute Order Violates The Principles Espoused In *Stolt-Nielsen* And Other Applicable Law

The Court's conclusion that Plaintiffs' FLSA claims "shall be collectively arbitrated" is directly in conflict with the Supreme Court's decision in *Stolt-Nielsen*, as well as other Supreme Court precedent and applicable law. The Court's September 24 Order Granting Arbitrations stated that it had considered the parties' papers discussing these very authorities before issuing its correct order granting Defendants' Motion to Compel Arbitration. Yet, misled by Plaintiffs in their October 26, 2012 Statement, the Court erroneously has reversed itself and now concluded: "The Prohibition [in the instant arbitration agreement] only prohibits consolidated or class arbitrations. Therefore, the Prohibition does not prohibit collective arbitration of Plaintiffs' FLSA claims; Plaintiffs' FLSA claims should be collectively arbitrated." (See Docket No. 61 (November 8 Minute Order) at 4.) This is clear error and must be corrected for the reasons discussed below.

To begin with, the Court's analysis in its November 8 Minute Order is directly contrary to the Supreme Court's instructions in *Stolt-Nielsen*. There, the Supreme Court was clear that arbitration is a matter of consent, and that courts *cannot* interpret an arbitration agreement to allow arbitrations to proceed collectively ***unless the parties have specifically agreed to do so***, because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Stolt-Nielsen*, 130 S.Ct. at 1773-76 (party may not be compelled to submit to class arbitration "unless the parties *agreed to authorize* class arbitration")(emphasis in original). As explained by the Supreme Court in *Stolt-Nielsen*:

> [C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." (Citations.) "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the

> courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. (Citations.) But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. (Citations.) Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties…The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. (Citation.) And the commercial stakes of class-action arbitration are comparable to those of class-action litigation (citation), even though the scope of judicial review is much more limited. . . .

Id. at 1775-76. *See also Lopez v. Ace Cash Express, Inc.*, 2012 WL 1655720 (C.D.Cal. May 4, 2012) (Kronstadt, J.) (applying *Stolt-Nielsen* to deny class arbitration: "When an arbitration agreement is silent regarding the availability of class-wide arbitration, a court may not order, and thereby impose, class-wide arbitration on the parties. Instead, the parties may be compelled to participate in bilateral arbitration only"). In reaching its decision, the Supreme Court's focus in *Stolt-Nielsen* was solely on whether the parties had agreed to anything other than bilateral arbitration. It drew no distinction between how the non-bilateral arbitration proceedings ultimately would be conducted — *i.e.*, opt-out procedures (as in a traditional class action), or an opt-in approach (such as in a collective action). *See id.* at 1778 (noting that arbitration panel had not yet decided whether putative class members "should be required to 'opt in' to the proceeding") and 1781 (noting that arbitration panel had not yet decided whether "class membership

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could be confined to those who affirmatively 'opt in' to the proceeding."). The Supreme Court in *Concepcion* similarly used the words "class action" and "collective action" interchangeably to refer to non-bilateral proceedings in its analysis regarding the enforceability of class action waivers. See *AT & T Mobility LLC v. Concepcion*, __ U.S. __, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011) (holding class action waivers to be enforceable; discussing "California's rule classifying most ***collective-arbitration waivers*** in consumer contracts as unconscionable," and stating "[w]e refer to this rule as the *Discover Bank* rule"; then stating that "[i]n *Discover Bank*, the California Supreme Court applied this framework to ***class-action waivers in arbitration agreements***") (emphasis added.). Plaintiffs' argument is thus based on a distinction without a difference given the controlling legal standard. Under *Stolt-Nielsen*, the distinction drawn by this Court in its November 8 Minute Order is irrelevant. The critical issue under *Stolt-Nielsen* is whether the parties *agreed to authorize* something other than bilateral arbitration. They did not.

An analysis of the plain language in the parties' arbitration agreement makes this clear. In addition to an explicit waiver provision prohibiting any type of non-bilateral proceeding: "Notwithstanding anything to the contrary contained or referred to herein, **no consolidated or class arbitrations will be conducted**," the arbitration provision also specifically used the words "*both parties*," clearly indicating that the arbitration clause applies to disputes between **two people** (the independent contractor/lessee and the defendant corporation). The arbitration clause does **not** ever refer to "*all* parties" or use any other collective or group wording that could suggest that a collective action claim was authorized. (*See* Docket No. 26 (Declaration of Robert Baer in Support of Motion to Compel Arbitration) at Exhibits A-G § 21 (arbitration clause).)

As in *Stolt-Nielsen*, nothing in the parties' agreement to arbitrate *expressly authorizes* any type of collective or non-bilateral arbitration. While Plaintiffs argue that a provision limiting class and consolidated actions does not encompass collective actions, the terms "consolidated" or "class" in this context means any representative

action, including a collective action. Indeed, the terms "consolidated" and "class" are synonyms of the word "collective," particularly in this context.

The Court's analysis in its November 8 Minute Order is also inconsistent with other recent Supreme Court precedent, such as *Concepcion*, 131 S.Ct. 1740 and *CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S.Ct. 665, 669, 181 L.Ed.2d 586 (2012)(courts must enforce agreements to arbitrate according to their terms, even when federal statutory claims are at issue). These cases underscored that courts must enforce agreements to arbitrate *according to their terms*. Here, as explained above, there is no term in the parties' arbitration agreement providing for collective arbitration.[6]

For all of the foregoing reasons, the November 8 Minute Order is demonstrably wrong.

B. The Court Should Reconsider And Correct Its November 8 Minute Order

As noted above, the Court's conclusion that Plaintiffs' FLSA claims "shall be collectively arbitrated" is also clear error because it directly contradicts the Court's correctly-decided September 24 Order Granting Arbitrations. Indeed, Defendants'

[6] Moreover, by citing cases from other jurisdictions like *Rame, LLC v. Popovich*, 2012 WL 2719159 (S.D.N.Y. 2012) in their October 26, 2012 Statement, (see Docket No. 59), Plaintiffs are implicitly suggesting the same argument that has been rejected by multiple courts, *i.e.*, that "an employee's statutory right to pursue a wage claim as part of a collective action [under the FLSA cannot] be waived in favor of individual arbitration." This argument was made by Plaintiffs in Opposition to Defendants' Motion to Compel Arbitration, (see Docket No. 40 (Plaintiffs' Opposition) at 10-25), and properly rejected by this Court. Indeed, Defendants' Reply brief provided numerous authorities rejecting Plaintiffs' argument, including *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); *LaVoice v. UBS Fin. Serv., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012). (See Docket No. 45 (Reply), at pp. 8-12).

Motion to Compel Arbitration specifically sought "[a]n order compelling all of the Plaintiffs and Opt-In Plaintiffs to arbitrate their claims *on an individual basis*,"[7] and the Court *granted* that Motion, without any limitations. There can be no confusion about what relief was requested, and thus implicitly granted. Before the Court granted Defendants' Motion to Compel Arbitration, there was extensive argument on this very issue: Plaintiffs argued that Plaintiffs' FLSA claims must proceed collectively, challenging Defendants' request that Plaintiffs' claims be ordered to proceed in arbitration on an *individual* basis. Defendants' papers in reply correctly explained why Plaintiffs' arguments seeking to proceed collectively failed.[8] Then, when granting Defendants' Motion to Compel Arbitration, the Court explicitly stated that it had "*considered all the papers filed in support of, or in opposition to, the Motion*" — papers that included Plaintiffs' lengthy FLSA collective action arguments and Defendants' arguments in response.[9] The November 8 Minute Order is thus not simply a "clarification" of the September 24 Order Granting Arbitrations but is instead an order compelling arbitration in a manner directly contrary to the request made by Defendants in their Motion.

Rather that move for reconsideration of the Court's September 24 Order Granting Arbitrations, Plaintiffs simply re-briefed the same exact issue in their October 26, 2012 Statement. While Plaintiffs admitted that they already had briefed this issue, they failed to advise the Court that its September 24 Order Granting Arbitrations had already rejected their argument. Defendants correctly advised the Court that the Court already had ruled on this issue by ordering individual arbitrations.[10] However, the November 8

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[7] *See* Docket No. 25 (Motion to Compel Arbitration) at page 2 of the Notice of Motion.

[8] See Docket No. 40 (Opposition to Motion to Compel Arbitration) at p. 11, fn. 6 and Docket No. 45 (Reply) at p. 10, fn. 7.

[9] *See* Docket No. 53 (September 24 Order Granting Arbitrations), at 1.

[10] See Docket No. 58 (Defendants' Position Statement in Response to Court's (footnote continued)

Minute Order fails to recognize that the Court previously ordered *individual* arbitrations notwithstanding Plaintiffs' lengthy arguments seeking to be allowed to proceed collectively with their FLSA claims. This is a material fact that was apparently overlooked by the Court. Reconsideration of the November 8 Minute Order is therefore proper on the additional grounds of manifest failure to consider such material facts before issuing this decision.

C. The November 8 Minute Order Will Result in Substantial Inefficiency and Greatly Increase Costs

Finally, compliance with the November 8 Minute Order will result in substantial inefficiency and greatly multiply the number of required proceedings and costs. If this error is not corrected, each plaintiff would be required to resolve his or her claims against Defendants through two separate types of proceedings — a collective arbitration for his or her FLSA claim, and then a separate individual arbitration for his or her forced labor claim. This makes no sense, and indeed defeats several principal advantages of arbitration, including lower costs and greater efficiency and speed. *See, e.g., Concepcion*, 131 S.Ct. 1751 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"). The Court should reconsider its

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September 27, 2012 Order), at 4. Defendants did not re-brief the issue of whether the FLSA claims could proceed collectively, as that issue already had been briefed by both parties in advance of the Court's September 24 Order Granting Arbitrations, and Defendants understood they had prevailed because the Court granted their Motion to Compel Arbitration, without any limitations, for the reasons explained above. Plaintiffs did not file any motion for reconsideration of the Court's September 24 Order Granting Arbitrations.

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November 8 Minute Order and reiterate that each Plaintiff must proceed individually with his or her claims in arbitration.[11]

V. Conclusion

For all of the reasons set forth above, Defendants respectfully request that the Court reconsider its November 8 Minute Order and find that each Plaintiff must arbitrate all of his or her claims individually against Defendants in Utah.

DATED: November 15, 2012 THEODORA ORINGHER PC

By: /s/ Drew R. Hansen
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[11] In Plaintiffs' October 26, 2012 Statement, Plaintiffs argue that the "general rule" is that an arbitrator, not a court, must decide how the case proceeds in arbitration, "and whether the arbitration occurs there on a collective, class or individual basis," relying on *Green Tree Financial Court v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003). (See Docket No. 59 (Plaintiffs' October 26, 2012 Statement) at 4] However, as discussed by the Supreme Court in *Stott-Nielsen*, no such rule is established by *Bazzle*, and indeed the issue of whether a court or an arbitrator should decide the issue of whether the parties' agreement permits anything other than bilateral arbitration is an open question. *See Stolt-Nielsen,* 130 S.Ct. at 1772.