AMERICAN ARBITRATION ASSOCIATION

ALAN COLQUHOUN, et al., **Claimants** **v.** **CHEMED CORPORATION and ROTO-ROOTER SERVICES COMPANY,** **Respondents**	**AAA Case No. 19 166 00167 09**

CLAIMANTS' CLAUSE CONSTRUCTION MEMORANDUM

Respectfully submitted,

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The Named Claimants, individually and on behalf of all other similarly situated, (collectively referred to as "Claimants"), hereby file this Clause Construction Memorandum in accordance with the Supplementary Rules for Class Arbitrations and the schedule agreed to by the parties.

I. STATEMENT OF CASE AND FACTUAL BACKGROUND

Claimants are service technicians employed by Respondents Chemed Corporation and Roto-Rooter Services Company (collectively referred to as "Roto-Rooter") and paid by commission to provide plumbing repair and maintenance services to residential and commercial customers. Claimants, who worked in various States including Massachusetts, Pennsylvania, North Carolina, Indiana, and Ohio, allege that Roto-Rooter violated their rights under federal and state wage-and-hour laws by (1) not paying them the minimum wage each week; (2) fraudulently altering time records and not recording work time to avoid paying overtime wages; and (3) making illegal deductions from their wages. These claims are currently being litigated on a class basis in a parallel action in the U.S. District Court for the Eastern District of New York. See *Morangelli, et al., v. Chemed Corp. and Roto Rooter Services Co.*, 10-cv-00876 (BMC), Doc. No. 65, Order granting conditional class certification for FLSA claims (Exh. 1 attached hereto).

On the first day of work, Roto-Rooter required each Claimant to sign a "Dispute Resolution Agreement" ("DRA") as a condition of employment. *See, e.g.,* Exh. 2. The DRA was presented to Claimants along with a host of other documents to sign. See, e.g., Exh.3, List of New Hire Paperwork from Roto-Rooter's Operations Manual, BSN 21189-190. Because the new hires often were to begin training with another Technician on the same day, signing the documents was typically a rushed affair. Alvarado Decl. ¶ 4;

Badanek Decl. ¶¶ 5-6; Colquhoun Decl. ¶¶ 4-5. Even when Technicians signed the documents prior to their first day of training, the process typically did not afford sufficient time to read and understand all the documents. Sullivan Decl. ¶¶ 3-4; Barnes Decl. ¶¶ 4, 6, 11; ~~Hiltebeitel~~ Decl. ¶¶ 3-4. Many Technicians did not have a chance to read the documents or consider what they were signing. Rather, they understood that signing the documents was part of their job and they had to do it to work at Roto-Rooter. Alvarado Decl. ¶¶ 4-7; Badanek Decl. ¶¶ 5, 6, 8; Barnes Decl. ¶¶ 7, 9; Colquhoun Decl. ¶¶ 5, 9; ~~Hiltebeitel~~ Decl. ¶¶ 3, 5, 7; Raymond Decl. ¶¶ 6, 7, 10; Sullivan ¶¶ 6, 7. Roto-Rooter provided no explanation of the DRA, did not call it to the Claimants' attention, and did not offer to answer any questions regarding the DRA. Alvarado Decl. ¶ 6, Badanek Decl. ¶ 7; Barnes Decl. ¶ 8; Colquhoun Decl. ¶ 8; ~~Hiltebeitel~~ Decl. ¶ 6; Raymond Decl. ¶ 10; Sullivan Decl. ¶ 5. Technicians were not given the opportunity to take the DRA home to consider it or seek advice from an attorney. Alvarado Decl. ¶ 8; Badanek Decl. ¶ 10; Barnes Decl. ¶¶ 11-12; Colquhoun Decl. ¶ 6; ~~Hiltebeitel~~ Decl. ¶¶ 9-10; Raymond Decl. ¶¶ 8, 12; Sullivan Decl. ¶¶ 9-10. Technicians did not believe that they were waiving their right to bring or participate in a class action. Alvarado Decl. ¶ 9; Badanek Decl. ¶ 9; Barnes Decl. ¶ 10; Colquhoun ¶ 10; ~~Hiltebeitel~~ Decl. ¶ 8; Raymond Decl. ¶ 11; Sullivan Decl. ¶ 8.

The DRA states in full:

> I hereby agree that I will settle any and all claims, disputes or controversies arising out of or relating in any way to my application for employment, employment and/or cessation of employment exclusively by final and binding arbitration before the American Arbitration Association under its Employment Dispute Resolution Rules, and I agree that judgment on the award rendered by the arbitrator(s) may be entered in any

> court having jurisdiction thereof. By way of example only, such claims include claims under federal, state and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Ex. 2. As explained more fully below, this agreement, properly interpreted, permits arbitration to proceed on a class basis. In the event the Arbitrator concludes that no agreement was reached on the question of class arbitration, then the entire agreement fails because a reasonable Claimant reading it would have understood it to permit class claims and there was, therefore, no meeting of the minds. Finally, in the unlikely event that the Arbitrator concludes that the parties agreed (implicitly) to arbitrate on an individual basis only, then the agreement is unconscionable and unenforceable.

II. ISSUES FOR DETERMINATION

1. Does the DRA, properly interpreted, permit class arbitration?

2. If the DRA is interpreted not to permit class arbitration was there a meeting of the minds with respect to the meaning of the DRA?

3. In the event the arbitrator finds that the agreement does not permit class arbitration, is the agreement unconscionable or otherwise unenforceable?

III. THE ARBITRATION AGREEMENT PERMITS CLASS ARBITRATION

A. *Stolt-Nielsen*

Roto-Rooter's claim that the DRA does not permit class arbitration is based entirely on a misunderstanding of the Supreme Court's recent decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S.Ct. 1758 (2010). It is important, therefore, to begin with a clear understanding of what *Stolt-Nielsen* actually held. The case arose from

a dispute between AnimalFeeds, a supplier of animal feed, and Stolt-Nielsen, a maritime shipping company that transported AnimalFeeds products. *Id.* at 1764. The parties entered into a form contract used in the maritime trade referred to as a "charter party." *Id.* The arbitration clause in the charter party was silent with respect to whether class arbitration was permitted, but the parties went a step further and stipulated that they had reached no agreement regarding class arbitration. *Id.* at 1765. Nevertheless, AnimalFeeds filed a demand for class arbitration and the arbitration panel allowed arbitration to proceed on a class-action basis. Stolt-Nielsen appealed and the case eventually ended up before the Supreme Court.

The Court's analysis began by noting that the arbitration panel's ruling in favor of class arbitration "was not based on a determination regarding the parties' intent." *Id.* at 1768 fn. 4. Rather, in permitting class arbitration "the panel simply imposed its own conception of sound policy." *Id.* at 1769. Such policymaking clearly went beyond the authority granted to the arbitrators by the arbitration agreement itself. Consequently, the Court had little choice but to vacate the class arbitration decision. *Id.* at 1770. However, rather than remand the case to the arbitrators to reconsider, the Court then went on to analyze for itself whether the charter party permitted class arbitration. *Id.*

The Court began with the principle that interpretation of an arbitration agreement is controlled by state law as well the Federal Arbitration Act and, like all contracts, "is a matter of consent, not coercion." *Id.* at 1773. In "construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties," *id.* at 1773-74, and may not compel a party "to submit to class arbitration unless there is a

contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Normally, in the absence of an explicit statement in an agreement regarding class arbitration, the next step would be to examine the arbitration provision as a whole to determine whether, properly construed, it evidenced such an agreement. However, the Court in *Stolt-Nielsen* had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," *id.* at 1776 fn 10, because of Stolt-Neilsen's and AnimalFeeds' stipulation that "no agreement ha[d] been reached on that issue." *Id.* at 1766. Given that stipulation, there was nothing to interpret. In the stipulated absence of an agreement to permit class arbitration, the FAA precluded the arbitration panel from imposing class arbitration. *Id.* at 1776. The Court summed up its analysis this way: "[W]e see the question as being whether the parties '*agreed to authorize* class arbitration. Here, where the parties stipulated that there was 'no agreement' on that question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.*

Two important principles arise from *Stolt-Nielsen:* First, the question of whether an arbitration agreement permits class arbitration cannot be decided on policy grounds, but instead must be decided based on the intent of the parties. Second, the fact that an agreement does not explicitly reference class arbitration does not decide the issue unless, as in *Stolt-Neilsen,* the parties stipulate that there was no agreement on class arbitration. Absent such a stipulation – and there is none here – the ordinary rules of contract interpretation must be applied to discern whether an agreement, properly construed, reflects an intent to permit class arbitration. *See generally, Smith & Wollensky Restaurant*

Group, Inc., v. Passow et al., Civ. No. 10-11498-EFH, Doc. No. 17 (D. Mass. Jan. 18, 2011) (finding that absent a stipulation barring class actions *Stolt Neilson* requires an arbitrator to "decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration"), (Exh.3, attached hereto); *Galakhova v. Hooters of America, Inc., 34-2010-00073111-CU-OE-GDS (CA Sup Ct., Sacramento County July 7, 27, 2010 (same)* (Exh. 4 attached hereto); *Fisher v. Gen. Steel Domestic Sales, LLC,* No. 10-cv-01509-WYD-BNB, 2010 WL 3791181 (D.Colo. Sept. 22, 2010) (analyzing holding of *Stolt-Nielsen*).

B. The Principles of Contract Interpretation Compel the Conclusion that the Parties' Agreement Permits Class Arbitration

The goal of contract interpretation is to ascertain the "intent" of the parties as of the time they entered into an agreement. *Williston On Contracts* §30.2. However, it is important to keep in mind that it is the parties' mutual, or "objective intent," as manifested in the words of their agreement, that matters in contract interpretation; the subjective intent or thoughts of one party or the other when signing a contract are irrelevant. 11 *Williston On Contracts* §31.4 (4th Ed.) ("It is clear, therefore, that it is not the real intent but the intent expressed or apparent in the writing which is sought; it is the objective, not the subjective, intent that controls.") As Learned Hand famously put it,

> A contract has, strictly speaking, nothing to do with personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

Hotchkiss v. National Bank of New York, 200 F.287, 293 (S.D.N.Y. 1911) aff'd 201 F. 664 (2d Cir. 1912) aff'd 231 U.S. 50 (1913). Nothing in *Stolt-Nielsen* purports to alter that basic rule of contract construction.

In interpreting the meaning of the words used in an agreement, the arbitrator should look to what a reasonable person in the position of the parties would have thought they meant. 11 *Williston On Contracts* §§31.4 (4th Ed.); *John's Insulation Inc. v. Siska Construction Co., Inc.*, 671 F.Supp. 289, 293 (S.D.N.Y. 1987) ("a party's manifestations of intent are viewed from the vantage point of a reasonable man in the position of the other party"); *Howell v. Smith*, 128 S.E.2d 144, 146 (N.C. 1962) ("the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."); *Brescoll v. Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 541 (1961) (same); *Tudesco v. Wilson*, 163 Pa. Super. 352, 60 A.2d 388 (1948) (the interpretation of a contract must result in a meaning that reasonably intelligent men would attach to it).

The DRA does not explicitly discuss class actions. However, it is a fundamental principle that "a contract includes not only the promises that are set forth in express words, but also any implied provisions that are necessary to effectuate the intention of the parties, and that arise from the express language of the contract and from the circumstances under which it was made." 11 *Williston On Contracts,* §31.4 (4th Ed.). Such "[i]mplied terms of a contract are just as much a part of the contract as express ones." *Id.* §31.7. In considering what terms are implied in an agreement, the rule of

reasonable expectations applies. This rule holds that a party choosing particular language in an agreement will be bound by the meaning that he could reasonably expect the other party to place on that language.[1] *Id.* §31.11; *Restatement (Second) of Contracts,* §201(2). *See Joyner v. Adams,* 361 S.E. 902, 905 (N.C. App. 1987) (same); *Rowe v. Great Atlantic & Pacific Tea Co., Inc.,* 46 N.Y.2d 62, 68 (1978) ("[T]he undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included."). Because Roto-Rooter drafted the DRA, this means that it must be interpreted from the point of view of a reasonable new hire entering into the agreement. As explained below, both the express language of the agreement and the circumstances under which it was made support the conclusion that a reasonable person accepting employment with Roto-Rooter would have understood the DRA to permit class arbitrations.

To begin with, the plain language of the agreement with its reference to "any and all claims . . . arising out of my . . . employment" objectively encompasses all conceivable claims including class claims. A lay person reading such language would naturally assume that it included all kinds of employment claims including class actions. Moreover, nothing in the remainder of the DRA limits the breadth of the "any and all claims" language or otherwise suggests that particular kinds of employment claims, such as class claims, are not encompassed by the agreement. Thus, the plain language of the DRA would clearly lead a reasonable job applicant to believe that the agreement

[1] *Cf. Stolt-Nielsen,* 130 S.Ct. At 1773-1774 (In "construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and *expectations* of the parties") (emphasis added).

permitted class arbitrations. *See, e.g.,* Exh. 3, *Smith & Wollensky*, Civ. No. 10-11498-EFH, Doc. No. 17 (finding it reasonable to interpret the term "any claim" in an arbitration agreement to include class claims); *Dickler v. Shearson Lehman Hutton*, 596 A.2d 860, 862-863 (Pa. Super. 1991), appeal denied 616 A.2d 984 (Pa. 1992) (holding that arbitration agreement permitted class arbitration based on the fact that the plain language of the agreement encompassed "any controversy"); *JSC Surgutneftegaz v. Pres. & Fellows of Harvard College,* No. 04 Civ. 6069(RMB), 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007) (affirming holding that arbitration agreement permitted class arbitration based on the plain language of the agreement which broadly included "any claim, controversy, or cause of action."). (The agreement is quoted in *JSC Surgutneftegaz v. Pres. & Fellows of Harvard College*, 167 Fed Appx. 266, 268 fn 1 (2d Cir. 2006).

The circumstances surrounding the signing of the DRA also lead to the conclusion that the agreement included class actions. It is black letter law that a contract should be interpreted in light of the circumstances and the facts known to the parties at the time they entered into the agreement. 11 *Williston On Contracts* §§ 32.7 (4th Ed.); *Restatement (Second) of Contracts* §202, comment b. One such circumstance known to the parties at the time they signed the agreement was that employment claims are typically litigated as class actions. Ever since the adoption of Federal Rule 23 in 1966 the benefits of class actions in the employment context – including making the prosecution of small claims possible and protecting workers reluctant to sue in their own names from retaliation – have been well known. Class actions are now part of popular culture.[2] Thus, in the

[2] Including a 1991 film entitled "Class Action" starring Gene Hackman.

absence of anything in the agreement qualifying the broad sweep of the "any and all claims" language, Roto-Rooter knew or should have known that prospective employees presented with the DRA would read its "any and all claims" language consistently with the common practice of bringing employment claims as class claims. Exh. 3, *Smith & Wollensky Restaurant*, Civ. No. 10-11498-EFH, Doc. No. 17 ("wage and hour claims like those in play here are frequently pursued as class or collective actions, and both the Claimants and S&W must be deemed to understand that.").

That the DRA created a reasonable expectation that class arbitrations were permitted is further supported by the reference in the DRA to the AAA rules. At the time most, if not all of the Claimants signed their arbitration agreements, the AAA Rules included Supplemental Class Action Rules setting forth precisely how class arbitrations would be handled. Any worker signing the agreement familiar with the AAA rules would logically conclude that such arbitrations were permitted.

For all of these reasons, the conclusion is inescapable that reasonable job applicants entering into the Agreement would have understood it to permit class arbitration claims. Given the language of the agreement and the surrounding circumstances, it is likely that Roto-Rooter read it that way too, but even if it did not, it knew or should have known that a reasonable employee entering into the agreement would understand that "any and all claims" encompassed class claims. Accordingly, if Roto-Rooter intended to exclude class claims, it had an obligation to say so. *See Williston On Contracts* §31.11 ("The law will presume that the defendant meant what his language by its terms and under the circumstances in which it was used would fairly

be understood to mean, and this presumption is a matter of law and not to be rebutted by proof that he intended something more or different which he made no attempt to express and which the plaintiff neither understood nor had reason to understand."); *U.S. v. Stuart*, 489 US 353, 367 fn 7 (1989) ("[i]t is hornbook contract law that the proper construction of an agreement is that given by one of the parties when "that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party."); *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 487 (2d Cir. 1998)("[i]f the contract is more reasonably read to convey one meaning, the party benefitted by that reading should be able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should bear the burden of negotiating for language that would express the limitation or deviation.").

This rule of contract interpretation is particularly applicable here where Roto-Rooter drafted the arbitration agreement and must have foreseen the possibility of class arbitration at the time it drafted its language. If it had intended to prohibit class arbitrations, it could easily have added language to that effect. Given its failure to do so, no such prohibition should be implied in the broad language of the agreement.[3]

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[3] In this sense, this case is the polar opposite of the one presented in *Stolt-Nielsen*. In *Stolt-Nielsen*, the circumstances surrounding the signing of the agreement would reasonably have led the parties to assume that class arbitrations were not intended to be included in the agreement. First, both Stolt-Nielsen and AnimalFeeds were sophisticated business entities, neither of whom had need for the cost sharing and retaliation protections that make class claims so important to workers in the employment context. Second, both were aware that class actions were unheard of in charter party disputes, *Stolt-Nielsen*, 130

Even if the intent of the DRA remained ambiguous after the application of the above mentioned rules of contract interpretation, several other rules of interpretation compel the conclusion that the only reasonable interpretation of the agreement is that it was intended to permit class arbitration.

First, a contract should be interpreted to accomplish its purpose. *Restatement (Second) of Contracts* §202 and comment c; 11 *Williston On Contracts* §32.9 (4th Ed.). It is clear that the primary purpose of the DRA was to ensure that employment disputes be resolved through arbitration rather than through judicial processes. Reading the provision as permitting class arbitration is consistent with that purpose, but reading it as prohibiting class arbitration is not. Class action waivers in employment contracts are clearly unlawful in many jurisdictions where Roto-Rooter used the Agreement, particularly where, as here, the alleged waiver is not explicit. *See, e.g., Shirchack v. Dynamics Research,* 508 F.3d 49 (1st Cir. 2007) (class action waiver included in one of several lengthy attachments to an e-mail was unenforceable because employees were not give fair notice of the waiver); *Ingle v. Circuit City Stores,* 328 F.3d 1165, 1175-1176 (9th Cir. 2003) (class action waiver in employment agreement is "manifestly and shockingly one-sided [and] substantively

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S.Ct. at 1769, a surrounding circumstance which would lead a reasonable person to conclude that class arbitrations were not contemplated. Third, given that reasonable expectation, the rules of contract interpretation imposed a duty on Animal Feeds, the party that chose the charter party language, to make its intention explicit if it intended to allow class arbitration. The Supreme Court mentioned all three of these factors in finding that the arbitrator's decision in *Stolt-Nielsen* was contrary to the usual rules of contract interpretation. *Id.* at 1775 ("Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war

unconscionable"); *Hopkins v. New Day Financial,* 643 F.Supp.2d 704 (E.D. Pa. 2009) (finding the unknowing waiver of right to class arbitrations in the employment context to be unconscionable and ordering a jury trial to determine whether plaintiff's waiver was knowing). Roto-Rooter is a sophisticated business and must have been aware of these decisions at the time it presented workers with the DRA. The logical conclusion is that Roto-Rooter must have intended the DRA to permit class arbitration since that would be the only way the Agreement could accomplish its intended purpose. To read the Agreement as implicitly barring class arbitrations or as not addressing the class issue at all would render the agreement invalid in many, if not all, of the states where Roto-Rooter used the agreement, thereby making it incapable of achieving its primary purpose. It would be directly contrary to the basic rules of contract interpretation to read an agreement in such a way as to defeat the primary purpose for which it was drafted.[4]

Second, an interpretation which makes a contract reasonable – *i.e.* an interpretation that does not give one party an unreasonable advantage over the other – is preferred to one that yields unreasonable results. 11 *Williston On Contracts* §32.11 (4th Ed.). This rule is based on the probability that the parties would more likely have entered into a fair contract than one with overreaching provisions. *Id.* As set forth below, the right to proceed on a class action basis is extremely important to workers, allowing them

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with the foundational FAA principle that arbitration is a matter of consent.").

[4] As set forth below, if the agreement does not permit class arbitration, it is unenforceable in all states where it was used. But the point Claimants are making here is that violates the fundamental principles of contract interpretation to read the Agreement in such a way as to make it invalid in *any* state in which it was used. If it can be read in a way that would carry out its purpose in all states where it was used – and it clearly can be by finding class claims to be encompassed in "any and all claims" – then that is the

to share costs, obtain counsel, and avoid retaliation. The waiver of such a right places workers at a distinct disadvantage *vis-á-vis* their employers. *See Gentry v. Superior Court,* 42 Cal.4th 443, 457-462 (2007). Thus, it is far more reasonable to interpret the DRA as permitting class arbitrations than to interpret it as implicitly prohibiting them.

Third, where private contracts touch on the public interest, an interpretation that carries out that public interest is preferred to one that defeats that interest. *Williston On Contracts.* §32.18, 32.19 (4th Ed.). Here, there is a strong public interest in enforcing labor laws. Such statutes are not only designed to protect individual workers, but also competing employers and the public at large from the adverse effects of unfair labor practices. Class actions are critical to enforcing those statutes and carrying out the public interest. That is why the FLSA specifically allowed for class litigation more than twenty years before Federal Rule 23 was adopted and that is why States have provisions like California Labor Code 2699 (allowing employees to act as "private attorneys general" to enforce labor laws on behalf of other workers). Thus, an interpretation permitting class arbitration is to be preferred to one that does not.

Fourth, contracts should be interpreted to be lawful, rather than unlawful to the extent possible. 11 *Williston On Contracts* §32.11 (4th Ed.). There is nothing unlawful about an arbitration agreement that permits class arbitration but, again, reading the DRA to prohibit class actions raises serious questions about its lawfulness. Some states, such as California, statutorily guarantee employees the right to proceed as a class and any agreement that contravenes that statutory guarantee is unlawful. *See* California Labor

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preferred interpretation.

Code 2699. In addition, Section 7 of the National Labor Relations Act guarantees that "[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection . . ." 29 U.S.C. §157, and it is unlawful "to interfere with, restrain, or coerce employees in the exercise of" those rights. 29 U.S.C. §158. Protected concerted activity includes the filing of collective and class action lawsuits regarding employment matters. *See Saigon Gourmet,* 353 NLRB No. 110 (2009) (employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage-and-hour lawsuit and by discharging employees who "were preparing to file a wage-and-hour lawsuit, [which is] clearly protected activity. . . .") (Exh. 5-1 attached hereto); *In re* 127 Restaurant Corp. D/B/A/ *Le Madri Restaurant,* 331 NLRB 269, 275-75 (2000) (employer unlawfully discharged two employees for engaging in protected activity including filing a lawsuit on behalf of themselves and 17 other employees alleging violations of federal and state labor laws) (Exh. 5-2 attached hereto); 52nd Street Hotel Associates D/B/A *Novotel New York,* 321 NLRB 624, 633-636 (1996) (filing of an "opt-in" class action lawsuit alleging employer violations of the FLSA was protected concerted activity)(Exh. 5-3 attached hereto); *United Parcel Service, Inc.,* 252 NLRB 1015, 1018, 1022 & fn26 (1980) *enfd.* 677 F.2d 421 (6th Cir. 1982) (employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks)(Exh. 5-4 attached hereto); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) *enfd. mem.* 567 F.2d 391 (7th cir. 1977) *cert. denied* 438 U.S. 914 (1978) (filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was deemed protected

activity)(Exh. 5-5 attached hereto). *See also U-Haul Co. of Ca., Inc.,* 347 NLRB 375, 377-378 (2006) *enfd.* 255 Fed.Appx. 527 (D.C.Cir. 2007) (enforced a Board order prohibiting an employer from using a mandatory arbitration agreement that could reasonably be read to prohibit an employee from filing unfair labor practice charges with the Board) (Exh. 5-6 attached hereto).

Because employees have a Section 157 right to act in concert to enforce their statutory employment rights before courts and other administrative tribunals, any attempt by an employer to condition employment on an employee's waiving his or her right to engage in concerted legal activity, including filing class actions, violates fundamental employee rights. Reading the DRA to permit class arbitrations avoids this illegality and is, therefore, the preferred interpretation.

Finally, if after applying all of the above rules of interpretation, the intended meaning of the contract remains ambiguous, the rule that ambiguities in a contract should be construed against the party who prepared the contract comes into play. *Williston On Contracts* §32.12; *Slatt v. Slatt,* 102 A.D.2d 475, 476-477 (N.Y.App. Div. 1984). Because Roto-Rooter drafted the DRA any remaining doubt as to its meaning must be resolved against Roto-Rooter and in favor of Claimants position that the DRA permits class arbitration.

Thus, the rules of contract interpretation compel the conclusion that the DRA was intended to permit class arbitrations.

C. Similar Arbitration Agreements Have Been Interpreted as Permitting Class Arbitration

Courts and Arbitrators confronted with agreements that are silent with respect to

class arbitration have consistently interpreted those agreements as permitting class arbitration, both before and after *Stolt-Nielsen.* For example, in *The Smith & Wollensky Restaurant Group, Inc., v. Passow,* the Court upheld an arbitrator's interpretation of a silent arbitration agreement to permit class arbitration:

> S&W contends that Stolt-Nielsen prevents the claim from proceeding in arbitration. The Court disagrees. In Stolt-Nielsen, "the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." *Id.* at 1776 n.10. Here, there was no such stipulation and, thus, the arbitrator was authorized "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." Id. The arbitrator ruled that the parties intended that class-action claims and relief were contemplated and permitted by the DRA and the Court concludes that the language of the DRA supports such a ruling. The arbitrator found that the arbitration clause in the DRA was broad in its reach, covering "any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state and federal law." The arbitrator noted that "any claim" is defined as "any claims for wages, compensation and benefits" and that both the FLSA and Massachusetts wage laws statutorily authorize an individual employee to bring a class-action in a court of law. The arbitrator further found that the DRA expressly provided that the "[a]rbitrator may award any remedy and relief as a court could award on the same claim," that the applicable statutes provide for class relief and the statutes were in existence when the DRA was executed. The arbitrator also noted that "wage and hour claims like those in play here are frequently pursued as class or collective actions, and both the Claimants and S&W must be deemed to understand that."
>
> The arbitrator's award was the result of a reasonable interpretation of the DRA.

Exh. 3, *The Smith & Wollensky Restaurant Group, Inc., v. Passow et al.*, Civ. No. 10-11498-EFH, Doc. No. 17.

Similarly, the Court in *Galakhova* found that Stolt Neilson supported a finding that a silent arbitration agreement provides for class treatment:

> Unlike the parties in Stolt-Nielsen, the parties here did not stipulate that there was "no agreement" between them "on the issue of class-

> arbitration." Thus, this court, unlike the Court in Stolt-Nielsen, has "occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. *Id.* at 1776 n.10. The arbitration agreement here supports such a finding. The agreement provides that "all Claims" shall be arbitrated, including, but "not limited to, any claim whether arising under federal, state, or local law." .... A class-action claim, of course, would be such a claim, as would a wage claim, which, as is the case with a class-action claim, is not specifically mentioned in the agreement."

Exh. 4, Galakhova,34-2010-00073111-CU-OE-GDS.

And in *Bensen v. CSA-Credit Solutions of America,* 11-160-M-02281-08 (July 6, 2010) (Exh. 6 attached hereto), an arbitrator concluded that an arbitration agreement virtually identical to the one at issue here permitted FLSA claims to be arbitrated on a class basis. The arbitrator began by noting that the language of the agreement that encompassed "any dispute" was consistent with permitting class arbitration. The arbitrator also noted that at the time the agreement was signed in 2008, it was not uncommon for employers to explicitly prohibit class arbitrations and the absence of any such explicit language in the agreement supported the conclusion that it was intended to permit such proceedings. *See also DePianti v. Jan-Pro Franchising Int'l.,* Nos. 08CV10663, 111140083807, 2008 WL 6045831 (AAA Oct.8, 2008) (broad language of agreement that covers "all disputes, controversies and claims of any kind" coupled with lack of anything to indicate class arbitrations were not permitted would lead francisee to believe class arbitrations were permitted)(Exh. 7 attached hereto); *Labor Ready Northwest, Inc. v. Crawford, Civil No. 07-1060-HA,* 2008 WL 1840749 (D.Or, April 21, 2008) (finding that in the wage-and-hour context the ordinary meaning of an arbitration agreement's reference to "any" and "all" disputes includes class disputes); *Ramirez v.*

Cintas, No. C 04-00281 JSW, 2009 WL 921629 (N.D.Cal., April 03, 2009) (finding that the plain meaning of an arbitration agreement's broad language includes class arbitration); *Dickler v. Shearson Lehman Hutton*, 596 A.2d 860, 862-863 (Pa. Super. 1991), appeal denied 616 A.2d 984 (Pa. 1992) (holding that arbitration agreement permits class arbitration "merely gives full weight to the language of Shearson's client agreement – *i.e.* "Any agreement").

For all of the foregoing reasons, the only reasonable interpretation of the Arbitration Agreement is that it permits class arbitration in appropriate cases.

IV. IF THERE WAS NO AGREEMENT REGARDING CLASS ARBITRATIONS THEN THERE IS NO AGREEMENT TO ARBITRATE

As set forth above, job applicants entering into Roto-Rooter's DRA would reasonably have read the Agreement to permit class arbitrations. Because Roto-Rooter wrote the agreement, Claimants reasonable understanding should control. But if the Arbitrator rejects that conclusion and finds that Roto-Rooter is not bound by the Claimants' reasonable understanding, then there has been no meeting of the minds: Claimants reasonably thought that they were agreeing to an arbitration agreement that allowed for class arbitration and (if the Arbitrator so finds) Roto-Rooter did not intend class arbitrations to be part of the agreement. In such circumstances, there is no enforceable agreement. *Restatement (Second) of Contracts* §201(3) ("Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent"). Just as Stolt-Nielsen could not be compelled to participate in a class arbitration that it had not agreed to, Claimants cannot be required

to participate in "individual claims only" arbitration that they did not agree to.[5]

V. A CLASS ARBITRATION WAIVER WOULD BE UNENFORCEABLE

Although Claimants believe that the only reasonable way to interpret the Arbitration Agreement is to read it to permit class arbitrations, in the unlikely event the DRA is construed to mean that class arbitrations are prohibited, then the arbitration agreement is unconscionable and unenforceable. The Federal Arbitration Act (FAA) provides that, when grounds "exist at law or in equity for the revocation of any contract," courts may decline to enforce such agreements. 9 U.S.C. §2; *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 683 (1996); *Ferguson v. Countrywide Credit Indus., Inc.,* 298 F.3d 778, 782 (9th Cir.2002). "Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir.2006). If the DRA were read to prohibit class arbitration, the agreement would be unenforceable because (1) Claimants did not receive adequate notice of that they were waiving the right to proceed as a class; (2) such a prohibition would prevent Claimants from vindicating their statutory rights in violation of the FAA; and (3) such a prohibition would be both

[5] Although the lack of agreement is similar to *Stolt-Nielsen* the remedy for the lack of agreement is different. In *Stolt-Nielsen* the parties' stipulation that no agreement was reached on class arbitration necessarily meant that the written arbitration agreement reflected an enforceable meeting of the minds about individual arbitration. Thus individual arbitration could go forward. Here, by contrast, there has been no such stipulation. The parties actively dispute the meaning of their written arbitration agreement – Claimants reasonably thought class arbitrations were part of the agreement and Roto-Rooter claims that they were not included. If the Arbitrator credits Roto-Rooter's position (which it should not under the rules of contract interpretation) there is no meeting of the minds and therefore no enforceable agreement. Hence the only appropriate remedy is to send the dispute back to district court.

procedurally and substantively unconscionable in the circumstances of this case. Any one of these reasons renders the agreement unenforceable.

A. Lack of Adequate Notice

If the arbitration agreement is interpreted to contain an implicit waiver of the right to proceed on a class basis, it would be unenforceable because Claimants did not receive adequate notice of such a waiver. An employee's ability to seek redress on a class basis is a valuable procedural right that the FLSA and many State labor laws specifically recognize. *See, e.g.*, 29 U.S.C. §216(b); M.G.L. Ch. 151 §20 (A person not receiving the statutory minimum fair wage "may institute and prosecute . . . for himself and for others similarly situated, a civil action"); Indiana Code 22-2-2-9 (An action to recover minimum wage "may be brought by any one (1) or more employees for and on behalf of himself or themselves and all other employees of the same employer who are similarly situated."); North Carolina Stat. 95-25.22 (b) (action to recover minimum wage may be brought by any one or more employees).

The legislative allowance for class actions arises from the recognition that class actions may be a more effective method for redressing small claims. S*ee Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326 338 (1980) (noting that "the class action . . . may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise"); *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 617 (1997) (stating that "[a] class action solves [the incentive problem created by small damages] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."). Class actions are particularly important in the labor context because

they provide some protection from retaliation. *Gentry v. Superior Court,* 42 Cal.4th 443, 459-460 (2007) (citing fear of retaliation as a basis for striking down a class-action waiver in the wage-and-hour context). Assuming that such rights can be waived, it is clear that there must be fair notice to an employee for such a waiver to be valid. Lack of fair notice renders arbitration agreements generally, and class action waivers in particular, invalid and unenforceable. For example, in *Shirchack v. Dynamics Research,* 508 F.3d 49 (1st Cir. 2007), an employer sent e-mails to its employees notifying them of an "improved" dispute resolution program which would be deemed accepted if an employee came to work the following Monday. Buried in the appendix to one of five attachments to the e-mail was a provision adding a class-action waiver to the previously signed arbitration agreement. The First Circuit held that this method of notifying employees of the waiver did not provide fair notice and, accordingly, the court found the waiver to be unenforceable. *Id.* at 59-60. *See also, Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 668 (6th Cir.2003) (*en banc*) (agreement to arbitrate must be knowing and voluntary); *Hopkins v. New Day Financial,* 643 F.Supp.2d 704, 719 (E.D. Pa. 2009) (class-action waiver given to employees on take-it-or-leave-it basis would be unconscionable if jury finds that employees did not have adequate time to understand the waiver); *Quiles v. Financial Exchange Co.,* 879 A.2d 281, 286 (Pa. Super. 2005) (where exact terms of arbitration agreement were never communicated to employee there was no knowing and voluntary waiver of rights and agreement was unenforceable); *Liodori v. CIGNA Corp.,* 175 N.J. 76, 96 (2002) ("[A] waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim.");

Geiger v. Ryan's Family Steak Houses, Inc., 134 F.Supp2d 985, 997 (S.D.Ind. 2001) (Indiana law places on the party seeking to enforce an arbitration contract the burden of showing that the contractual provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds).

In this case, the notice of the alleged class waiver provided to Claimants was even less fair than that in *Shirchack* and *Hopkins*. In the first place, the waiver, if it existed was only *implicit,* not explicit. Nothing on the face of the DRA alerted Claimants to the fact that it allegedly contained a class waiver and, as explained above, the language of the DRA could reasonably be understood to permit class arbitration. Roto-Rooter did nothing to explain the class waiver it now alleges was contained in the agreement, nor did it give Claimants an opportunity to ask questions; the agreement was simply handed to workers along with a stack of other papers which they had to sign before beginning work. *See, e.g.,* Exh.8, List of New Hire Paperwork from Roto-Rooter's Operations Manual, BSN 21189-190. In these circumstances, it cannot be said that Claimants' received any notice, let alone fair notice, of the alleged class waiver. Nor can it be said that they clearly and unambiguously waived their right to proceed on a class basis. Accordingly, the alleged class waiver is unenforceable.

B. Interference With the Vindication of Statutory Rights

The Federal Arbitration Act encourages the enforcement of private arbitration agreement on the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). "By agreeing to arbitrate a statutory claim, a party does not

forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/Johnson Lane Corp,* 500 U.S. 20, 26 (1991). Arbitral agreements that do not provide for the fair and adequate means of enforcing a party's substantive statutory rights are unenforceable as a matter of federal law. *Kristian v. Comcast Corp.,* 446 F.3d 25, 37 (1st Cir. 2006) (class action waiver unenforceable); *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 658 (6th Cir. 2003) (cost-splitting provision unenforceable).

Claimants contend that, if the DRA is read to preclude class action arbitration, the waiver would be unenforceable under the FAA because it would interfere with the Claimants' ability to vindicate their FLSA and state labor law claims. This is so for a number of reasons. First, because the value of certain wage claims tends to be small in value, Sweeney Decl. ¶ 5, it would be difficult if not impossible for Claimants to obtain legal counsel to pursue individual claims. Hiring an attorney on an hourly basis is economically out of the question for low wage workers. Alvarado Decl. ¶ 10; Badanek Decl. ¶ 11; Barnes Decl. ¶ 13; Colquhoun Decl. ¶ 11; Raymond Decl. ¶ 13; Sullivan ¶ 11; Lubelsky Decl. ¶ 3; Swartz Decl. ¶ 3; Pelton Decl. ¶ 3; Stein Decl. ¶ 3; Rand Decl. ¶ 3; Sweeney Decl. ¶ 6. The only way they can obtain counsel is on a contingency basis, Raymond Decl. ¶ 13, but it is simply not practical for attorneys to take small class claims on a contingency basis unless there is an opportunity to combine many such claims through a class action. Lubelsky Decl. ¶¶ 4-5; Swartz Decl. ¶¶ 4-5; Pelton Decl. ¶¶ 4-5; Rand Decl. ¶¶ 4-5; Stein Decl. ¶¶ 4-5; Sweeney Decl. ¶¶ 6-7. Thus, a class-waiver provision that forces workers like Claimants to pursue their claims on an individual basis

will effectively preclude workers from obtaining counsel to pursue their claims.[6] *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997) ('[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.' "); *Shady Grove Othopedic Assocs., P.A. v. Allstate Ins. Co.,* 549 F.3d 137, 144 (2d Cir.2008) ("[C]lass actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred.")

Even in the unlikely event that an attorney could be found, a rational worker could quite reasonably conclude that pursuing a small claim on an individual basis is simply not worth the time and energy necessary to bring such a claim. Taking time off from work to confer with counsel, respond to discovery, and to prepare for and attend a deposition could easily cost a worker as much in lost wages as could be gained in damages. On the other hand, if workers can proceed on a class basis, then those with claims too small to be worth pursuing individually may still be able to recover by participating as passive class members. *Roper,* 445 U.S. at 338 ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise[, thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be

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[6] The fact that the FLSA and some state wage hour statutes provide for an award of reasonable attorneys fees does not change this conclusion. As courts have noted, the mere possibility of being awarded fees does not provide sufficient incentive for attorneys to take complicated cases. *Gentry,* 42 Cal.4th at 458-59; *Dale v. Comcast Corp.,* 498 F.3d 1216, 1223 (11th Cir. 2007); *In re: Checking Overdraft Litigation,* 2010 WL 3389034 at *3 (S.D.

more than consumed by the cost.").

A class action waiver deters workers from obtaining relief in yet another way. Many workers are hesitant to file individual claims out of fear of being viewed as troublemakers. In these difficult economic times, a worker with a job is rarely willing to risk the consequences of stepping forward and filing an individual claim against his employer. To many workers it is far better to keep one's head down and quietly accept the occasional wage hour violation than to risk the far worse consequence of losing one's job. Class actions offer such workers the possibility of recovery: If former employees are willing to pursue claims on a class basis, current workers who fear to be seen as actively challenging their employer can participate as passive class members. *Gentry v. Superior Court*, 42 Cal.4th 443, 459-460 (2007) ("bringing formal legal action against one's employer is not 'a viable option for many employees.'") (internal citations omitted).

These deterrent effects not only interfere with individual workers' ability to obtain relief, but they also injure the public interest. State and federal labor laws that regulate wages and hours and other terms of work are designed not only to protect individual workers from exploitation, but to protect the public at large from the deleterious effects that unfair labor practices have on public health and safety, and free and fair competition. *See, e.g.* 29 U.S.C. §202 (finding that unfair labor practices spread ill health, burden commerce, lead to labor strife, and interfere with the fair marketing of goods). Any limitation that deters workers from seeking redress for labor violations, including a class-action waiver, places the fulfillment of important public policies at risk.

Fla. 2010).

At least two Courts of Appeals have found arbitration agreements with class action waivers interfere with the ability to vindicate important statutory rights. *Kristian,* 446 F.3d at 59 (finding class action waiver in the context of anti-trust claims unenforceable); *In re American Express Merchants Litigation,* 554 F.3d 300 (2d Cir. 2009) (same), *judgment vacated and remanded for reconsideration,* 130 S.Ct. 2401 (2010). *Kristian* is particularly noteworthy for its criticisms of an earlier Third Circuit case upholding a class action waiver in a Truth-in-Lending Act case, *Johnson v. West Suburban Bank,* 225 F.3d 366, 374 (3rd Cir. 2000). *Kristian* noted that the availability of attorneys' fees to a successful claimant was not sufficient to provide an incentive for attorneys to take individual claims whether through litigation or arbitration. *Kristian,* 446 F.3d at 59-60. S*ee also Am. Express,* 554 F.3d at 317-18 (same). Finally, the *Kristian* court rejected *Johnson's* argument that even if individuals were deterred from bringing private enforcement actions, the public interest in ensuring compliance with remedial laws could be vindicated through administrative enforcement:

> When Congress enacts a statute that provides a role for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. Otherwise, Congress would not have provided for both. Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme. Eliminating one entirely is surely incompatible with Congress' choice.

Kristian, 446 F.3d at 59; see also *American Express,* 554 F.3d at 319 (same). While the expert witness costs in this case are not as great as they were for the anti-trust claims discussed in *Kristian*, the fact remains that a class action bar in this case will deter many small claimants from vindicating their FLSA and state labor rights to the detriment not

only of those individual claimants, but the public at large that has a keen interest in ensuring that wage-and-hour laws are enforced. *Kristian* itself recognized that its reasoning applied outside the anti-trust context as it cited with approval the California Supreme Court's reasoning in *Discover Bank v. Superior Court,* 36 Cal.4th 148 (Cal. 2005), which struck down class action waivers in the context of consumer claims, recognizing that the potential rewards from bringing individual small claims are simply insufficient to motivate private counsel to assume the risks of prosecuting such cases. *Kristian,* 446 F.3d at 60-61. And the principles of *Discover Bank* have been applied to strike down class action waivers in employment situations indistinguishable from this case. *See Gentry v. Superior Court,* 42 Cal.4th 443 (2007) (finding class arbitration waiver unconscionable in the context of wage-and-hour claims for low wage workers);[7] *Franco v. Athens Disposal Co., Inc.,* 171 Cal.App.4th 1277 (2009) (class waiver signed by trash truck driver unenforceable because wage hour damages are too low to pursue on an individual basis either in court or in arbitration).

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[7] "[W]hen it is alleged that an employer has systematically denied proper overtime pay to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class action waiver, the trial court must consider the factors discussed above: the modest size of potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If it concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and that the disallowance of the class action will likely lead to a less comprehensive enforcement of the overtime laws for employees alleged to be affected by the employers' violations, it must invalidate the class arbitration waiver . . ." *Gentry,* 42 Cal.4th at 463.

In *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003), the Sixth Circuit applied the same "vindication of federal rights" analysis used in *Kristian* to an employment claim. The arbitration provision at issue was a cost-splitting provision, rather than a class action waiver, but the court's analysis applies with equal force to the class action context. In particular, the court noted that because statutory employment laws serve a remedial and deterrent function, a function which would be defeated if a substantial number of claimants would be deterred by the provision, a court evaluating whether a provision interferes with statutory rights must consider "more than just the interests and conduct of a particular plaintiff." *Id.* at 663. Rather, it must consider all similarly situated workers affected by the challenged provision and determine whether the provision would be likely to deter a sufficient number of individuals to undermine the purposes served by the statute. The court also noted that in deciding whether a provision will deter employees from bringing their claims, a court must consider the reality of the decision making process of potential litigants at the time a claim is brought, rather than in light of the possible outcomes. "In many cases, if not most, employees considering the consequences of bringing their claims in the arbitral forum will be inclined to err on the side of caution. . . " *Id.* at 665. Applying this approach to the class waiver question, the question becomes not whether the particular named claimants will be deterred by Roto-Rooters class waiver, but whether a class waiver undermines enforcement of the statute because a substantial number of employees are likely to view their claims as too small, and the potential adverse consequences of having to file individual claims (as opposed to participating as a passive class member) too great to risk.

Because a class action waiver would, effectively preclude many claimants from vindicating their rights under the statutes at issue here, such a waiver is unenforcable under the FAA.

C. Unconscionability

States where Claimants worked have found arbitration agreements with class action waivers to be unconscionable. *Thibodeau v. Comcast,* 912 A.2d 874 (Pa. 2006) (class waiver in consumer contract); *Lytle v. CitiFinancial Services,* 810 A.2d 643 (Pa. 2002) (class action waiver in mortgage contract); *Tillman v. Consumer Credit Loans,* 655 S.E.2d 362 (N.C. 2008) (class action waiver in mortgage contract); *In re Checking Account Overdraft Litigation,* No. 09-MD-02036-JLK, 2010 WL 3361127 (S.D. Fla. Aug. 23, 2010) (class action waiver in bank agreement unconscionable under North Carolina law); *Schwartz v. AllTel Corp.*, No. 86810, 2006 WL 2243649 (Ohio App. 8 Dist., June 29, 2006) (class waiver in consumer contract unconscionable).

Unconscionability generally involves two aspects, procedural unconscionability and substantive unconscionability. While the presence of both procedural and substantive problems is generally necessary for an ultimate finding of unconscionability, there is a sliding scale so that unconscionability may be found where there is a pronounced degree of substantive unfairness and a minimal degree of procedural unfairness and vice versa.[8] 15 *Williston On Contracts* §1763A at 226-227 (3d Ed. 1972); *Tillman,* 655 S.E.2d at 370;

[8] This is the principal distinction between state law unconscionability analysis and the federal vindication of statutory rights analysis in the prior section. Because of the sliding scale aspect of unconscionability analysis, the greater the procedural unconscionability – and it is great here given the fact that Claimants were given no hint that they were agreeing to an implicit class waiver – the less severe the substantive

Ingle v. Circuit City Stores, 328 F.3d 1165, 1171 (9th Cir. 2003). Here there is a pronounced degree of both.

1. Procedural Unconscionability

Procedural unconscionability generally involves unfair surprise or oppression – i.e. inequality of bargaining power coupled with a lack of meaningful choice. *See, e.g., Fensterstock v. Education Finance Partners,* 611 F.3d 124 (2d Cir. 2010); *Tillman v. Commercial Credit Loans, Inc.,* 655 S.E.2d 362, 370 (N.C. 2008). Roto-Rooter, a large national company with in-house counsel, was clearly in a stronger bargaining position than Claimants, most of whom had little or no more than a high school education. Alvarado Decl. ¶ 3; Badanek Decl. ¶ 3; Barnes Decl. ¶ 3; Colquhoun Decl. ¶ 3; Raymond Decl. ¶ 3; Sullivan ¶ 3. The form DRA drafted by Roto-Rooter was not subject to negotiation. Rather it was presented to Claimants along with a number of other documents that had to be signed in order to be hired. Alvarado Decl. ¶¶ 4-7; Badanek Decl. ¶¶ 5-8; Barnes Decl. ¶¶ 6-9; Colquhoun Decl. ¶¶ 4-5, 7; ~~Hiltebeitel~~ Decl. ¶¶ 3-6; Raymond Decl. ¶¶ 5-7, 9; Sullivan ¶¶ 3-7. Roto-Rooter provided no explanation of the meaning of the DRA and gave workers very little time to read or consider it. Alvarado Decl. ¶¶ 6-8; Badanek Decl. ¶¶ 6-7; Barnes Decl. ¶¶ 8; Colquhoun Decl. ¶¶ 8; ~~Hiltebeitel~~ Decl. ¶¶ 6; Raymond Decl. ¶¶ 10; Sullivan ¶¶ 5. These circumstances are more than sufficient to establish procedural unconscionability. *See Tillman,* 655 S.E.2d at 370 (finding procedural unconscionability where party with superior bargaining power presented documents on a take-it-or-leave-it basis hurriedly and without explanation);

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deterrent effects that must be shown to establish unconscionability.

Denlinger, Inc. v. Dendler, 415 Pa.Super. 164, 608 A.2d 1061, 1068 (1992) (procedural unconscionability is generally found where there is a contract of adhesion-a contract prepared by a party with excessive bargaining power and presented to the other party on a "take it or leave it" basis); *Thibodeau v. Comcast Corp.,* 912 A.2d 874, 886 (Pa.Super.Ct.2006) (the general test is whether the party challenging the agreement had any meaningful choice regarding the acceptance of its provisions); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171 (standard form that job applicants must sign without changes is oppressive and procedurally unconscionable). The procedural impropriety in this case is even more extreme than in the above cases because the agreement did not explicitly notify Claimants that it was intended to operate as a class action waiver. As noted above, that lack of notice is alone sufficient to render the agreement unenforceable, although if it were not, it is certainly enough to establish procedural unconscionability.

The procedural unconscionability is even more pronounced where Technicians, like John Raymond, were required to purchase a van before being required to sign the DRA. *See, e.g.,* Raymond Decl. at ¶¶ 4-9. The Third Circuit addressed precisely this situation in *Lucey v. FedEx Ground Package Systems, Inc.* It found the arbitration agreement procedurally unconscionable because "where FedEx drafted the arbitration provision and presented it to Plaintiffs with little to no bargaining power on a take-it-or-leave it basis, we cannot equate an opportunity to review the agreement with a meaningful choice to accept its terms." 305 Fed.Appx. 875, 877-78 (3rd Cir. Jan. 8, 2009).

2. Substantive Unconscionability

Substantive unconscionability refers to harsh, one-sided and oppressive contract

terms that unreasonably favor one party. *Tillman,* 655 S.E.2d at 370; *Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 119 (Pa. 2007); *Collins v. Click Camera & Video, Inc.* 621 N.E.2d 1294 (Ohio App. 1993). The class action waiver, if one exists in the DRA, is substantively unconscionable because it would be entirely one-sided and has the effect of deterring Claimants from vindicating their rights. The one-sidedness of the agreement lies in the fact that only workers suffer a detriment from the class action waiver. Roto-Rooter would have no occasion to file a class action against its employees so that a bar on class actions in no way limits its ability to bring or defend claims against employees. *See Tillman v. Commercial Credit Loans,* 655 S.E.2d 362, 372 (N.C. 2008). The unfairness of such a waiver to employees has been discussed at length above. In essence, because many Claimants have only small claims, a class action is the only viable mechanism for vindicating their rights. In the absence of class procedures, their ability to proceed will, effectively, be foreclosed. Without class procedures, the public interest embodied in the policies behind the wage-and-hour laws also suffers.

For all of these reasons, courts have not hesitated to find class-action waivers to be substantively unconscionable when applied to relatively low wage claims. For example, in *Tillman,* the North Carolina Supreme Court found a class action waiver in a mortgage agreement substantively unconscionable because it deterred potential plaintiffs from bringing claims and because the prohibition on class actions "contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers." 655 S.E.2d at 373. The court specifically noted that the relatively modest amounts sought by the plaintiffs, ($2,000 - $4000), "make it unlikely

that any attorneys would be willing to accept the risks attendant to pursuing claims against one of the nation's largest lenders, even with the prospect of a treble damages award and statutory attorney's fees." Similarly, in *In re Checking Overdraft Litigation,* the court found that a class waiver in bank agreement was unconscionable under North Carolina law because even assuming the plaintiffs' damages amounted to several thousand dollars that would not be sufficient to take a complicated case on a contingency fee basis. --- F.Supp.2d ----, 2010 WL 3389034 (S.D. Fla. May 10, 2010). In *Thibodeau v. Comcast Corp.,* a Pennsylvania court held that a class action waiver in a cable TV contract was unconscionable under both Pennsylvania and Massachusetts law because it effectively prevented consumers from pursuing their claims. 912 A.2d 874 (Pa. Super. 2006). *Hopkins v. New Day Financial,* reached a similar conclusion in a FLSA action holding that "the determinative fact in finding a class action waiver unconscionable is whether the prospects of a favorable verdict create an incentive for a plaintiff to file the action individually" and ordering jury trial to determine whether potential damages were sufficient to enable worker to bring individual suit). 643 F.Supp.2d 704, 718 (E.D. Pa. 2009). The court in *Schwartz v. AllTel Co.* struck down a class action waiver in consumer contract as unconscionable because by eliminating a consumer's right to file on behalf of a class the clause directly deterred claims and undermined the protections of the Ohio consumer protection statute. 2006 WL 2243649 (Ohio App. 2006).[9]

[9] Many other states have found class action waivers to be unconscionable. *See, e.g. Scott v. Cingular Wireless,* 160 Wash 2d 843 (2007) (consumer class waiver); *Vasquez-Lopez v. Beneficial Oregon, Inc.,* 152 P.3d 940 (Or. App. 2007) (consumer class action waiver); *Wong v. T-Mobile,* No. 05-73922, 2006 WL 2042512 (E.D. Mich. July, 20, 2006) (consumer class action waiver); *Whitney v. Alltel Communications, Inc.,* 173

The implicit class action waiver in this case – if there is one – is every bit as unconscionable as the explicit agreements addressed in the above cases. Indeed, because the alleged waiver could only be implicit, the degree of procedural unconscionability in this case far exceeds that in the cases cited above. Accordingly, if the Arbitrator finds that the DRA implicitly waived the right to class arbitration such an agreement would be unconscionable and unenforceable.

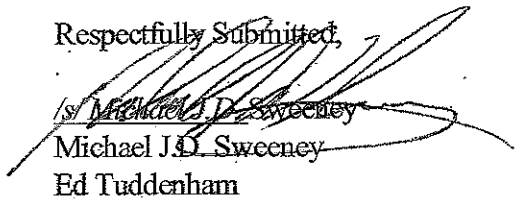
CONCLUSION

For all of the foregoing reasons, the DRA, properly construed, permits class arbitration. Roto-Rooter knew or should have known that job applicants entering into its form agreement would understand it to permit class arbitration and Roto-Rooter, having failed to clarify its position, is bound by that reasonable interpretation pursuant to the standard rules of contract interpretation. In the event the Arbitrator disagrees and finds that Roto-Rooter is not bound by the reasonable interpretation of the Claimants, then there is no enforceable agreement to arbitrate as there was no meeting of the minds regarding the agreement. In the unlikely event the Arbitrator were to find that the Agreement implicitly waives class arbitration, such a waiver would be unenforceable because Claimants did not receive fair notice of it, such a waiver would unlawfully interfere with Claimants' ability to vindicate their statutory rights, and such a waiver would be unconscionable under the circumstances of this case.

Dated: January 24, 2011

S.W.3d 300, 308-314 (Mo.App.2005) (consumer class waiver).

Respectfully Submitted,



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