IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL KOBREN, on behalf of himself and all others similarly situated, Plaintiff, v. A-1 LIMOUSINE INC., MICHAEL STARR, and JEFFREY STARR, Defendants.	:	CIVIL ACTION No. 3:16-cv-00516-FLW-DEA ELECTRONICALLY FILED Motion Day June 6, 2016

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS A-1 LIMOUSINE INC., MICHAEL STARR, AND JEFFREY STARR'S MOTION TO COMPEL ARBITRATION AND STAY THE ACTION

Dated: May 23, 2016

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I. INTRODUCTION

Plaintiff Michael Kobren ("Kobren") respectfully submits this brief in opposition to Defendants A-1 Limousine Inc., Michael Starr, and Jeffrey Starr's (collectively "Defendants") "Motion to Compel Arbitration and Stay the Action." See Doc. 23 (the "Motion") (Doc. 23). For reasons discussed below, the Motion should be denied.

First, the arbitration provision in the "Assigned Employee Notice & Acknowledgments"[1] is unenforceable because it improperly denies a forum for Kobren and other signatories to effectively vindicate their statutory rights. See pp. 3-6, infra. Second, even if the Court agrees with Defendants that this case should proceed to arbitration, this Court must still determine whether Kobren can pursue his claims in arbitration on a behalf of the proposed collective under the Fair Labor Standards Act, 29 U.S.C. § 216(b) in light of a class-action waiver in the Arbitration Agreement. See pp. 6-7, infra. The National Labor Relations Board ("NLRB") has repeatedly held that such agreements violate employees' substantive rights under the National Labor Relations Act ("NLRA") and it is currently investigating Defendants' use of it here. See pp. 7-13, infra.

II. PROCEDURAL HISTORY

Kobren filed his Complaint with the Court on January 29, 2016. See Doc. 1. Therein, he alleged that Defendants violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* and the New Jersey Wage and Hour Law ("NJWHL"), N.J.S.A. §§ 34:11-56a, *et seq.* by failing to pay overtime premium compensation (equal to 150% their hourly rate of pay) for hours worked over 40 in a week by him and other drivers employed by Defendants. Id. Instead, Defendants just paid them their "straight" hourly rate for overtime work. Id. Kobren brought his

[1] Referred to herein as the "Arbitration Agreement."

FLSA claims as an "opt-in" collective action pursuant to 29 U.S.C. § 216(b) and his NJWHL claims as an "opt-out" class action pursuant to Fed. R. Civ. P. 23. Id.[2] On March 1, 2016, Kobren and fellow driver Jerry Daniel ("Daniel") filed consent forms to participate in the FLSA collective. See Docs. 12-13.

On April 22, 2016, Defendants filed the Motion based on the Arbitration Agreement, which was signed by Kobren, Daniel, and "all A-1 employees as of May 22, 2013 through today." See Doc. 23-2 at p. 1; Doc. 23-1 at Exhibits B and C; see also Doc. 23-2 at p. 3 ("On or about May 22, 2013, A-1 received [Arbitration Agreements] from all of its then extant employees, and has continued to do so for all subsequently hired employees."). Defendants' drivers were required to sign the Arbitration Agreement as a condition of their employment and were unable to "opt-out" or exclude themselves from its terms. Id. The Arbitration Agreement contains language stating: (i) "Unless prohibited by law, costs of arbitration will be shared equally by the parties" (the "Cost Sharing Provision"); and (ii) that the signatory agrees "to participate in any legal dispute with any Beneficiary only in my individual capacity, not as a member or representative of a class or part of a class action" (the "Class/Collective Action Waiver"). See Doc. 23-1 at Exhibits B and C

On May 3, 2016, Kobren and Daniel each filed individual charges with the NLRB. See Exhibits A-B. Therein, Kobren and Daniel allege that the Class/Collective Action Waiver in Defendants' Arbitration Agreement violates section 8(a)(1) of the NLRA by interfering with their rights to engage in concerted activity under section 7 of the NLRA. Id. A field attorney from the NLRB is currently investigating these charges, and is expected to make his findings on the legality of Defendants' Class/Collective Action Waiver in the coming weeks.

[2] The parties subsequently stipulated to the dismissal of Kobren's NJWHL claim with prejudice. See Doc. 25. Thus, only the FLSA collective action claim remains. Id.

III. ARGUMENT

A. Standard.

This Court has held that the summary judgment standard under Fed. R. Civ. P. 56(c) should be utilized to review motions to compel arbitration, see Morando v. Netwrix Corp., 2012 U.S. Dist. LEXIS 58140, *6-7 (D.N.J. Apr. 24, 2012), stating:

> A court shall grant summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Therefore, a court must first determine whether there is a genuine issue of material fact as to whether a valid arbitration agreement exists. In making this determination, a court must give the party opposing arbitration "the benefit of all reasonable doubts and inferences that may arise." In examining whether certain claims fall within the ambit of an arbitration clause, a court must "focus . . . on the 'factual allegations in the complaint rather than the legal causes of action asserted.'" If the court decides that the claims at issue fall within the scope of the arbitration clause, the court must then refer the dispute to arbitration without considering the merits of the case.

Id. at *7-8 (internal citations omitted).

B. Enforcement of the Cost Sharing Provision Would Prevent Kobren and Daniel From Effectively Vindicating their Statutory Rights.

In 2013, the U.S. Supreme Court explained that under the effective vindication rule, arbitration agreements should be invalidated: (i) when it forbids asserting certain statutory rights; and (ii) requires a plaintiff to "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." American Express Co. v. Italian Colors Restaurant, __ U.S. __, 133 S. Ct. 2304, 2310-11 (2013); see also Blair v. Scott Specialty Gases, 283 F.3d 595, 605 (3rd Cir. 2002) ("The Supreme Court has [. . .] made clear that arbitration is only appropriate 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum' allowing the statute to serve its

purposes.").[3]

The Cost Sharing Provision states: "Unless prohibited by law, ***costs of arbitration will be shared equally by the parties***." See Doc. 21-1 (emphasis supplied). Under this term, Kobren and Daniel would be responsible for half of the arbitrator's fees and administrative costs if they are required to pursue their claims in arbitration.

"Arbitration costs are directly related to a litigant's ability to pursue the claim." Blair, 283 F.3d at 605 (internal citations and brackets omitted); see also Parilla v. IAP Worldwide Services VI, Inc., 368 F.3d 269, 284 (3d Cir. 2004) ("we have held that an arbitration provision that makes the arbitral forum prohibitively expensive for a weaker party is unconscionable."). Accordingly, several district courts within this Circuit have held that arbitration provisions requiring a plaintiff-employee to share arbitration fees and costs, such as the one in this case, are unenforceable where he or she is financially unable to do so. See Cirino v. Gordon Holdings,

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[3] Similarly, the Sixth Circuit observed:

> The Supreme Court has made clear that statutory rights . . . may be subject to mandatory arbitration ***only if*** the arbitral forum permits the effective vindication of those rights. "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (quotation omitted). . . . The arbitration of statutory claims must be accessible to potential litigants as well as adequate to protect the rights in question so that arbitration, like the judicial resolution of disputes, will "further broader social purposes." *Gilmer*, 500 U.S. at 28. ***To put the matter in a slightly different way, employers should not be permitted to draft arbitration agreements that deter a substantial number of potential litigants from seeking any forum for the vindication of their rights.*** To allow this would fatally undermine the federal anti-discrimination statutes, as it would enable employers to evade the requirements of federal law altogether.

Morrison v. Circuit City Stores, 317 F.3d 646, 658 (6th Cir. 2003) (emphasis supplied); see also Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 385 (6th Cir. 2005) ("Even if there is a contract-based defense to the enforceability of an arbitration agreement, a court cannot enforce the agreement as to a claim if the specific arbitral forum provided under the agreement does not 'allow for the effective vindication of that claim.'").

Inc., 2014 U.S. Dist. LEXIS 86253, *21 (E.D. Pa. June 25, 2014) (finding arbitration provision requiring parties to split arbitration fees unenforceable as "splitting the arbitration fees will severely limit his ability to vindicate his rights as he is unable to afford the anticipated costs of arbitration"); Hodges v. SCE Environmental Group, Inc., 2012 U.S. Dist. LEXIS 72490, *13-14 (M.D. Pa. May 24, 2012) (finding that arbitration provision requiring the parties to share the costs of the arbitration was unenforceable based on plaintiff's declaration demonstrating he was financially unable to pay for such costs); Spinetti v. Service Corp. Int'l, 240 F. Supp. 2d 350, 353-57 (W.D. Pa. 2001) (finding arbitration provision requiring plaintiff to pay one-half of the costs and fees of arbitration unenforceable as plaintiff had "adequately demonstrated that the costs associated with arbitrating her claims are prohibitive"); Giordano v. Pep Boys, 2001 U.S. Dist. LEXIS 5433, *24 (E.D. Pa. March 29, 2001) ("Thus, I find that the cost-sharing provision in the agreement is unenforceable because its functions as a deterrent to plaintiff's vindication of his claims through arbitration."); see also Alexander v. Anthony International, 341 F.3d 256, 263, 269 (3d Cir. 2003) (arbitration provision requiring loser to pay arbitrator's fees and expenses unenforceable due to plaintiffs' inability to pay); Caponi v. Jetro Holdings, Inc., 2014 U.S. Dist. LEXIS 4614, *6 (D.N.J. Jan. 14, 2014) ("The case law strongly indicates that ordering [a plaintiff] to pay any [arbitration] fees could well be unconscionable.") (citing cases).[4]

Here, neither Kobren nor Daniel are able to underwrite half of the costs of arbitration as required by Defendants' Cost Sharing Provision. See Declaration of Michael Kobren attached as Exhibit C; Declaration of Jerry Daniel attached as Exhibit D. While the Arbitration Agreement

[4] Other circuit courts agree that such fee and cost splitting mandates are sufficient grounds to find an arbitration agreement unenforceable. See, e.g., Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1233-35 (10th Cir. 1999); Cole v. Burns Int'l Sec. Servs., 103 F.3d 1465, 1485 (D.C.C. 1997) ("In sum, we hold that [the plaintiff-employee] could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses.").

is silent as to what group would conduct any arbitration proceeding (such as "AAA" or "JAMS") or how many arbitrators are used, the potential costs of arbitration are significant. By way of example, the AAA recently provided the undersigned three proposed arbitrators in a separate wage and hour case with "Hearing" and "Study" hourly rates ranging between $350.00 and $700.00, and "Travel" hourly rates between $200.00 and $700.00. See Exhibit E. If Defendants' Motion is granted and utilizing the lowest hourly rates of $350.00 for a modest 20 hours of Hearing and Study time, Kobren and Daniel would be on the hook for at least $5,250.00 each in costs under the Arbitration Agreement. Since Kobren and Daniel cannot afford to share the arbitration costs as required by the Cost Sharing Provision, the Arbitration Agreement is unenforceable and Defendants' Motion should be denied.

C. Even if the Court Holds that the Arbitration Agreement is Enforceable Despite the Cost Sharing Provision, the Court Must Still Decide the Gateway Arbitrability Question of Whether the Class/Collective Action Waiver is Valid.

Even if the Arbitration Agreement is enforceable despite the Cost Sharing Provision, the Class/Collective Action Waiver is legal. The Third Circuit, in Opalinski v. Robert Half International Inc., 761 F.3d 326, 329 (3rd Cir. 2014), held that it is for the court, and not the arbitrator, to decide whether a party has waived its ability to arbitrate its claims on a classwide basis: "Because of the fundamental differences between classwide and individual arbitration, and the consequences of proceeding with one rather than the other, we hold that the availability of classwide arbitration is a substantive 'question of arbitrability' to be decided by a court." Id. at 334; see also Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746 (3d Cir. 2015).

The Class/Collective Action Waiver requires signatories to "agree to participate in any legal dispute with any Beneficiary only in my individual capacity, not as a member or

representative of a class or part of a class action" without the opportunity to "opt-out" of its terms. See Doc. 23-1 at Exhibits B and C. As discussed below, this provision is invalid because it violates Kobren and Daniel's substantive rights under the NLRA.

D. The Arbitration Agreement's Class/Collective Action Waiver is Invalid and Unenforceable because it Violates the NLRA.

The Arbitration Agreement's Class/Collective Action Waiver which requires signatories, such as Kobren and Daniel, to arbitrate on an individual basis violates the NLRA. Specifically, this provision interferes with their right to engage in protected concerted activity under Sections 7 and 8(a)(1) of the NLRA. See NLRA § 7, 29 U.S.C. § 157; NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1). The Central District of California in Totten v. Kellogg Brown & Root, LLC, 2016 U.S. Dist. LEXIS 10424 (C.D. Cal. Jan. 22, 2016)[5] recently provided a detailed discussion of the substantive rights provided under Sections 7 and 8(a)(1) of the NLRA, and how the filing of a legal action on behalf of other employees (such as the collective action here) is a protected "concerted activity" under the statute:

> Section 7 of the NLRA provides that "[e]mployees shall have the right to . . . engage in . . . *concerted activities* for the purpose of collective bargaining or other *mutual aid or protection."* NLRA § 7, 29 U.S.C. § 157 (emphasis added). Section 8(a)(1) makes it an unfair labor practice for the employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1). Thus, if the workplace rule imposed by the employer restricts activities protected by Section 7, the rule is unlawful.
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> It is firmly established that employees' Section 7 right to act for the purpose of "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Eastex, Inc. v. NLRB, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).
>
> This right to engage in concerted activity to improve one's working conditions is not limited to union workers seeking to collectively bargain with management. It

[5] A copy of the Totten decision is attached for the Court's convenience as Exhibit F.

also applies to non-union employees "when they seek to improve working conditions through resort to administrative and judicial forums . . . ." Id. at 566; see, e.g., Signal Oil and Gas Co. v. NLRB, 390 F.2d 338, 342-43 (9th Cir. 1968) (finding non-union employee engaged in protected concerted activity when he made pro-strike remarks to another non-union employee); see also Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1508 (8th Cir. 1993) ("Non-union employees as well as union employees share the right to engage in concerted activity.") (citations omitted); Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237, 241 (6th Cir. 1980) ("[U]norganized employees who jointly participate in a walkout . . . to present job related grievances to management are engaged in concerted activity protected by Section 7 regardless of whether or not the employees are members of a union.").

In order for employee activity to fall within Section 7, it must be "concerted." While this term "embraces the activities of employees who have joined together in order to achieve common goals," the Supreme Court has found that "the language of § 7 does not confine itself to such a narrow meaning." NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 831, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984) ("In fact, § 7 itself defines both joining and assisting labor organizations — activities in which a single employee can engage — as concerted activities."). Thus, "[a]n individual acting alone engages in concerted activity when she acts on behalf of the workforce." YMCA of Pikes Peak Region, Inc. v. NLRB, 914 F.2d 1442, 1455 (10th Cir. 1990) (citing City Disposal, 465 U.S. at 831) (footnote omitted); see also Int'l Transp. Serv. v. NLRB, 449 F.3d 160, 166 (D.C. Cir. 2006) ("[C]oncerted activity includes circumstances where individual employees work to initiate, induce or prepare for group action. . . . The touchstone for concerted activity, then, must be some relationship between the individual employee's actions and fellow employees.") (citation omitted).

Significantly, concerted activity also encompasses concerted legal action. See, e.g., Brady v. National Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); Mohave Elec. Co-op, Inc. v. NLRB, 206 F.3d 1183, 1188, 340 U.S. App. D.C. 391 (D.C. Cir. 2000) (filing petition for injunction against employer harassment supported by fellow employees and joined by a co-worker was protected concerted activity); Altex Ready Mixed Concrete Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith.") (citing Leviton Mfg. Co., Inc. v. NLRB, 486 F.2d 686, 689 (1st Cir.1973)).

Id. at *19-22.

As in Totten, Kobren's lawsuit for unpaid wages qualifies as a concerted activity which is

a protected substantive right under the federal NLRA. See Mohave Elec. Coop., Inc., v. NLRB, 206 F.3d 1183, 1188 (D.C.C. 2000) ("the rule [is] that filing a civil action by a group of employees is protected activity *unless done with malice or in bad faith*.") (emphasis in original); Altex Ready Mixed Concreate Corp. v. NLRB, 542 F.2d 295, 297 (5th Cir. 1976) (same); Lewis v. Epic Systems Corp., 2015 U.S. Dist. LEXIS 121137 (W.D. Wis. Sept. 11, 2015) (citing cases); Herrington v. Waterstone Mortgage Corp., 2012 U.S. Dist. LEXIS 36220, *10-11 (W.D. Wis. Mar. 16, 2012) (same).

The United States Supreme Court has unequivocally held arbitration agreements are invalid and unenforceable if they require a party to waive a substantive federal right. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("'[B]y 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.'") (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)). Federal courts possess the authority to invalidate contractual provisions that violate the NLRA. See Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86 (1982) ("While only the [NLRB] may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates [the NLRA]. Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.").

In recent years, with the rise of employers (such as Defendants) seeking to avoid liability through the use of class/collective action waivers in arbitration agreements, the NLRB has repeatedly been asked to examine whether agreements (similar to those singed by Kobren and Daniel) violate the NLRA. In 2012, the NLRB examined this very question, and concluded that employers violate the NLRA by entering into individual arbitration agreements with employees

that prohibit class and collective actions. See In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 NLRB LEXIS 11 ("In this case, we consider whether an employer violates Section 8(a)(1) of the [NLRA] when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.") ("Horton I").

In Horton I, the arbitration agreement required that "all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived." Id. at *3. The Western District of Wisconsin succinctly and cogently described the NLRB's Horton I analysis as follows:

> The reasoning followed by the board is straightforward: (1) under the NLRA, "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, and employers may not "interfere with, restrain, or coerce employees in the exercise of" that right, 29 U.S.C. § 158(a)(1); (2) both courts and the board have found consistently that lawsuits for unpaid wages brought by multiple plaintiffs may be one type of "concerted activity" protected by §§ 157 and 158(a)(1); (3) an employer interferes with an employee's right to engage in concerted activities by requiring her to sign an agreement that includes a prohibition on collective actions by employees; (4) there is no conflict between the Federal Arbitration Act and the NLRA because the Federal Arbitration Act does not require the enforcement of arbitration agreements that conflict with substantive provisions of federal law.[6]

Herrington v. Waterstone Mortgage. Corp., 993 F. Supp. 2d 940, 943 (W.D. Wis. 2014) (citing Horton I).

In holding that arbitration agreements containing class waivers are unenforceable, the NLRB relied on the U.S. Supreme Court's statement in Glimer that arbitration agreements may not require a party to "'forgo the substantive rights afforded by the statute.'" See Horton I, 357

[6] This fourth point is based in part on the Federal Arbitration Act's "savings clause" which states that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

NLRB No. 184, 2012 NLRB LEXIS 11, at *39-48. The NLRB then observed:

> The question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See Gilmer, supra. Rather, the issue here is whether the [arbitration agreement]'s categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA.
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> ***
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> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action -- including collective *legal* action -- is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. The Respondent and supporting amici argue that class-action waivers do not implicate substantive rights under Section 7 because the right of a litigant to employ the class action procedures of Federal Rule of Civil Procedure 23 (or in corresponding State rules) or the collective action procedures under the FLSA (29 U.S.C. § 216(b)) "is a procedural right only, ancillary to the litigation of substantive claims." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). There is no substantive Section 7 right to maintain a class or collective action, the Respondent and amici contend. To the extent they mean that there is no Section 7 right to class certification, they are surely correct. Whether a class is certified depends on whether the requisites for certification under Rule 23 have been met. But that is not the issue in this case. The issue here is whether Respondent may lawfully condition employment on employees' waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23. Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.

Id. at *40-44.

In the years since Horton I, the NLRB has continued to investigate employers and find under that arbitration agreements requiring employees to proceed individually and waive the ability to bring or participate in class and collective actions violate the NLRA and are unenforceable. A small sample of examples include, *inter alia*: In re Murphy Oil USA, Inc., 361 NLRB No. 72 (2014) available at 2014 NLRB LEXIS 820; In re ZEP, Inc., 363 NLRB No. 192 (2016) available at 2016 NLRB LEXIS 347; In re Securitas Sec. Servs. USA, Inc., 363 NLRB No. 182 (2016), available at 2016 NLRB LEXIS 339; In re CVS RX Servs., 363 NLRB No. 180

(2016), available at 2016 NLRB LEXIS 325; In re Bloomingdale's, Inc., 363 NLRB No. 172 (2016), available at 2016 NLRB LEXIS 314; In re UnitedHealth Group, Inc., 363 NLRB No. 134 (2016) available at 2016 NLRB LEXIS 155; In re 24 Hour Fitness USA, Inc., 363 NLRB No. 84 (2015), available at 2015 NLRB LEXIS 947; In re Kmart Corp., 363 NLRB No. 66 (2015), available at 2015 NLRB LEXIS 914; In re Chesapeake Energy Corp., 362 NLRB No. 80 (2015), available at 2015 NLRB LEXIS 324.

In 2013, a divided Fifth Circuit Court of Appeals overturned the NLRB's Horton I decision, holding that the right to concerted litigation activity under Section 7 of the NLRA is not a protected substantive right that cannot be waived by an arbitration agreement. See D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) ("[t] use of class action procedures . . . is not a substantive right" but merely a "procedural device.") ("Horton II"). However, several district courts have explicitly refused to follow the Fifth Circuit's holding in Horton II, and instead have adopted the NLRB's analysis in Horton I. See, e.g., Herrington v. Waterstone Mortgage Corporation, 993 F. Supp. 2d 940, 943-46 (W.D. Wis. 2014) ("[T]he majority [in Horton II] never persuasively rebutted the [NLRB's] conclusion that a collective litigation waiver violates the NLRA and never explained why, if there is tension between the NLRA and the FAA, it is the FAA that should trump the NLRA, rather than the reverse.") ("Herrington II");[7] Totten v. Kellogg Brown & Root, LLC, 2016 U.S. Dist. LEXIS 10424, *34-*49 (C.D. Cal. Jan. 22, 2016) ("In short, the Fifth Circuit [in Horton II] fails to provide a convincing response to the [NLRB's] explanation of why the right to engage in collective legal action is a core substantive right protected by Section 7 [of the NLRA]."); Lewis v. Epic System Corp., 2015 U.S. Dist. LEXIS

[7] Herrington II denied a motion for reconsideration of an earlier pre-Horton II decision, describing the NLRB's analysis in Horton I as "reasonably defensible" and invalidating an arbitration agreement containing a class action waiver. See Herrington v. Waterstone Mortgage Corp., 2012 U.S. Dist LEXIS 36220 (W.D. Wis. Mar. 16, 2012).

121137 (W.D. Wis. Sept. 11, 2015) ("Both courts and the [NLRB] have found consistently that lawsuits for unpaid wages brought by multiple plaintiffs may be one type of 'concerted activity' protected by §§ 157 and 158(a)(1).").

Here, the Court should also follow the Supreme Court's instruction that the NLRB's interpretations of the NLRA are to be given consideration deference, see ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994), and find that the Arbitration Agreement's Class/Collective Action Waiver, which signatories are not able to opt-out of, is unenforceable. Or, in the alternative, the Court should deny Defendants' Motion without prejudice to allow for the NLRB to complete its ongoing investigation of Defendants' use of the Arbitration Agreement.

IV. CONCLUSION

For the reasons discussed above, Plaintiff respectfully requests that Defendants' Motion be denied.

Dated: May 23, 2016

Respectfully,

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Exhibit A

UNITED STATES GOVERNMENT
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May 4, 2016

A-I LIMOUSINE, INC., MICHAEL STARR,
AND JEFFREY STARR (COLLECTIVELY "A-I")
2 EMMONS DR
PRINCETON, NJ 08540-5927

Re: A-1 LIMOUSINE, INC., MICHAEL STARR, AND JEFFREY STARR
Case 22-CA-175471

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney ROBERT E. MULLIGAN whose telephone number is (973)645-3652. If this Board agent is not available, you may contact JULIE KAUFMAN whose telephone number is (973)645-5928.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent.

Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

DAVID E. LEACH III
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	22-CA-175471

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed)*

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box)*: [ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)***: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 22-CA-175471	Date Filed MAY 3, 2016

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A-1 Limousine, Inc., Michael Starr, and Jeffrey Starr (collectively "A-1")

b. Tel. No. (609) 951-0070
c. Cell No.
f. Fax No.
g. e-Mail
h. Number of workers employed At least 100

d. Address *(Street, city, state, and ZIP code)*
2 Emmons Drive
Princeton, NJ 08540

e. Employer Representative

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Car Service

j. Identify principal product or service
Car Service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
A-1 requires all employees, including Charging Party listed below, to sign to a document titled "Assigned Employee Notice & Acknowledgments" ("Arbitration Agreement") mandating that employees resolve any disputes with A-1 on an individual basis. Specifically, the Arbitration Agreement states: "I agree to participate in any legal dispute with any Beneficiary only in my individual capacity, not as a member or representative of a class or part of a class action." By subjecting employees, such as Charging Party, to waive their right to pursue class claims in all forums and arbitrate strictly on an individual basis, A-1 is violating section 8(a)(1) of the NLRA by interfering with employees' rights under section 7 to engage in concerted activity. See, e.g., Chesapeake Energy Corp., 362 NLRB No. 80 (Apr. 30, 2015).

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Michael Kobren c/o R. Andrew Santillo, Esq., Winebrake & Santillo, LLC (address in section 6 below)

4a. Address *(Street and number, city, state, and ZIP code)*
32 Cedar Street
New Egypt, NJ 08533

4b. Tel. No. 609-658-1829
4c. Cell No.
4d. Fax No.
4e. e-Mail actionmai@aol.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ R. Andrew Santillo, Esq
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 715 Twining Road, Suite 211, Dresher, PA 19025 5/3/16 *(date)*

Tel. No. 215-884-2491
Office, if any, Cell No. 215-884-2491
Fax No. 215-884-2492
e-Mail asantillo@winebrakelaw.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

FORM NLRB-4541
(1/92)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE: PARTIES INVOLVED IN AN INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE SHOULD BE AWARE OF THE FOLLOWING PROCEDURES:

Right to be represented by counsel — Any party has the right to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event you wish to have a representative appear on your behalf, please have your representative complete Form NLRB-4701, Notice of Appearance, and forward it to the respective Regional Office as soon as counsel is chosen.

Designation of representative as agent for service of documents — In the event you choose to have a representative appear on your behalf, you may also, if you so desire, use Form NLRB-4813 to designate that representative as your agent to receive exclusive service on your behalf of all formal documents and written communications in the proceeding, except charges and amended charges, and further except subpoenas which are served on the person to whom they are addressed. If this form is not filed, both you and your representative will receive copies of all formal documents, including complaints, orders, and decisions. If it is filed, copies will be served only on your representative, and that service will be considered service on you under the statute. The designation, once filed, shall remain valid unless a written revocation is filed with the Regional Director.

Impartial investigation to determine whether charge has merit — Immediately upon receipt of a charge, the Regional Office conducts an impartial investigation to obtain all the facts which are material and relevant to the charge. In order to determine whether the charge has merit, the Region interviews the available witnesses. Your active cooperation in making witnesses available and stating your position will be most helpful to the Region.

The Region seeks evidence from all parties. Naturally, if only the charging party cooperates in the investigation, a situation results whereby the evidence presented by the charging party may warrant the issuance of a complaint, in the absence of any explanation from the party charged with having violated the law. Where evidence of meritorious defenses is made available a number of cases are withdrawn or dismissed. Your active cooperation will result in disposing of the case at the earliest possible time, whether the case has merit or not.

If the charge lacks merit, charging party has opportunity to withdraw — If it is determined that the charge lacks merit, the charging party is offered the opportunity to withdraw it. Should the charging party refuse to withdraw the charge, the Regional Director dismisses the charge, advising the charging party of its right to appeal the dismissal to the General Counsel.

If the charge has merit, the matter may be voluntarily adjusted — If the Regional Director determines that the charge has merit, all parties are afforded an opportunity to settle the matter by voluntary adjustment. It is the policy of this office to explore and encourage voluntary adjustment before proceeding with litigation before the Board and courts, which is both costly and time consuming. The Regional Director and members of the staff are always available to discuss adjustment of the case at any stage and will be pleased to receive and act promptly upon any suggestions or comments concerning settlements.

Voluntary adjustments after issuance of complaint — If settlement is not obtained, the Regional Director will issue a complaint which is the basis for litigating the matter before the Board and courts. However, issuance of a complaint does not mean that the matter cannot still be disposed of through voluntary adjustment by the parties. On the contrary, at any stage of the proceeding the Regional Director and staff will be pleased to render any assistance in arriving at an appropriate settlement, thereby eliminating the necessity of costly and time-consuming litigation.

FORM NLRB-4701
(5-11)

National Labor Relations Board

NOTICE OF APPEARANCE

CASE

☐ REGIONAL DIRECTOR.

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C. 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C. 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☐ REPRESENTATIVE IS AN ATTORNEY

☐ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

NAME OF REPRESENTATIVE _____

MAILING ADDRESS: _____

E:MAIL ADDRESS: _____

OFFICE TELEPHONE NUMBER: _____

CELL PHONE NUMBER: _____ FAX: _____

SIGNATURE: _____
(Please sign in ink)

DATE: _____

1/ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT

FORM NLRB-4943
(9-12)

National Labor Relations Board

NOTICE OF DESIGNATION OF ATTORNEY OR REPRESENTATIVE

	CASE NO.

To: Regional Director,

I, _____, the undersigned, hereby designate

_____, whose name and address appear below,

as my attorney/representative in this proceeding.

This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

FULL NAME OF WITNESS
SIGNATURE OF WITNESS *(please sign in ink)*
DATE

NAME OF ATTORNEY/REPRESENTATIVE
☐ REPRESENTATIVE IS AN ATTORNEY
MAILING ADDRESS
EMAIL ADDRESS
TELEPHONE NUMBER

Exhibit B

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 22
20 WASHINGTON PL
FL 5
NEWARK, NJ 07102-3127

Agency Website: www.nlrb.gov
Telephone: (973)645-2100
Fax: (973)645-3852

Download
NLRB
Mobile App

May 4, 2016

A-I LIMOUSINE, INC., MICHAEL STARR, AND
JEFFREY STARR (COLLECTIVELY "A-I")
2 EMMONS DR
PRINCETON, NJ 08540-5927

Re: A-1 LIMOUSINE, INC., MICHAEL
STARR, AND JEFFREY STARR
Case 22-CA-175474

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney ROBERT E. MULLIGAN whose telephone number is (973)645-3652. If this Board agent is not available, you may contact JULIE KAUFMAN whose telephone number is (973)645-5928.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent.

Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials by E-Filing (not e-mailing) through our website, www.nlrb.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlrb.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

DAVID E. LEACH III
Regional Director

Enclosures:
1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	CASE NUMBER
	22-CA-175474

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed)*:

7. A. PRINCIPAL LOCATION:	B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:

9. DURING THE MOST RECENT *(Check appropriate box)*: [ ] CALENDAR YR [ ] 12 MONTHS or [ ] FISCAL YR *(FY dates)*

	YES	NO
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)***: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 22-CA-175474	Date Filed MAY 3, 2016

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
A-1 Limousine, Inc., Michael Starr, and Jeffrey Starr (collectively "A-1")

b. Tel. No. (609) 951-0070
c. Cell No.
f. Fax No.
g. e-Mail
h. Number of workers employed At least 100

d. Address *(Street, city, state, and ZIP code)*
2 Emmons Drive
Princeton, NJ 08540

e. Employer Representative

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Car Service

j. Identify principal product or service
Car Service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
A-1 requires all employees, including Charging Party listed below, to sign to a document titled "Assigned Employee Notice & Acknowledgments" ("Arbitration Agreement") mandating that employees resolve any disputes with A-1 on an individual basis. Specifically, the Arbitration Agreement states: "I agree to participate in any legal dispute with any Beneficiary only in my individual capacity, not as a member or representative of a class or part of a class action." By subjecting employees, such as Charging Party, to waive their right to pursue class claims in all forums and arbitrate strictly on an individual basis, A-1 is violating section 8(a)(1) of the NLRA by interfering with employees' rights under section 7 to engage in concerted activity. See, e.g., Chesapeake Energy Corp., 362 NLRB No. 80 (Apr. 30, 2015).

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Jerry Daniel c/o R. Andrew Santillo, Esq., Winebrake & Santillo, LLC (address in section 6 below)

4a. Address *(Street and number, city, state, and ZIP code)*
1530 Rose Circle
Mableton, GA 30126

4b. Tel. No. 678-346-8674
4c. Cell No.
4d. Fax No.
4e. e-Mail jdhb64@yahoo.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ R. Andrew Santillo, Esq
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 715 Twining Road, Suite 211, Dresher, PA 19025 5/3/16 *(date)*

Tel. No. 215-884-2491
Office, if any, Cell No. 215-884-2491
Fax No. 215-884-2492
e-Mail asantillo@winebrakelaw.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

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FORM NLRB-4541
(1/92)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE: PARTIES INVOLVED IN AN INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE SHOULD BE AWARE OF THE FOLLOWING PROCEDURES:

Right to be represented by counsel — Any party has the right to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event you wish to have a representative appear on your behalf, please have your representative complete Form NLRB-4701, Notice of Appearance, and forward it to the respective Regional Office as soon as counsel is chosen.

Designation of representative as agent for service of documents — In the event you choose to have a representative appear on your behalf, you may also, if you so desire, use Form NLRB-4813 to designate that representative as your agent to receive exclusive service on your behalf of all formal documents and written communications in the proceeding, except charges and amended charges, and further except subpoenas which are served on the person to whom they are addressed. If this form is not filed, both you and your representative will receive copies of all formal documents, including complaints, orders, and decisions. If it is filed, copies will be served only on your representative, and that service will be considered service on you under the statute. The designation, once filed, shall remain valid unless a written revocation is filed with the Regional Director.

Impartial investigation to determine whether charge has merit — Immediately upon receipt of a charge, the Regional Office conducts an impartial investigation to obtain all the facts which are material and relevant to the charge. In order to determine whether the charge has merit, the Region interviews the available witnesses. Your active cooperation in making witnesses available and stating your position will be most helpful to the Region.

The Region seeks evidence from all parties. Naturally, if only the charging party cooperates in the investigation, a situation results whereby the evidence presented by the charging party may warrant the issuance of a complaint, in the absence of any explanation from the party charged with having violated the law. Where evidence of meritorious defenses is made available a number of cases are withdrawn or dismissed. Your active cooperation will result in disposing of the case at the earliest possible time, whether the case has merit or not.

If the charge lacks merit, charging party has opportunity to withdraw — If it is determined that the charge lacks merit, the charging party is offered the opportunity to withdraw it. Should the charging party refuse to withdraw the charge, the Regional Director dismisses the charge, advising the charging party of its right to appeal the dismissal to the General Counsel.

If the charge has merit, the matter may be voluntarily adjusted — If the Regional Director determines that the charge has merit, all parties are afforded an opportunity to settle the matter by voluntary adjustment. It is the policy of this office to explore and encourage voluntary adjustment before proceeding with litigation before the Board and courts, which is both costly and time consuming. The Regional Director and members of the staff are always available to discuss adjustment of the case at any stage and will be pleased to receive and act promptly upon any suggestions or comments concerning settlements.

Voluntary adjustments after issuance of complaint — If settlement is not obtained, the Regional Director will issue a complaint which is the basis for litigating the matter before the Board and courts. However, issuance of a complaint does not mean that the matter cannot still be disposed of through voluntary adjustment by the parties. On the contrary, at any stage of the proceeding the Regional Director and staff will be pleased to render any assistance in arriving at an appropriate settlement, thereby eliminating the necessity of costly and time-consuming litigation.

FORM NLRB-4701
(5-11)

National Labor Relations Board

NOTICE OF APPEARANCE

CASE

☐ REGIONAL DIRECTOR.

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C. 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C. 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☐ REPRESENTATIVE IS AN ATTORNEY

☐ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

NAME OF REPRESENTATIVE _____

MAILING ADDRESS: _____

E:MAIL ADDRESS: _____

OFFICE TELEPHONE NUMBER: _____

CELL PHONE NUMBER: _____ FAX: _____

SIGNATURE: _____
(Please sign in ink)

DATE: _____

1/ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT

FORM NLRB-4943
(9-12)

National Labor Relations Board

NOTICE OF DESIGNATION OF ATTORNEY OR REPRESENTATIVE

CASE NO.

To: Regional Director,

I, _____, the undersigned, hereby designate

_____, whose name and address appear below,

as my attorney/representative in this proceeding.

This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

FULL NAME OF WITNESS
SIGNATURE OF WITNESS *(please sign in ink)*
DATE

NAME OF ATTORNEY/REPRESENTATIVE
☐ REPRESENTATIVE IS AN ATTORNEY
MAILING ADDRESS
EMAIL ADDRESS
TELEPHONE NUMBER

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KOBREN, on behalf of himself and all others similarly situated, Plaintiff, v. A-1 LIMOUSINE, INC., MICHAEL STARR, and JEFFREY STARR, Defendants	Civil Action No.: 3:16-cv-00516-FLW-DEA

DECLARATION OF MICHAEL KOBREN

I, Michael Kobren, hereby certify under the penalty of perjury pursuant to 28 U.S.C. § 1746 that:

1. I am the named plaintiff in this matter.

2. I understand that the Defendants in this case are seeking to have my claims compelled to arbitration based on an agreement that would require the costs of arbitration to be shared equally by the parties.

3. If I were to pursue arbitration of my claims in this matter, I would be exposed to paying substantial arbitration costs that I cannot afford.

4. For example, were the arbitration held before the American Arbitration Association, I would be required to pay half of the following: an initial filing fee of at least $200; an arbitrator fee of $1,700; hearing fees of $350 per day; and all expenses of the arbitrator.

5. Were the arbitration held before JAMS, I would be required to pay half of the following: a filing fee of $1,200; arbitrator fees of between $400 and $600 per hour; and an administrative fee equal to 12% of the arbitrator fees.

6. I am financially unable to pursue my claims in arbitration. While I am employed, I get paid only $9.00 per hour plus gratuity. My monthly take home pay is approximately $2,500 per month. I am currently in debt more than $15,000 for medical treatment for cancer, and I pay out between $1,000 and $1,500 per month on my debts. This is between 40% and 60% of my net income each month.

7. Given the potential size of my claim for unpaid overtime and my financial condition, I would not be able to afford to pursue my right to unpaid overtime pay through arbitration.

I HEREBY DECLARE, SUBJECT TO PENALTY AND PERJURY, THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

Michael Kobren

Exhibit D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL KOBREN, on behalf of himself and all others similarly situated, Plaintiff, v. A-1 LIMOUSINE, INC., MICHAEL STARR, and JEFFREY STARR, Defendants	Civil Action No.: 3:16-cv-00516-FLW-DEA

DECLARATION OF JERRY DANIEL

I, Jerry Daniel, hereby certify under the penalty of perjury pursuant to 28 U.S.C. § 1746 that:

1. I am an opt-in plaintiff in this matter.

2. I understand that the Defendants in this case are seeking to have my claims compelled to arbitration based on an agreement that would require the costs of arbitration to be shared equally by the parties.

3. If I were to pursue arbitration of my claims in this matter, I would be exposed to paying substantial arbitration costs that I cannot afford.

4. For example, were the arbitration held before the American Arbitration Association, I would be required to pay half of the following: an initial filing fee of at least $200; an arbitrator fee of $1,700; hearing fees of $350 per day; and all expenses of the arbitrator.

5. Were the arbitration held before JAMS, I would be required to pay half of the following: a filing fee of $1,200; arbitrator fees of between $400 and $600 per hour; and an administrative fee equal to 12% of the arbitrator fees.

6. I am financially unable to pursue my claims in arbitration. While I am employed, I only make $17.95 per hour for a little over thirty hours per week. I am currently in debt more than $19,000, and must pay approximately $950 per month towards my debts, which constitutes approximately 40 % of my net income each month.

7. Given the potential size of my claim for unpaid overtime and my financial condition, I would not be able to afford to pursue my right to unpaid overtime pay through arbitration.

I HEREBY DECLARE, SUBJECT TO PENALTY AND PERJURY, THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

Jerry Daniel 19 MAY 2016
Jerry Daniel

Exhibit E

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Marc P. Seidler, Esq.

DLA Piper LLP US

Current Employer-Title	DLA Piper US LLP - Of Counsel
Profession	Attorney - Commercial Litigation, Franchise and Dealership, Alternative Dispute Resolution, Trade Regulation, Insurance
Work History	DLA Piper US LLP (and predecessor firm), 2005-present; Partner, Seidler & McErlean, 1996-05; Partner, Rudnick & Wolfe, 1981-96; First Assistant States Attorney, Chief Civil Division, 1976-81; Associate, Wilson & McIlvaine, 1973-76.
Experience	Over 30 years of experience as a civil trial lawyer specializing in general commercial litigation, franchising, trade regulation and insurance. Represented franchisors and franchisees, manufacturers and distributors, and insurance carriers, brokers and insureds. Litigated matters involving fraud, RICO, antitrust, trademark, real estate, insurance coverage, construction, securities, business loss and valuation, employment, and other business law issues with claims ranging to $45 million. Class action defense experience in insurance, dairy and consumer matters. Hearing officer in teacher grievance cases. Listed in "Leading Illinois Attorneys," "Leading Lawyers Network," "Best Lawyers in America," "Illinois Super Lawyers" and the "International Who's Who of Business Lawyers."
Alternative Dispute Resolution Experience	Arbitrator in various commercial, franchise and dealership, computer software, and business valuation and loss claims valued in excess of $15 million. Member of the American Arbitration Association's Large, Complex Case Panel. Selected for inclusion in Leading Lawyers Network "Top 5% of Lawyers" in the areas of commercial arbitration and international arbitration.
Alternative Dispute Resolution Training	Developments in Arbitration Law - Testing the Boundaries of Court Intervention, 2015; AAA Principled Deliberations Decision-Making Skills for Arbitrators (ACE008), 2015; AAA Dealing With Delay Tactics in Arbitration (ACE004), 2008; AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards (ACE001), 2007; AAA Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics (ACE005), 2006; AAA Pro Se: Managing Cases Involving Self-Represented Parties (ACE002), 2004; AAA Commercial Arbitrator II Training: Advanced Case Management Issues, 2002; AAA Central Case Management Center, Administrative Issues Training, 2001; AAA Commercial Arbitrator Training, 1999; various other ADR training.
Professional Licenses	Admitted to the Bar: Illinois, 1973; U.S. District Court: Northern (1973) and Central (1991) Districts of Illinois; Eastern District of Wisconsin, 1991; District of Arizona, 1991; U.S. Court of Appeals: Eleventh (1983), Eighth (1986), Seventh (1989), Fifth (1991), Sixth (1992), District of Columbia (1993), and Tenth Circuits; U.S. Supreme Court, 1980.

Marc P. Seidler, Esq.
Neutral ID : 97855

Professional Associations	American Bar Association (Litigation Section; Forum Committee on Franchising; Antitrust Section); Chicago Bar Association; International Franchise Association.
Education	University of Chicago (AB-1970; JD-1973).
Publications and Speaking Engagements	"Rational Dispute Resolution," NATIONAL LAW JOURNAL, July 1994; "The Case for Alternative Dispute Resolution," AMERICAN BAR ASSOCIATION FRANCHISE LAW JOURNAL, 1992; "The Impact of Rule 11 on Franchise Litigation," AMERICAN BAR ASSOCIATION FRANCHISE LAW JOURNAL, 1989; "RICO and the Franchise Relationship Revisited," FRANCHISE LEGAL DIGEST, vol. 1, 1986; "RICO and the Franchise Relationship," FRANCHISE LEGAL DIGEST, vol. 4, 1984.
Citizenship	United States of America
Languages	English
Locale	Baltimore , Maryland, United States of America

Compensation

Hearing:	$425.00/Hr
Study:	$425.00/Hr
Travel:	$425.00/Hr
Cancellation:	$0.00/Hr
Cancellation Period:	0 Days
Comment:	

Marc P. Seidler, Esq.
Neutral ID : 97855

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Edith N. Dinneen, Esq.

Current Employer-Title	Self-employed - Dispute Resolution Neutral
Profession	Attorney, Arbitrator, Mediator, Hearing Officer, Fact-Finder
Work History	Arbitrator and Mediator, Private Practice, 2000-present; Of Counsel, Akerman Senterfitt, 1999-00; Partner, Annis, Mitchell, Cockey, Edwards & Roehn, 1997-99; Partner, Lane Powell Spears Lubersky, 1992-97; Partner/Associate, Rogers & Wells, 1973-92.
Experience	Twelve years exclusively in neutral dispute resolution following 27 years as a litigation attorney in labor and employment, as well as a wide variety of complex commercial, civil rights, and constitutional disputes (individual and class actions in federal and state courts and administrative agencies). Familiar with numerous private sector industries such as retail, security, journalism, banking and other financial services, insurance, manufacturing, entertainment, hotel and restaurant, transportation, healthcare, pharmaceutical, agriculture, and utilities. Business litigation issues included breach of contract or warranty, Uniform Commercial Code, securities, commodities, insurance (E&O and D&O), First Amendment, Fair Credit Reporting Act, Truth in Lending Act, Equal Credit Opportunity Act, real estate, lender liability, equipment leasing, tradename misappropriation, antitrust, fraud and unfair or deceptive business practices statutes. Civil rights experience primarily with employment, affirmative action, housing, and public accommodation statutes and related constitutional issues. Employment work addressed all types of federal and state statutes and common law dealing with executive contracts, discrimination, harassment, retaliation, whistleblowing, wages, benefits, I-9's and immigration status, drug testing, leaves of absence, plant closings, noncompetition and nonsolicitation covenants, trade secrets, privacy, defamation, and other personal injury torts. Traditional labor-management work covered NLRB unit clarifications, unfair labor practice charges, contract interpretation and "just cause" arbitrations, successor liability in mergers and acquisitions, "last chance" agreements, union organizing and elections, employee committees, strikes, picketing, and secondary boycotts.
Specialties and Sub-Specialties	Employment, civil rights, commercial, securities and constitutional litigation.
Alternative Dispute Resolution Experience	Dispute resolution neutral exclusively since 2000, handling cases involving labor and employment, commercial, securities, consumer, and healthcare disputes. American Arbitration Association arbitrator and mediator since 1992. Qualified as court-appointed arbitrator for Florida Circuit Courts since 2003. Los Angeles Superior Court mediator (employment and commercial cases) from 1995 to 1997. Judge pro tempore of Los Angeles Superior Court from 1992 to 1993. EEOC Los Angeles District Office Pilot Mediation Project, 1996.

Alternative Dispute Resolution Training	AAA Arbitrator Subpoenas: Are They Worth the Paper They're Printed On?, 2015; AAA "Managing ESI Exchanges in Arbitration" 2014; AAA Webinar, What's a Respondent Like You Doing in a Place Like This? Confronting Arbitrability and Jurisdiction Issues in Arbitration, 2013; ABA, The Future of Class Actions, 2012; AAA Maximizing Efficiency & Economy in Arbitration: Challenges at the Preliminary Hearing, 2011; California Bar, Wage & Hour Class Actions after AT&T v. Concepcion, 2011; AAA Webinar, Arbitrator Boundaries: What are the Limits of Arbitrator Authority?, 2011; ABA, 6th Annual Commercial Arbitration Training Institute, 2011; AAA Webinar, Solving the Puzzle of "Just Cause" in Labor Arbitration, 2011; California Bar, ADR: Issues and Trends, 2011; ABA, The Future of Employment Discrimination Class Actions after Dukes v. Wal-Mart, 2010; ABA, Class Action Arbitration after Stolt-Nielsen, 2010; ABA Labor and Employment Law Conference, ADR Track, 2009; AAA Webinar, Will Traditional Litigation Strategies Work in Employment Arbitration?, 2009; Hillsborough County Bar, Advanced Mediation Skills, 2009; ABA, Ethical Issues in Mediation and Settlement of Class/Collective Actions, 2009; National Arbitration Forum, Arbitrator Training, 2008; ABA, ADR in Labor and Employment Law, 2007, 2006, 2003, 2002; AAA Neutrals Conference, 2006, 2003; ALI-ABA, Being a Special Master in State and Federal Courts, 2005; NYSE Arbitrator Training, 2007, 2005, 2003; National Futures Assn. Arbitrator Training, 2006; AAA Dealing With Delay Tactics in Arbitration (ACE004), 2005; AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards (ACE001), 2003; AAA Pro Se: Managing Cases Involving Self-Represented Parties (ACE002), 2003; AAA Employment Arbitrator II Training: Advanced Case Management Issues, 2002; NASD Securities Chairperson Training, 2002, 1996, 1995; FMCS, Labor Arbitrator Training, 2002; AAA Arbitrator Update 2001; AAA Employment Arbitrator Training, 2000; SPIDR (now ACR), Advanced Dispute Resolution in Employment, 1998; Los Angeles County Bar Assn., Civil and Workplace Mediator Training, 1996; Los Angeles Superior Court, Mediator Training, 1996; EEOC Mediator Training, 1996; Los Angeles County Bar Assn., Mediator Training, 1995; NASD Introductory Securities Arbitration Training, 1995.
Professional Licenses	Admitted to the Bar: New York, 1974; Florida, 1988; California, 1989; U.S. District Courts: Southern (1974) and Eastern (1978) Districts of New York; Central (1989), Southern (1989), Northern (1989), and Eastern (1989) Districts of California; Middle (1997), Southern (1997), and Northern (1997) Districts of Florida; U.S. Court of Appeals: Second (1975), Ninth (1989), and Eleventh (1997) Circuits; U.S. Supreme Court, 1979.
Professional Associations	State Bar of California (Labor and Employment Law Section); The Florida Bar (Labor and Employment Law Section); American Bar Association (Dispute Resolution Section; Labor and Employment Section; Committee on Employment Rights and Responsibilities; Committee on Equal Employment Opportunity; Committee on ADR in Labor and Employment); American Health Lawyers Association.
Education	Smith College (BA-1969); Boston College (JD-1973).
Awards and Honors	Member (1971-72) and Articles Editor (1972-73) of BOSTON COLLEGE LAW

REVIEW. Judge for ABA (Law Student Division) National Arbitration Competition.

Citizenship	United States of America
Languages	English
Locale	Tampa, Florida, United States of America

Compensation

Hearing:	$350.00/Hr
Study:	$350.00/Hr
Travel:	$200.00/Hr
Cancellation Period:	0 Days
Comment:	Hourly rate billed in 1/10 hour increments for hearing time (4-hour minimum); pre-hearing conferences; correspondence with counsel; review and analysis of motions, transcripts, briefs and legal authorities; preparation of orders and awards; and communication with AAA. $200.00 per hour for travel time (trips more than 1/2 hour each way), plus actual expenses.

Edith N. Dinneen, Esq.
Neutral ID : 120296

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Hon. William H. Webster

Current Employer-Title	Milbank, Tweed, Hadley & McCloy LLP - Retired Partner
Profession	Attorney - Business Law and Internal Inquiries, Government Contracts, Insurance, Computers
Work History	Retired Partner/Consulting Partner/Senior Partner, Milbank, Tweed, Hadley & McCloy, 1991-06; Director, Central Intelligence Agency, 1987-91; Director, Federal Bureau of Investigation, 1978-87; Judge, U.S. Court of Appeals for the Eighth Circuit, 1973-78; Judge, U.S. District Court, Eastern District of Missouri, 1971-73; Partner, Armstrong, Teasdale, Kramer & Vaughan, 1961-70, 1952-60, and 1949-50.
Experience	Extensive experience in the above areas of law. Former Director of the Central Intelligence Agency and the Federal Bureau of Investigation. Also former Judge for the U.S. Court of Appeals for the Eighth Circuit Court. Prior experience in banking, antitrust and corporate matters. Worked on the evolution of the Mastercard system. Headed the Webster Commission to evaluate the riots of Los Angeles. Chaired the National Commission on Advancement of Federal Law Enforcement. Chaired the Webster Commission on Criminal Investigative Division of the IRS. Chaired the Commission on Internal Security Procedures of the F.B.I. Member of the President's Homeland Security Advisory Council (Vice Chair).
Alternative Dispute Resolution Experience	Arbitrated a dispute between the State of Florida and a major software manufacturer; a dispute between international oil companies over provisions of a liabilities contract; a dispute between a major manufacturer and the U.S. Postal Service; a case between two medical products companies over personnel issues; a dispute between a major health services insurer and their affiliates. Mediated disputes between major chemical manufacturers regarding their respective liabilities to consumers; a case between a bankrupt insurer and a reinsurance company and a matter between two insurance carriers. Acted as special examiner to mediate a bankruptcy plan involving major asbestos claimants. Arbitrated construction dispute between major power equipment manufacturer and major contractor. Mediated a double class action anti-trust dispute between state automobile association members and class of purchasers of 2.5 million automobiles. Arbitrated a dispute between major energy corporation on a joint venture and arbitrated disputes between pharmaceutical companies over joint venture agreements. Arbitrated a dispute between three major wireless companies over right of top executive of one to become chief executive officer of another. Arbitrated dispute between major league baseball team and the stadium authority on parity provisions. Mediated a class action dispute between major league football team and its former season ticket holders. Arbitrated a dispute between major wrestling enterprise and two of its performers.

Alternative Dispute Resolution Training

AAA Exercising Arbitrator Discretion: A Look at Some Best Practices (ACE011), 2015; AAA Managing the Arbitration Process Following the Preliminary Hearing, 2015; ICDR International Symposia in Advanced Case Management Issues, 2007; Attended AAA Annual Board Meeting, Arbitrator Update, 2006, 2004; Attended AAA Neutrals Conference, 2006; AAA Chairing an Arbitration Panel: Managing Procedures, Process & Dynamics (ACE005), 2005; AAA Dealing with Delay Tactics in Arbitration (ACE004), 2005; AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards (ACE001), 2004; AAA Arbitrator Update, 2002; AAA Commercial Arbitrator II Training: Advanced Case Management Issues, 2002; AAA Commercial Arbitrator Training, 1998.

Professional Licenses

Admitted to the Bar: Missouri, 1949; U.S. District Court: Eastern District of Missouri, 1950; District of Columbia, 1980; U.S. Court of Appeals, Eighth Circuit, 1960; U.S. Supreme Court, 1960.

Professional Associations

American Bar Association (Business Law Section, Past Chair; Standing Committee on Law and National Security, Counselor); Institute of Judicial Administration (Past President); American Law Institute; American Bar Foundation (Fellow); American College of Trial Lawyers (Hon. Fellow); National Legal Center for the Public Interest (Council, Past Chair); Center for Strategic and International Studies; American Arbitration Association (Past Board of Directors).

Education

Amherst College (BA-1947; LLD-1970); Washington University (LLB-1949; LLD-1978).

Awards and Honors

Recipient of the following: 2002 American Bar Association Medal; 2001 Justice Award, American Judicature Society; Presidential Medal of Freedom, 1991; the National Security Medal, 1991; American Silver Buffalo Award, Boy Scouts of America, 1990; Distinguished Public Service Award, Federal City Club, 1989; Thomas Jefferson Award in Law, University of Virginia, 1986; First Annual Patrick V. Murphy Award from the Police Foundation for distinguished service in law enforcement, 1985; National Service Medal, Freedom Foundation, 1985; Jefferson Award for the Greatest Public Service by an Elected of Appointed Official, 1984; Theodore Roosevelt Award for Excellence in Public Service, International Platform Association, 1983; Louis Stein Award, Fordham Law School, 1982; William Greenleaf Elliot Award, Washington University, 1981; Man of the Year, St. Louis Globe-Democrat, 1980; Distinguished Service Award, International Academy of Mediators.

Citizenship United States of America
Languages English
Locale Washington, District of Columbia, United States of America

Compensation

Hearing:	$700.00/Hr
Study:	$700.00/Hr
Travel:	$700.00/Hr
Cancellation:	$0.00/Day
Cancellation Period:	0 Days

Hon. William H. Webster
Neutral ID : 123363

Comment:

Hon. William H. Webster
Neutral ID : 123363

Exhibit F

Totten v. Kellogg Brown & Root, LLC

United States District Court for the Central District of California

January 22, 2016, Decided; January 22, 2016, Filed

ED CV 14-1766 DMG (DTBx)

Reporter
2016 U.S. Dist. LEXIS 10424

David L. Totten, et al. v. Kellogg Brown & Root, LLC, et al.

Prior History: Totten v. Kellogg Brown & Root, LLC, 2015 U.S. Dist. LEXIS 104076 (C.D. Cal., Aug. 7, 2015)

Counsel: **[*1]** For David L. Totten, an individual, and all others similarly situated, Plaintiff: Lee R Feldman, LEAD ATTORNEY, Leonard H Sansanowicz, Feldman Browne Olivares APLC, Los Angeles, CA; Michael Rubin, LEAD ATTORNEY, Altshuler Berzon LLP, San Francisco, CA; Alicia Olivares, The Feldman Law Firm, Los Angeles, CA.

For Kellogg Brown & Root, LLC, a Delaware Corporation, Defendant: Kathryn P Conard, LEAD ATTORNEY, Holly R Lake, Miller Law Group PC, Los Angeles, CA; Rachel E Linzy, Samuel Zurik, III, PRO HAC VICE, The Kullman Firm, New Orleans, LA.

For Molycorp, Inc., a Delaware Corporation, Defendant: Rachel E Linzy, Samuel Zurik, III, PRO HAC VICE, The Kullman Firm, New Orleans, LA.

Judges: DOLLY M. GEE, UNITED STATES DISTRICT JUDGE.

Opinion by: DOLLY M. GEE

Opinion

CIVIL MINUTES—GENERAL

Proceedings: IN CHAMBERS - ORDER RE DEFENDANTS' MOTION TO COMPEL ARBITRATION OF INDIVIDUAL CLAIMS, AND DISMISS CLASS AND REPRESENTATIVE CLAIMS [22]

I.

PROCEDURAL BACKGROUND

On July 22, 2014, Plaintiff David L. Totten filed an amended complaint in San Bernardino County Superior Court, alleging the following causes of action: (1) failure to pay wages for all hours worked at the minimum wage rate, in violation of Cal. Lab. Code §§ 1194 and 1197; (2) failure to pay overtime **[*2]** wages for daily overtime and all time worked, in violation of Cal. Lab. Code §§ 510, 1194, and 1198; (3) failure to provide second meal periods or pay meal period premium wages, in violation of Cal. Lab. Code §§ 512 and 226.7; (4) failure to provide complete and accurate wage statements, in violation of Cal. Lab. Code § 226; (5) failure to timely pay all earned wages due at the time of separation of employment, in violation of Cal. Lab. Code §§ 201, 202, and 203; (6) unfair business practices, in violation of Cal. Bus. & Prof. Code § 17200 *et seq.*; and (7) civil penalties under the Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 *et seq.* [Doc. # 1-1.] On August 27, 2014, Defendants removed the action to federal court. [Doc. # 1.]

Defendants Kellogg Brown & Root, LLC ("KBR") and Molycorp, Inc. ("Molycorp") currently have a motion to compel arbitration and dismiss or stay the action pending before this Court. ("Def. Motion") [Doc. # 22.] For the reasons set forth below, Defendants' motion to compel arbitration of individual claims, and dismiss class and representative claims, is **GRANTED in part** and **DENIED in part**. Defendants' motion to compel arbitration is **GRANTED** as to Plaintiff's individual claims.

II.

FACTUAL BACKGROUND

On January 16, 2012, KBR hired Totten. *See* Bynum Decl. ¶ 6 [Doc. # 22-1 at 1-3.] Totten worked for KBR at the **[*3]** Mountain Pass rare earth mine in California, where KBR provided services to Molycorp, Inc. *Id.* ¶¶ 2, 6.

At his new hire orientation on January 16, Totten signed an acknowledgment of and agreement to KBR's Dispute Resolution Program ("DRP") as a condition of his employment. *See id.* ¶ 9, Exh. B ("Signature Page") [Doc. # 22-1 at 38.] Totten contends, however, that he was not given a copy of any of the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS") rules referenced in the DRP Agreement. Totten Decl. ¶ 3 [Doc. #23-1].

The DRP Agreement requires employees to arbitrate their claims against KBR and third parties, including KBR's clients such as Molycorp:

> This Program is intended to be for the benefit of the Company's clients, customers, contractors, and vendors, who are intended third-party beneficiaries of this Dispute Resolution Plan. The mandatory arbitration provisions of this Plan shall be applicable to all Disputes between Employees and the Company's clients, customers, contractors, and vendors, who shall have the right to enforce the provisions of the Plan.

See id. ¶ 5, Exh. A ("DRP Agreement") § 3C [Doc. # 22-1 at 4-37.] The agreement to arbitrate **[*4]** also "applies to and binds the Company" as well as "each Employee and Applicant." *Id.* § 3B.

Furthermore, the scope of the DRP Agreement encompasses "all legal and equitable claims . . . with respect to . . . [t]he employment . . . of an Employee, including but not limited to the terms, conditions, or termination of such employment . . . [or] any other matter related to or concerning the relationship between the Employee and [KBR]." *Id.* § 2E(4).

The DRP Agreement also bars KBR, employees, and applicants from pursuing claims on a class, collective, or representative basis:

> Each Dispute shall be arbitrated on an individual basis. *Neither the Company nor any Employee or Applicant may pursue any Dispute on a class action, collective action or consolidated basis or in a representative capacity on behalf of other persons or entities who are claimed to be similarly situated, or participate as a class member in such a proceeding*. The arbitrator in any proceeding under this Plan shall have no authority to conduct the matter as a consolidated, class, or collective action.

Id. § 4B(i) (emphasis added). The agreement further states:

> If the procedural limitation in subparagraph B(i) of this section is held unenforceable by **[*5]** a court in a proceeding in which a party seeks to pursue a class or collective action or otherwise act in a representative capacity, then this Plan shall not apply with respect to that class or representative action which shall proceed instead before the court. If the court, however, ultimately denies the party's request to proceed on a class, collective or representative basis, then the party's individual claim(s) shall be subject to this Plan and referable to arbitration pursuant to the Plan's terms.

Id. § 4B(ii). The agreement also contains provisions addressing modification, discovery costs, and attorneys' fees. *Id.* §§ 6, 31C, 8B, 8D.

KBR terminated Totten's employment on or around June 24, 2014. Bynum Decl. ¶ 10.

III.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1744, 179 L. Ed. 2d 742 (2011). The FAA reflects "both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract.'" *Id.* at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). "The FAA mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to **[*6]** which an arbitration agreement has been signed." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (*en banc)* (internal quotation omitted). "The basic role for courts under the FAA is to determine (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Id.* (internal quotation omitted). "Upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under . . . an agreement," the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3.

"Section 2 of the FAA contains a savings clause, which provides that arbitration agreements are 'enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* (quoting 9 U.S.C. § 2). The savings clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (internal quotation omitted).

Federal substantive law governs questions concerning the interpretation **[*7]** and enforceability of arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Courts apply ordinary state law contract principles, however, "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . ." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). As long as an arbitration clause is not itself invalid under "generally applicable contract defenses, such as fraud, duress, or unconscionability," it must be enforced according to its terms. *Concepcion*, 131 S. Ct. at 1746.

"When evaluating a motion to compel arbitration, courts treat the facts as they would when ruling on a motion for summary judgment, construing all facts and reasonable inferences that can be drawn from those facts in a light most favorable to the non-moving party." *Chavez v. Bank of Am.*, 2011 U.S. Dist. LEXIS 116630, 2011 WL 4712204, at *3 (N.D. Cal. Oct. 07, 2011) (citing *Perez v. Maid Brigade*, Inc., 2007 U.S. Dist. LEXIS 78412, 2007 WL 2990368, at *3 (N.D. Cal. Oct. 11, 2007)).

IV.

DISCUSSION

Defendants move to compel arbitration of Totten's individual claims on the ground that they are encompassed within their valid agreement to submit disputes to the KBR DRP. They also seek to dismiss Totten's class and representative claims as they are barred by the DRP Agreement. In opposition, Totten asserts that he never agreed to arbitrate under the DRP. And even if he did, Totten maintains that the arbitration agreement is unenforceable because it is unconscionable. In addition, Totten argues that the DRP Agreement's class **[*8]** action waiver is unenforceable because it interferes with his right to engage in protected concerted action under the National Labor Relations Act ("NLRA"), 29 U.S.C § 151 *et seq.* Finally, Totten contends that the DRP Agreement's representative action waiver cannot be enforced as to his PAGA claims.

A. Mutual Assent

The parties do not dispute that, if the agreement is valid, it encompasses Totten's claims. Rather, the parties disagree that a valid agreement exists. Under California law, a contract is valid if there is mutual assent between the parties and valid consideration. *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 69 Cal. App. 3d 268, 275, 137 Cal. Rptr. 855 (1977).

Totten contends that he never assented to the agreement because he was never given a copy of, or access to, the KBR arbitration agreement at or before the time he signed it. ("Plaintiff's Opp.") [Doc. # 23 at 13.] KBR has submitted evidence that its practice is to brief new employees on the DRP, provide new employees with a copy of the DRP's rules, and read aloud the DRP's rules to them. *See* Bynum Decl. ¶ 8. Totten disputes that this occurred when he was hired. Nonetheless, it is undisputed that Totten signed the agreement acknowledging that he had "received and reviewed a copy of the KBR Dispute Resolution Plan and Rules," "agree[d] to the **[*9]** terms of the Program," and understood that certain legal claims must be "resolved through binding and final arbitration instead of any court system." *See id.* ¶ 9, Exh. B.

"It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." *Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1588, 36 Cal. Rptr. 3d 901 (2005) (internal quotation marks and citations omitted); *see also Brookwood v. Bank of Am.*, 45 Cal. App. 4th 1667, 1674, 53 Cal. Rptr. 2d 515 (1996) (holding the employee was "bound by the provisions of the [arbitration] agreement regardless of whether [she] read it or [was] aware of the arbitration clause when [she] signed the document"). Indeed, "ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms. A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Metters v. Ralphs Grocery Co.*, 161 Cal. App. 4th 696, 701, 74 Cal. Rptr. 3d 210 (2008) (internal quotation omitted).

Here, Totten assented to be bound by the DRP when he signed the agreement that he had "received and

reviewed a copy of the KBR Dispute Resolution Plan and Rules," "agreed to the terms of the Program," and understood that certain legal claims must be "resolved through binding and final arbitration **[*10]** instead of any court system." *See* Bynum Decl. ¶ 9, Exh. B. Furthermore, valid consideration supports the DRP. The parties mutually agreed to submit to arbitration in the event of a dispute covered by the DRP, and Totten accepted KBR's offer of employment in exchange for his agreement to arbitrate.

Accordingly, the Court finds that Totten has not demonstrated a lack of assent to the DRP Agreement. An agreement to arbitrate exists in this case.

B. Unconscionability

Even if he assented to the DRP Agreement, however, Totten asserts that it is invalid because it is unconscionable. Under California law, "the doctrine of unconscionability has both a procedural and substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, 685, 121 Cal. Rptr. 3d 58, 247 P.3d 130 (2011). Both procedural and substantive unconscionability are required to render a contract unenforceable, but they need not be present in the same degree. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000). California courts apply a "sliding scale" analysis in making determinations of unconscionability: the "more substantively unconscionable the contract, the less procedurally unconscionable it must be to be found unconscionable, and vice **[*11]** versa." *Kilgore*, 718 F.3d at 1063. Whether a contract or provision is unconscionable is a question of law. *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 851, 113 Cal. Rptr. 2d 376 (2001). The party challenging the arbitration agreement bears the burden of establishing unconscionability. *Pinnacle Museum Tower Ass'n*, 55 Cal. 4th 223, 247, 145 Cal. Rptr. 3d 514, 282 P.3d 1217 (2012).

1. Procedural Unconscionability

Totten has met his burden of showing that the DRP Agreement is procedurally unconscionable. First, KBR imposed the agreement on Totten as a condition of his employment, without giving him a meaningful opportunity to negotiate its terms. Indeed, the Signature Page states, "I understand that this agreement is a condition of my employment with the Company." *See* Bynum Decl. ¶ 9, Exh. B. Thus, because the agreement was signed by Totten as a condition of his employment without affording him a meaningful opportunity to negotiate its terms, the DRP Agreement is to some degree procedurally unconscionable. *See Armendariz*, 24 Cal. 4th at 114-15 (arbitration agreement was procedurally unconscionable because "[i]t was imposed on employees as a condition of employment and there was no opportunity to negotiate").

But "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Here, Totten bolsters his argument that the agreement **[*12]** is procedurally unconscionable because he was never given a copy of any of the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS") rules referenced in the DRP Agreement. *See Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418 (2003) (an agreement was procedurally unconscionable where it referenced the arbitration rules but failed to provide them to the customer to review, forcing the customer "to go to another source to find out the full import of what he or she is about to sign . . . *prior* to signing"); *see also Samaniego v. Empire Today LLC*, 205 Cal. App. 4th 1138, 1146, 140 Cal. Rptr. 3d 492 (2012) (defendant's failure to provide plaintiffs with a copy of the relevant arbitration rules was "significant"); *Trivedi v. Curexo Tech. Corp.*, 189 Cal. App. 4th 387, 393-94, 116 Cal. Rptr. 3d 804 (2010) ("Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability."). Under the existing standards, Totten has shown that the DRP Agreement is procedurally unconscionable.

2. Substantive Unconscionability

California law requires that a plaintiff also show that the agreement is substantively unconscionable in order to find the agreement unenforceable on the basis of unconscionability. Totten advances several arguments why the DRP Agreement is substantively unconscionable: **[*13]** (1) the agreement lacks mutuality; (2) KBR reserves the right to unilaterally modify the arbitration policy and rules in its sole discretion; (3) the DRP Agreement requires that all discovery costs be borne by the party taking the discovery; (4) the attorneys'

fees provision permits an arbitrator to award fees to either party, including KBR; and (5) the class and representative action waivers violate the NLRA and California public policy. The Court addresses each of these arguments in turn.

i. Lack of Mutuality

The Court rejects Totten's argument that the DRP Agreement lacks mutuality. The agreement clearly states that it "applies to and binds the Company" as well as "each Employee and Applicant," thus ensuring a mutual obligation to arbitrate. DRP Agreement § 3B.

ii. Unilateral Modification Policy

Totten objects to the DRP Agreement's unilateral modification provision. The provision states: "This Plan may be amended by Sponsor at any time by giving at least 30 days notice to current Employees. However, no amendment shall apply to a Dispute which is initiated prior to the effective date of the amendment." DRP Agreement § 6A. Totten argues that KBR's reservation of the right to unilaterally modify the arbitration policy and **[*14]** rules with 30 days' notice renders the arbitration agreement illusory, unconscionable, and unenforceable, because KBR can be aware of a pending dispute before it is "initiated" and can therefore unfairly manipulate the rules.

The Court agrees, but only to the extent that the quoted language renders the modification provision itself illusory and unconscionable. Under California law, "[a]n agreement to arbitrate is illusory if . . . the employer can unilaterally modify [it]." *Sparks v. Vista Del Mar Child & Family Servs.*, 207 Cal. App. 4th 1511, 1523, 145 Cal. Rptr. 3d 318 (2012). Nevertheless, "the covenant of good faith and fair dealing may save an arbitration agreement from being illusory[.]" *Peleg v. Neiman Marcus Grp., Inc.*, 204 Cal. App. 4th 1425, 1465, 140 Cal. Rptr. 3d 38 (2012); *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1199, 1214, 78 Cal. Rptr. 2d 533 (1998) (finding employment arbitration agreement that allows employer to prospectively modify its terms enforceable because employer's discretionary power is subject to "prescribed or implied limitations such as the duty to exercise it in good faith and in accordance with fair dealings") (citation omitted).

The court in *Peleg* examined a similar modification provision that allowed the employer arbitration agreement to be "amended, modified, or revoked in writing by the Company at anytime, but only upon thirty (30) days' advance notice . . . ." *Peleg*, 204 Cal. App. 4th at 1436. Yet, such amendments would have "*no effect on any Claim that* **[*15]** *was filed for arbitration prior to the effective date* of [the] amendment." *Id.* (emphasis in original). Finding that the modification provision allowed the employer to alter the agreement after it *became aware* of potential claims, the court questioned the validity of the modification provision: "[t]he vice of the modification provision . . . is that it allows the employer to manipulate the arbitration process . . . either by making the process more difficult or more expensive for the employee, or by revoking the Agreement in the belief that a judicial forum is preferable." *Id.* at 1459.

Thus, the *Peleg* court concluded, "if a claim has accrued or if the employer knows about a claim, all parties to the Agreement should be bound by the version in effect at that time; no changes should apply after the point of accrual or knowledge." *Id.* Discussing the implied covenant of good faith and fair dealing as a potential remedy, the court found that "[a] unilateral modification provision that is silent as to whether contract changes apply to claims, accrued or known, is impliedly restricted by the covenant so that changes do not apply to such claims." *Id.* at 1465.

Conversely, if "a modification provision expressly addresses **[*16]** whether contract changes apply to claims that have accrued or are known to the employer," the implied covenant of good faith and fair dealing "cannot create implied terms that contradict the express language." *Id.* Accordingly, the court determined that a modification provision—which expressly states that it shall have "*no effect on any Claim that was filed for arbitration prior to the effective date* of [the] amendment"—is illusory under California law. *Id.* at 1436, 1465 (emphasis in original).

Here, the DRP Agreement explicitly delineates the modification provision's applicability. The modification provision states that the arbitration policy may be amended with a 30-day notice, but that "no amendment shall apply to a Dispute *which is initiated* prior to the effective date of the amendment." DRP Agreement § 6A (emphasis added). Put differently, "modifications may apply to claims already accrued or known to [KBR], provided that the claim was not *filed* until after the 30-day notice period." *Reyes v. United Healthcare Servs., Inc.*, 2014 U.S. Dist. LEXIS 111645, 2014 WL 3926813, at *3 (C.D. Cal. Aug. 11, 2014) (emphasis in original) (finding illusory the following modification

provision: "[a]ll arbitrations shall be conducted in accordance with the Policy in effect on the date the Corporate Employee Relations Department receives the Demand for **[*17]** Arbitration").[1]

Just as in *Peleg* and *Reyes*, the implied covenant of good faith and fair dealing cannot save the DRP Agreement's unilateral modification provision—the implied covenant cannot alter the express language of the arbitration agreement between Totten and KBR. Accordingly, the Court finds that the modification provision is illusory and unconscionable.

iii. Discovery Costs Provision

With respect to discovery costs, Defendants point out that the DRP Agreement's provision that discovery costs be borne by the party initiating the discovery allocates those costs in the same manner that they are allocated in state and federal courts. *See Luafau v. Affiliated Computer Services, Inc.*, 2006 U.S. Dist. LEXIS 33048, 2006 WL 1320472, at *7 (N.D. Cal. May 15, 2006) (arbitration provision requiring that the cost of discovery be borne by the party initiating it is not substantively unconscionable because it is "consistent with **[*18]** the practice under the Federal Rules of Civil Procedure" and "does not require an employee to bear costs that she would not incur if she were free to bring the action in court").

Further, the Agreement does not preclude Totten from recovering discovery costs, but provides the arbitrator with the authority to order the same relief as would be available in court to a prevailing party. *See* DRP Agreement § 8B ("The substantive legal rights, remedies, and defenses of all Parties are preserved . . . the arbitrator shall have the authority . . . to order any and all relief, legal or equitable . . . which a Party could obtain from a court of competent jurisdiction . . . ."). This includes awarding discovery costs. As such, the discovery costs provision is not substantively unconscionable.

iv. Attorneys' Fees Provision

The attorneys' fees provision at issue permits the arbitrator to award attorneys' fees to an employee, not KBR, even where the law does not provide for an award of fees:

> Notwithstanding the provisions of the preceding subsection, in any proceeding before an arbitrator, the arbitrator, in the arbitrator's discretion, may allow a prevailing Employee or Applicant a reasonable attorney's fee as part of **[*19]** the award. The discretion to allow an award of fees under this subsection is in addition to any discretion, right or power which the arbitrator may have under applicable law. However, any award of fees shall be reduced by any amounts which have been or will be paid by the KBR Employee Legal Consultation Plan.[2]

See id. § 8D. Nothing in this provision suggests that the arbitrator has the power to award KBR attorneys' fees contrary to a statute. As the attorneys' fees provision in the arbitration agreement would not discourage potential claimants, the Court finds that it is not substantively unconscionable.

C. Class Action Waiver

Totten argues that this Court should not enforce the class action waiver in the DRP Agreement because the waiver violates the NLRA. In particular, Totten contends that the class action waiver interferes with his right to engage in protected concerted activity under Sections 7 and 8(a)(1) of the NLRA. Plaintiff's Opp. at 22 (citing NLRA § 7, 29 U.S.C. § 157; NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1)).[3]

1. Sections 7 and 8(a)(1) of the NLRA

Section 7 of the NLRA provides that "[e]mployees shall have the right to . . . engage in . . . *concerted activities*

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[1] While the language in *Peleg* referred to "filed claims" and the DRP Agreement here refers to "initiated disputes," the Court does not find that distinction significant. In both instances, claims or disputes that were known to the employer before the employer amended the rules may be subject to those amendments if the claims or disputes were not filed or initiated until after those amendments.

[2] Under KBR's Legal Consultation Plan, KBR pays up to $2,500 a year for an employee to consult an attorney when the employee is pursuing a claim pursuant to the DRP. *See* Supplemental Declaration of Bynum ¶ 9.

[3] Totten makes this argument under the substantive **[*20]** unconscionability rubric. But because he cites to no authority that necessarily subsumes the NLRA analysis under the state law contractual concept of unconscionability, the Court will analyze this invalidity argument separately as a matter of federal law.

for the purpose of collective bargaining or other *mutual aid or protection."* NLRA § 7, 29 U.S.C. § 157 (emphasis added).[4] Section 8(a)(1) makes it an unfair labor practice for the employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]." NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1). Thus, if the workplace rule imposed by the employer restricts activities protected by Section 7, the rule is unlawful.

It is firmly established that employees' Section 7 right to act for the purpose of "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505, 57 L. Ed. 2d 428 (1978).

This right to engage in concerted activity **[*21]** to improve one's working conditions is not limited to union workers seeking to collectively bargain with management. It also applies to non-union employees "when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Id.* at 566; *see, e.g., Signal Oil and Gas Co. v. NLRB*, 390 F.2d 338, 342-43 (9th Cir. 1968) (finding non-union employee engaged in protected concerted activity when he made pro-strike remarks to another non-union employee); *see also Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1508 (8th Cir. 1993) ("Non-union employees as well as union employees share the right to engage in concerted activity.") (citations omitted); *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980) ("[U]norganized employees who jointly participate in a walkout . . . to present job related grievances to management are engaged in concerted activity protected by Section 7 regardless of whether or not the employees are members of a union.").

In order for employee activity to fall within Section 7, it must be "concerted." While this term "embraces the activities of employees who have joined together in order to achieve common goals," the Supreme Court has found that "the language of § 7 does not confine itself to such a narrow meaning." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 831, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984) ("In fact, § 7 itself defines both joining and assisting labor organizations — activities in which a single employee can engage — as concerted activities."). **[*22]** Thus, "[a]n individual acting alone engages in concerted activity when she acts on behalf of the workforce." *YMCA of Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1455 (10th Cir. 1990) (citing *City Disposal*, 465 U.S. at 831) (footnote omitted); *see also Int'l Transp. Serv. v. NLRB*, 449 F.3d 160, 166 (D.C. Cir. 2006) ("[C]oncerted activity includes circumstances where individual employees work to initiate, induce or prepare for group action. . . . The touchstone for concerted activity, then, must be some relationship between the individual employee's actions and fellow employees.") (citation omitted).

Significantly, concerted activity also encompasses concerted legal action. *See, e.g., Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188, 340 U.S. App. D.C. 391 (D.C. Cir. 2000) (filing petition for injunction against employer harassment supported by fellow employees and joined by a co-worker was protected concerted activity); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith.") (citing *Leviton Mfg. Co., Inc. v. NLRB*, 486 F.2d 686, 689 (1st Cir.1973)).

Such concerted legal action is also evident in *Salt River Valley Water Users' Association v. NLRB.*, 206 F.2d 325, 328 (9th Cir. 1953), where the Ninth Circuit found that a petition circulated by an employee authorizing him to take court action or negotiate on behalf of his coworkers with **[*23]** regard to workplace grievances constituted concerted activity for the purpose of mutual aid and protection. *Id.* The court went on to recognize the effectiveness of collective action as opposed to individual action: "By soliciting signatures to the petition, [the employee] was seeking to obtain such solidarity among the [workers] as would enable the exertion of group pressure upon the [employer] in regard to possible negotiation and settlement of the [workers'] claims." *Id.* The court characterized "concerted activity for the purpose of . . . mutual aid or protection" as an "effective weapon for obtaining that to which the participants, as individuals, are already 'legally' entitled." *Id.*

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[4] The NLRA broadly provides that "[the] term 'employee' shall include any employee," 29 U. S. C. § 152(3), subject only to certain specifically enumerated exceptions.

Given that protected concerted activity can take the form of concerted legal action, the Court turns next to the National Labor Relations Board's ("NLRB") decision in *In re D. R. Horton, Inc.*, a case which both sides debate in their briefing.

2. The NLRB's *Horton I* Decision

i. Class Action Waiver and the NLRA

In support of his argument that the class action waiver in this case is invalid under the NLRA, Totten invokes a series of NLRB decisions that began with *In re D. R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012) ("*Horton I*"). *See, e.g., Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, *3 (Oct. 28, 2014) ("*Murphy Oil* **[*24]** *I*") (reaffirming *Horton I*); *Chesapeake Energy Corp. & Its Wholly Owned Subsidiary Chesapeake Operating, Inc. & Bruce Escovedo*, 362 NLRB No. 80, 2015 WL 1956197, at *4 (Apr. 30, 2015) (applying *Horton I* and *Murphy Oil I* to find arbitration agreement's class action waiver violated Section 8(a)(1)); *Hoot Winc, LLC, et al.*, 363 NLRB No. 2, 204 LRRM 1285, 2015 WL 282611, at *2 (September 1, 2015) (same); *Countrywide Fin. Corp., et al.*, 362 NLRB No. 165, 204 LRRM 1009, 2015 WL 263136, at *3-4 (Aug. 14, 2015) (while silent as to whether employees are prohibited from filing class or collective claims, arbitration agreement violated Section 8(a)(1) by requiring employees to arbitrate on an individual basis); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, 2015 WL 273521, at *8 (August 25, 2015) (affirming ALJ decision finding the same).

Defendants respond by pointing to the Fifth Circuit's decision refusing to enforce that portion of the Board's opinion upon which Totten relies. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) ("*Horton II*").

In *Horton I*, the NLRB struck down an employer arbitration agreement containing a class action waiver because it restricted employees from engaging in the protected concerted activity of pursuing collective legal action to improve workplace conditions under Section 7 of the NLRA. Specifically, the Board found that the coming together by employees to bring a class proceeding to address workplace issues like wages constituted a form of concerted activity under Section 7. *Horton I*, 357 NLRB No. 184, 2012 WL 36274, at *7-10. It then found that the arbitration agreement at issue there violated Section 8(a)(1) of the NLRA because it "require[d] employees covered by the Act, as a condition of **[*25]** their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." 357 NLRB No. 184, [WL] at *1.

The *Horton I* Board highlighted the fact that the Supreme Court has long upheld the principle that "employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively." *Horton I*, 357 NLRB No. 184, 2012 WL 36274, at *6 (citing *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337, 64 S. Ct. 576, 88 L. Ed. 762 (1944) ("Wherever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility."); *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 361, 60 S. Ct. 569, 84 L. Ed. 799 (1940) (agreement forbidding employees from presenting grievances to employer "through a labor organization or his chosen representatives, or in any way except personally" was unlawful and a "continuing means of thwarting the policy of the Act"); *see also NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (employer agreement requiring employees to arbitrate disputes individually with the employer is an unlawful "restraint upon collective action").

The Board then concluded that, unlike procedural rights, employers cannot demand that employees waive their substantive rights to act collectively to improve **[*26]** workplace conditions:

> Just as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8.

Horton I, 357 NLRB No. 184, 2012 WL 36274, at *7.

The Board had no trouble reconciling its ruling with the FAA. In fact, the Board stated that the class action waiver it found impermissible fell within the FAA's savings clause, which makes arbitration agreements "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. According to the Board:

> [T]he purpose of the FAA was to prevent courts from treating arbitration agreements less favorably

> than other private contracts. The Supreme Court . . . has made clear that "[w]herever private contracts conflict with [the] functions" of the National Labor Relations Act, "they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co*. [ ]321 U.S. at 337. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than **[*27]** any other private contract that conflicts with Federal labor law. The [employer's arbitration agreement] would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the Respondent solely on an individual basis.

Horton I, 357 NLRB No. 184, 2012 WL 36274, at *11.

Because the arbitration agreement violated federal law—by preventing employees from exercising their substantive right to engage in protected concerted activity for mutual aid or protection—the Board concluded that the agreement could not be enforced under the FAA.

To further support its position, the Board emphasized the principle that arbitration agreements may not require a party to "forgo the substantive rights afforded by the statute." *Id.* (quoting *Gilmer*, 500 U.S. at 26) (internal quotation marks omitted); *see also Murphy Oil I*, 361 NLRB No. 72, 2014 WL 5465454, at *11 ("The Supreme Court has explained recently that the Federal policy favoring arbitration, however liberal, does have limits. It does not permit a 'prospective waiver of a party's right to pursue statutory remedies,' such as a 'provision in an arbitration agreement forbidding the assertion of certain statutory rights.'") (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310, 186 L. Ed. 2d 417 (2013)).

Here, like in *Horton I*, KBR's arbitration **[*28]** agreement requires employees like Totten to agree, as a condition of employment, that "[e]ach Dispute shall be arbitrated on an individual basis" and that no employee "may pursue any Dispute on a class action, collective action or consolidated basis or in a representative capacity on behalf of other persons or entities who are claimed to be similarly situated, or participate as a class member in such a proceeding." DRP Agreement § 4B(i).

In light of the plain text of Sections 7 and 8 of the NLRA, this Court finds the Board's reasoning in *Horton I* not only persuasive, but at the very least "reasonably defensible." *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) (interpretations of the Board will be upheld if "reasonably defensible") (internal citation omitted). In the face of competing interpretations of the FAA and the NLRA, the Court must honor the spirit animating both statutes.

ii. Class Action Waiver and the Norris-LaGuardia Act

In addition to its finding that class action waivers run afoul of Section 7 rights, the NLRB also found that the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.*, protects employees' concerted litigation activity against contractually-based restraints, because an employment-related class, collective, or joint action falls within the definition of a "labor dispute." **[*29]** *Horton I*, 357 NLRB No. 184, 2012 WL 36274, at *7 (citing 29 U.S.C. §§ 104(d), 113). The Court finds this analysis in *Horton I* persuasive.

Section 2 of the Norris-LaGuardia Act declares that it is the "public policy of the United States" that individual workers be free of "interference, restrain, or coercion" by employers when they engage in "concerted activities for the purpose of collective bargaining or *other mutual aid or protection* . . . ." 29 U.S.C. § 102 (emphasis added). Section 3 states that "any . . . undertaking or promise" that conflicts with the policy declared in Section 2 "shall not be enforceable in any court of the United States . . . ." 29 U.S.C. § 103. Section 4 identifies activities not subject to restraining orders or injunctions—whether undertaken "singly or in concert"—including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is *prosecuting, any action or suit* in any court of the United States or of any State." 29 U.S.C. § 104(d) (emphasis added). The Norris-LaGuradia Act goes on to define "labor dispute" in Section 13 to include "any controversy concerning terms or conditions of employment." 29 U.S.C. § 113.

Viewed in tandem, Sections 2, 3, 4, and 13 of the Norris-LaGuardia Act prevent a federal court from enforcing any undertaking or promise that contravenes the public policy that employees be free from **[*30]** employer interference in concerted activities for the purpose of mutual aid or protection, such as pursuing employment-related collective legal action. The Norris-LaGuardia Act makes KBR's class action waiver, imposed as a condition of employment, unenforceable—such waivers constitute promises or undertakings that prevent employees from acting in

concert with their coworkers to vindicate their workplace rights in court or in arbitration.[5]

3. *AT&T Mobility LLC v. Concepcion*

Defendants contend that Supreme Court precedent permits class action waivers like the one in KBR's arbitration agreement. Relying on the Supreme Court's decision in *Concepcion*, Defendants state that this Court "is obligated to comply with the mandate of the United States Supreme Court and enforce the class arbitration waiver at **[*31]** issue in this matter." ("Def. Reply") [Doc. # 25 at 18.]

The Court disagrees, however, that *Concepcion* applies to this case. *Concepcion* involved preemption of a state law ruling precluding enforcement of a class arbitration waiver in the consumer context. *Concepcion*, 131 S. Ct. at 1746 ("The question in this case is whether § 2 [of the Federal Arbitration Act] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."). The consumers in *Concepcion* could not have relied upon the NLRA: they did not seek to bring a collective action against their employer seeking to better their workplace conditions.[6] Although many courts, including this one, have granted motions to compel arbitration in the employment litigation context under the FAA, those cases involved *individual* employees who were not engaged in concerted activity. *See, e.g., Foster v. Macy's, Inc.*, No. 15-CV-03123-DMG, slip op. at 12 (C.D. Cal. Nov. 4, 2015); *Verdugo v. Davey Tree Surgery Co.*, No. 14-CV-09897-DMG, slip op. at 1, 8 (C.D. Cal. Apr. 28, 2015); *Wright v. JPMorgan Chase Bank N.A.*, No. 13-CV-09022-DMG, slip op. at 1 (C.D. Cal. Aug. 1, 2014); *Abeyrama v. J.P. Morgan Chase Bank*, 2012 U.S. Dist. LEXIS 87847, at *15 (C.D. Cal. June 22, 2012). Moreover, *Concepcion* did not involve a class action waiver that clashed with a substantive right guaranteed in another federal statute.

Defendants cite another recent Supreme Court case, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). There, merchants who accepted American Express cards brought a class action against American Express for violations of federal antitrust laws, namely the Sherman Act and Clayton Act. *Id.* at 2308. The merchants alleged that American Express used its monopoly power in the charge-card market to force merchants to pay high credit card fees. *Id.* American Express moved to compel individual arbitration under the FAA. *Id.* The arbitration agreement between the merchants and American Express contained a class action waiver. *Id.* In opposing the motion, the merchants argued that the costs (e.g., expert fees) necessary to prove the antitrust claims would far exceed any statutory recovery for each individual plaintiff. *Id.* Because such costs would make it economically infeasible for plaintiffs to pursue their statutory claims individually, the merchants argued that the class action waiver should be invalidated in accordance with the "effective vindication" exception to the FAA. *Id.* at 2310. This exception "allow[s] courts to invalidate agreements that prevent the 'effective **[*33]** vindication' of a federal statutory right." *Id.*

The Supreme Court rejected the merchants' arguments. It found that federal "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." *Id.* at 2309. The Court also held that the class action waiver was enforceable, even when "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." *Id.* at 2307. As the majority put it, "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Id.* at 2311 (citation omitted).

This case is distinguishable. *Italian Colors* did not implicate NLRA-covered employees entitled to the substantive right to collective action. The Court in *Italian Colors* considered whether a "judge-made exception to the FAA" applied to invalidate an arbitration agreement's class action waiver. *See id.* at 2310. By contrast, here, the plain text of Section 2 of the FAA renders the class action waiver unenforceable: Defendants' interference with Totten's Section 7 rights violates federal law. *See id.* at 2310-11 (the FAA's savings clause "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory **[*34]** rights").

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[5] The Board also observed, assuming a "direct conflict between the NLRA and the FAA," that the Norris-LaGuardia Act was enacted after the FAA and includes language repealing any acts that conflict with it. *Horton I*, 357 NLRB No. 184, 2012 WL 36274, at *16 (citing 29 U.S.C. § 115). The Court need not address this concern over conflicting statutes. As explained *infra*, the Court does not perceive a direct conflict between the NLRA and the FAA in Totten's case.

[6] For the same reason, the Court also finds the Supreme **[*32]** Court's decision in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015), cited by Defendants in a Notice of Supplemental Authority, inapposite. [Doc. # 46.]

4. The Fifth Circuit's *Horton II* Decision

Understandably, Defendants rely heavily on the Fifth Circuit's decision in *Horton II*, which overturned the key ruling in *Horton I*. The Fifth Circuit disagreed with the Board's finding that the class action waiver in the arbitration agreement violated the NLRA. *See also Murphy Oil USA, Inc. v. NLRB.*, 808 F.3d 1013, 2015 WL 6457613, at *3 (5th Cir. 2015) ("*Murphy Oil II*") (affirming *Horton II* and finding employer "committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing" an arbitration agreement).

This Court is not persuaded by *Horton II* for the following reasons.

i. Concerted Legal Action is a Section 7 Substantive Right

First, this Court respectfully disagrees with the Fifth Circuit's assertion that the right to protected concerted litigation activity under Section 7 is not a substantive non-waivable right. According to the Fifth Circuit, the "[t]he use of class action procedures . . . is not a substantive right" but merely a "procedural device." *Horton II*, 737 F.3d at 357 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)). "Thus, while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy." *Id.* (internal quotation marks omitted) (citing *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643 (5th Cir.2012), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013)) **[*35]** . The Fifth Circuit's facile pronouncement eviscerates the right of concerted action by eliminating the mechanism that effectuates the right. Section 7 recognizes the right of employees to join together for mutual aid and protection by challenging a condition of employment that affects them all. One of the remedies for *that* right *is* to permit employees to join together for concerted litigation activity through the class action mechanism, whether the class action proceeds in court, arbitration, or some other forum.[7]

The Fifth Circuit cites cases in support of its decision that do not involve Section 7. *Horton II*, 737 F.3d at 357 (citations omitted). For instance, the cases it cites involve Federal Rule of Civil Procedure 23 or "class procedures under various employment-related statutory frameworks," such as the Age Discrimination in Employment Act ("ADEA")[8] and the Fair Labor and Standards Act ("FLSA")[9] where courts have held based **[*36]** upon the language specific to those statutes that there is no substantive right to proceed collectively. *See, e.g., Gilmer*, 500 U.S. at 32 (ADEA); *Carter v. Countrywide Credit Indus.*, Inc., 362 F.3d 294, 298 (5th Cir. 2004) (FLSA); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (FLSA); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996) (FLSA); *Amchem*, 521 U.S. at 612-13 (Rule 23). The Fifth Circuit goes on to state that these ADEA and FLSA cases stand for the proposition that "[e]ven explicit procedures for collective actions will not override the FAA." *Horton II*, 737 F.3d at 360 (citations omitted).

This Court does not quibble with the line of decisions the Fifth Circuit cites that determined no substantive right to class procedures exist under the ADEA and the **[*37]** FLSA. Whether those substantive rights exist under those particular "employment-related statutory frameworks" bears no relevance to whether the

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[7] In the Section 7 context, the right often cannot exist without the remedy. For example, employees who wish to stage a lawful demonstration or a picket to challenge what is perceived to be unfair employer policies must apply for a permit to lawfully assemble, which may result in the imposition of appropriate time, place, and manner restrictions. *See, e.g., Serv. Employees Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 605 (5th Cir. 2010) (ordinances under which a labor union applied for parade permits for striking janitors violated the First Amendment). The permit is a procedural device, which effectuates the employees' right to assemble and engage in concerted activity. Likewise, the Rule 23 class action procedure imposes the equivalent of time, place, and manner restrictions on employee class actions.

[8] "The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. 29 U.S.C. § 626(b)." *Gilmer*, 500 U.S. at 41-42.

[9] The FLSA's class action provision states that an action to recover the liability prescribed under the FLSA "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). It adds that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

substantive right to "engage in concerted activities for the purpose of . . . mutual aid or protection" through a class action exists under the NLRA. Indeed, the Fifth Circuit acknowledges the distinctions that the Board makes between the NLRA and other statutes. *See Horton II*, 737 F.3d at 357 ("Rule 23 is not the source of the right to the relevant collective actions. The NLRA is.").

In its decision, the Fifth Circuit also states that "[a] detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Horton II*, 737 F.3d at 359. This Court respectfully disagrees. As explained earlier, *Concepcion* is distinguishable because it did not involve a waiver of time-honored *substantive* rights protected by a federal statute, i.e., Section 7 of the NLRA. Moreover, *Concepcion* addressed a conflict between the FAA and state law, triggering the application of the preemption doctrine. Here, in contrast, two federal statutes are at play—the Supremacy Clause is not implicated.

In short, the Fifth Circuit fails to provide a convincing response to the Board's explanation of why the right to engage in collective legal **[*38]** action is a core substantive right protected by Section 7:

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. . . . To the extent [the employer and amici argue] that there is no Section 7 right to class certification, they are surely correct. Whether a class is certified depends on whether the requisites for certification under Rule 23 have been met. But that is not the issue in this case. The issue here is whether [the employer] may lawfully condition employment on employees' waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23. *Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not*.

Horton I, 357 NLRB No. 184, 2012 WL 36274, at *12 (internal citations omitted) (emphasis added).

In similarly criticizing the Fifth Circuit's opinion in *Horton II*, the district court in *Herrington v. Waterstone Mortgage Corporation* observed that "it is not clear [from the Fifth **[*39]** Circuit's analysis] how §§ 157 and 158(a)(1) can be distinguished from any other substantive right in the employment context, such as the right to be paid a minimum wage or to be free from certain types of discrimination." 993 F. Supp. 2d 940, 944 (W.D. Wis. 2014) (denying reconsideration of earlier decision in *Herrington v. Waterstone Mortgage Corp.*, 2012 U.S. Dist. LEXIS 36220, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012) (finding *Horton I* "reasonably defensible" and applying it to invalidate class action waiver in arbitration agreement)).

Courts and the Board regularly invoke Section 7 to protect various forms of concerted employee activity geared towards improving the workplace, and even activities for "mutual aid or protection" not limited to those aimed at changing the terms and conditions of employment. *See, e.g., Std. Concrete Prods. v. General Truck Drivers, Office, Food & Warehouse Union, Local 952*, 353 F.3d 668, 678 (9th Cir. 2003) (sympathy strike to support workers engaged in primary strike); *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 817 (5th Cir. 1981) (refusal to return to work because of dangerous working conditions); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976) (lobbying legislators regarding national policy issues which affect job security); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S. Ct. 1099, 8 L. Ed. 2d 298 (1962) (walkout to protest cold working conditions); *Walls Mfg. Co. v. NLRB.*, 321 F.2d 753, 753, 116 U.S. App. D.C. 140 (D.C. Cir. 1963) (writing letter on behalf of employees to state health department complaining of sanitary conditions); *Teamsters, Chauffeurs & Helpers* Local Union No. 79, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB, 325 F.2d 1011, 1012, 117 U.S. App. D.C. 84 (D.C. Cir. 1963) (refusal by drivers to cross picket line at another employer's place of business where drivers were supposed to make deliveries).

Given the myriad **[*40]** forms that protected collective action can take, Defendants cite to no authority that can provide a reasoned basis why the Court should create a special carve-out for concerted *legal* activity and deem that particular form of concerted action unprotected activity.

ii. The NLRA Coexists with the FAA Through the Savings Clause

In *Horton II*, the Fifth Circuit observes that "[t]here is no argument that the NLRA's text contains explicit

language of a congressional intent to override the FAA." *Horton II*, 737 F.3d at 360. As the *Herrington* court noted, however, the Fifth Circuit "did not explain why it was necessary to locate language or congressional intent to 'override the FAA.'" *Herrington*, 993 F. Supp. 2d at 944. The Supreme Court has already established that a valid arbitration agreement cannot require a party to waive a substantive federal right. *See Gilmer*, 500 U.S. at 26 (arbitration agreement may not require party to "forgo the substantive rights afforded by the [federal] statute"). Yet, rather than engaging with the plain text of Sections 7 and 8—which served as the basis for the Board's *Horton I* decision—and its interplay with the plain meaning of the savings clause, the Fifth Circuit searched in vain for explicit congressional intent to "override the FAA." *Cf. Russello v. United States*, 464 U.S. 16, 20, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("If the statutory language is unambiguous, in the absence of a clearly expressed **[*41]** legislative intent to the contrary, that language must ordinarily be regarded as conclusive.") (internal quotation marks and citation omitted).

The Fifth Circuit had no need to search for congressional intent to "override the FAA": there is no conflict between the NLRA and the FAA in this context. *But see infra*, note 10. The class action waiver in *Horton* violated the NLRA and thus falls squarely within the ambit of the FAA's savings clause. 9 U.S.C. § 2. *See also Mortensen v. Bresnan Communs., LLC*, 722 F.3d 1151, 1158 (9th Cir. 2013) ("The FAA's preemption power has an exception: It does not require the enforcement of arbitration agreements on 'such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2"). The Supreme Court firmly held in *J.I. Case* and *National Licorice* that individual employment contracts that conflict with employees' rights to "engage in concerted activities for the purpose of . . . mutual aid or protection" under Section 7 are unlawful. *J.I. Case*, 321 U.S. at 337; *National Licorice*, 309 U.S. at 361. As the Supreme Court later made clear, "[i]t is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84, 102 S. Ct. 851, 70 L. Ed. 2d 833 (1982) (finding illegality under the NLRA a valid defense to claims made under the contract). Notably, as the Board in *Murphy* **[*42]** *Oil I* pointed out, "[i]n rejecting the Board's position in [*Horton I*], the Fifth Circuit failed even to cite *National Licorice* or *J.I. Case*, much less attempt to reconcile them with the result reached by the court." *Murphy Oil I*, 361 NLRB No. 72, 2014 WL 5465454, at *11.

Finally, the Fifth Circuit looked for evidence in the NLRA's "legislative history of a disavowal of arbitration" and found none.[10] Just as the Fifth Circuit had no reason to examine the legislative history for evidence of intent to "override the FAA," it also had no need to search the legislative history for a "disavowal of arbitration."

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[10] The Fifth Circuit further concluded, "[h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *Horton II*, 737 F.3d at 361. To the extent that the Fifth Circuit is referring to the body of law governing labor arbitration, this is not necessarily true. To be sure, a conflict between the two statutes does not exist in cases involving individual, non-union workers without a collective bargaining agreement. But in the context of labor-management relations that revolve largely around a collective bargaining agreement with an arbitration provision, potential conflicts between federal labor law and the FAA do exist. Such conflicts **[*43]** stem from the fact that the FAA does not govern arbitration in the collective bargaining context.

The Fifth Circuit, in its exploration of the NLRA's legislative history, neglects to discuss Section 301 of the Labor Management Relations Act ("LMRA"), which is the statute, distinct from the NLRA, that gives federal courts jurisdiction to enforce and vacate labor arbitration agreements. While Section 301 makes no mention of the word "arbitration," the Supreme Court in *Textile Workers Union of America v. Lincoln Mills* ruled that arbitration agreements in collective bargaining contracts are enforceable under Section 301 of the LMRA, not the FAA. 353 U.S. 448, 455-56, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); *see also id.* at 466 (Frankfurter, J., dissenting) ("I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion.").

The Supreme Court acknowledged that Section 301 expresses a federal policy that "federal courts should enforce these agreements . . . and that industrial peace can be best obtained only in that way." *Id.* at 455. It then held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor **[*44]** laws." *Id.* at 456. *Lincoln Mills* thus laid the groundwork for three seminal Supreme Court cases that came to be known as the *Steelworkers Trilogy*, where the Court solidified arbitration as a defining aspect of federal labor law. Among other things, the Court announced a "presumption of arbitrability" and established a deferential standard of judicial review of arbitration awards. *See* 1 J. Higgins, *The Developing Labor Law* 1503-1512 (6th ed. 2012) (describing the *Steelworkers Trilogy*). Notably, the Court

In light of the above discussion, the Court declines to follow the Fifth Circuit's decision in *Horton II*. Instead, like the *Horton II* dissent, the Court endorses the Board's position in *Horton I*. See *Horton II*, 737 F.3d at 364-65 (Graves, J., dissenting) ("I agree with the Board that the [arbitration agreement] interferes with the exercise of employees' substantive rights under Section 7 of the NLRA, which provides, in relevant part, that employees have the right 'to engage in other concerted activities for the purpose of collective bargaining or other mutual **[*47]** aid or protection . . . .'").

5. Other Cases That Have Declined to Follow *Horton I*

Defendants assert that "[f]ederal courts have overwhelmingly rejected the NLRB's reasoning [in *Horton I*], found that class action waivers in arbitration agreements do not violate the NLRA, and held that the NLRB's reasoning conflicts with the [FAA] and Supreme Court precedent." Def. Reply at 17. In addition to *Horton II*, they cite to three other circuit court decisions. *Id.* (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013)).

None of these other circuit opinions are controlling authority. The Second Circuit in *Sutherland* did not provide any substantive analysis regarding its decision not to apply the Board's *Horton I* reasoning. *Sutherland*, 726 F.3d at 297-98 n.8 (stating that it owed no deference to the Board's reasoning and that *Horton I* may have been decided without proper quorum). Similarly, the Eight Circuit in *Owen* stated that it owes "no deference" to the reasoning in Horton I. *Owen*, 702 F.3d at 1054. That court did state that the arbitration agreement at issue in *Owen* "does not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor . . . , the Equal Employment Opportunity Commission, the NLRB, or any similar administrative body," and hence does not bar " **[*48]** *all* protected concerted action." *Id.* at 1053 (emphasis in original). But as the court in *Herrington* pointed out, the Eighth Circuit fails to explain "why a statute that protects 'concerted activities' *generally* should be construed to permit an employer to determine on its own which

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stated that in the field of collective bargaining agreements—as opposed to commercial agreements—"the hostility evinced by courts to arbitration of commercial disputes has no place here." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). After all, unlike in commercial cases where "arbitration is the substitute for litigation," in the field of labor relations, "arbitration is the substitute for industrial strife." *Id.* In the wake of the *Steelworkers Trilogy*, the courts fashioned an entire body of labor-arbitration law unique to union-management relations.

As this judicial "hostility" towards arbitration in commercial cases has waned in recent decades, courts have applied reasoning from labor arbitration case law to commercial arbitration cases **[*45]** brought under the FAA. *See, e.g., Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) ("Although *Nolde Bros*. involved a collectively bargained labor agreement and thus is arguably not dispositive here, we find its reasoning persuasive in this context as well.") (quoting language from Section 301 case *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977)). In turn, courts in arbitration cases brought under Section 301 have sought guidance from arbitration cases brought under the FAA. *See, e.g., Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52, 54 (2d Cir. 2001) ("[T]he body of law developed under Section 301 will at times draw upon provisions of the FAA, but by way of guidance alone."). Some courts, such as the Seventh Circuit, have even taken the position that the FAA applies to collective bargaining agreements provided there is no conflict with an express provision of Section 301. *See Smart v. Int'l Broth. of Elec. Workers, Local 702*, 315 F.3d 721, 724-25 (7th Cir. 2002) ("Where there is no conflict, however, and the FAA provides a procedure or remedy not found in section 301 but does not step on section 301's toes, then . . . we apply the Federal Arbitration Act.").

This blurring of the divide between FAA cases and Section 301 cases does not mean, however, that "no inherent conflict" exists between labor law and the FAA. For instance, the Court in the *Steelworkers Trilogy* established standards for when a court can overturn an arbitrator's award, including when a court determines that the award does not draw its "essence" **[*46]** from the collective bargaining agreement. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). No such "essence test" exists under FAA doctrine. In contrast to the doctrine for vacating awards under Section 301, the FAA lays out four grounds for vacating an arbitration award in § 10(a) of the Act: (1) "where the award is procured by corruption, fraud, or undue means;" (2) "where there was evident partiality or corruption in the arbitrators;" (3) "where the arbitrators were guilty of misconduct . . . or any other misbehavior by which the rights of any party have been prejudiced;" and (4) "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10.

concerted activities are protected and which are not." *Herrington*, 993 F. Supp. 2d at 946 (emphasis in original). As for the Ninth Circuit, Defendants rightly state that the court declined to address the rationale in *Horton I*, only noting other courts' rejection of the Board's reasoning. *Richards*, 744 F.3d at 1075 n.3 (listing cases). In fact, the Ninth Circuit amended its opinion to add language clarifying that it notes the other cases "[w]ithout deciding the issue" of whether *Horton I* "conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act." *Id.* (amended decision); *contrast with Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-74 n.3 (9th Cir. 2013) (original decision).

Defendants also cite to two district court decisions and a California Supreme Court decision. *See Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1082-83 (E.D. Cal. 2014); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865, 2013 WL 452418, at *9 (C.D. Cal. Feb. 5, 2013); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 366-374, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014). To the extent these cases largely endorse the Fifth Circuit's rationale in *Horton II* or the Eighth Circuit's position in *Owen*, the Court does not find those cases persuasive for the reasons already discussed. *See* discussion **[*49]** *supra*, Section IV.C.4.

In sum, the Court endorses the Board's reasoning in *Horton I* and finds the class action waiver in KBR's arbitration agreement invalid. The waiver violates federal labor law and thus is unenforceable under Section 2 of the FAA. 9 U.S.C. § 2. The Court, therefore, **DENIES** Defendants' motion to dismiss Totten's class action claims.

D. Totten's PAGA Claim

Totten contends that the representative action waiver cannot be enforced against claims brought under the Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 *et seq.* Such "representative" PAGA claims seek penalties for Labor Code violations affecting other employees. The California Supreme Court in *Iskanian v. CLS Transp. Los Angeles, LLC* found agreements that waive the right to bring PAGA representative claims to be unenforceable under California law. 59 Cal. 4th at 360. In *Iskanian*, the court reasoned:

> [California Civil Codes sections 1668 and 3513] compel the conclusion that an employee's right to bring a PAGA action is unwaivable. Section 2699, subdivision (a) states: "Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be recovered **[*50]** through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." As noted, the Legislature's purpose in enacting the PAGA was to augment the limited enforcement capability of the Labor and Workforce Development Agency by empowering employees to enforce the Labor Code as representatives of the Agency. Thus, an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. Because such an agreement has as its "object, . . . indirectly, to exempt [the employer] from responsibility for [its] own . . . violation of law," it is against public policy and may not be enforced. (Civ. Code, § 1668.)

59 Cal. 4th at 383. Because "[i]n interpreting state law, federal courts are bound by the pronouncements of the state's highest court," this Court is bound by the California Supreme Court's pronouncement that waiver of an employee's right to bring a PAGA action is against public policy and unenforceable. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002).

Defendants contend that the rule against PAGA waivers laid out in *Iskanian* is preempted by the FAA. This argument, however, no longer carries **[*51]** weight.

The Ninth Circuit, in *Sakkab v. Luxottica Retail North America, Inc.*, recently found that "the *Iskanian* rule does not stand as an obstacle to the accomplishment of the FAA's objectives, and is not preempted" by the FAA. 803 F.3d 425, 427 (9th Cir. 2015). In particular, *Sakkab* found that the *Iskanian* rule falls within the ambit of FAA § 2's savings clause and does not conflict with the FAA's purposes. *Id.* at 433 (finding that the "*Iskanian* rule is a 'generally applicable' contract defense that may be preserved by § 2's savings clause, provided it does not conflict with the FAA's purposes. . . . After considering the objectives of the FAA, we conclude that the *Iskanian* rule does not conflict with those objectives").

The *Iskanian* court likened PAGA actions to *qui tam* actions in that a representative plaintiff brings an action

"as the proxy or agent of the state's labor enforcement agencies." *Iskanian*, 59 Cal. 4th at 380-82 (internal quotation marks and citation omitted). Thus, unlike a consumer class action, a representative PAGA action is "an action to recover civil penalties [that] is fundamentally a law enforcement action designed to protect the public and not to benefit private parties." *Id.* at 381 (internal quotation marks and citation omitted). *Sakkab* endorsed this view, **[*52]** finding that the "right to inform the state of violations that did not injure the informer is the very essence of a qui tam action." *Sakkab*, 803 F.3d at 439-40 ("Qui tam actions predate the FAA by several centuries.") (citing *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-76, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000)). "The FAA was [neither] intended to preclude states from authorizing qui tam actions to enforce state law" nor "was it intended to require courts to enforce agreements that severely limit the right to recover penalties for violations that did not directly harm the party bringing the action." *Id.*

Because the *Iskanian* rule against PAGA waivers is not preempted by the FAA, this Court finds the representative action waiver in KBR's agreement as applied to Totten's PAGA claims unenforceable. Accordingly, the Court **DENIES** Defendants' motion to dismiss Totten's PAGA claims.

E. Severance of Unconscionable Contract Provision

A court determination that "the arbitration agreement contains . . . flawed provisions does not necessarily mean that the entire [arbitration agreement] is substantively unconscionable." *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1084 (9th Cir. 2007) (quotation omitted). State law permits a court to sever unconscionable provisions of an arbitration agreement if they are "merely 'collateral' to the main purpose of the arbitration agreement[.]" **[*53]** *Id.* (quoting *Armendariz*, 24 Cal. 4th at 124).

Here, the Court finds the modification provision "collateral" to the arbitration agreement's main purpose. Accordingly, the Court severs the prospective-modification provision from the DRP Agreement.

As for the class action and representative waivers, section 4B(ii) of the DRP Agreement provides that in the event the Court finds those waivers unenforceable, "this Plan shall not apply with respect to that class or representative action which shall proceed instead before the court." Thus, pursuant to the DRP Agreement's own terms, Totten's class and representative claims shall proceed in this Court.

To the extent Totten brings individual claims, the Court **GRANTS** Defendants' motion to compel arbitration as to those individual claims.

F. Defendant Molycorp's Bankruptcy

On August 5, 2015, Defendant KBR notified the Court that Molycorp filed a petition for Chapter 11 bankruptcy. [Doc. # 39.] KBR suggests that the bankruptcy petition should automatically stay the entire case under 11 U.S.C. § 362. The Court disagrees. The Court "does not have the jurisdiction to extend the stay to a non-debtor party." *Placido v. Prudential Ins. Co. of Am.*, 2010 U.S. Dist. LEXIS 12147, at *2-3 (N.D. Cal. Jan. 21, 2010) ("In order to apply the automatic stay outlined in 11 U.S.C. § 362 to a non-debtor party, the bankruptcy court must issue an extension of the **[*54]** stay under its jurisdiction.") (citing *Boucher v. Shaw*, 572 F.3d 1087, 1093 (9th Cir. 2009)); *see also Campo v. Am. Corrective Counseling Serv.*, 2009 U.S. Dist. LEXIS 23036, at *10 (N.D. Cal. Mar. 12, 2009) ("A determination concerning whether the automatic stay under § 362(a) should be extended to non-debtor parties is a determination to be made by a bankruptcy court.") (citing *In re Chugach Forest Products, Inc.*, 23 F.3d 241, 247 (9th Cir. 1994); *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)).

In any event, the bankruptcy of one defendant does not normally stay the case as to nondebtor defendants absent unusual circumstances. *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Products, Inc.)*, 23 F.3d 241, 246 (9th Cir. 1994) ("As a general rule, 'the automatic stay of section 362(a) protects only the debtor. . . . It does not protect non-debtor parties. . . . Thus, section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor.") (quoting *In re Advanced Ribbons & Office Prods.*, 125 B.R. 259, 263 (Bankr. 9th Cir. 1991). Such circumstances include when the judgment against the non-debtor defendant would in effect be a judgment or finding against the debtor. *See Boucher*, 572 F.3d at 1093 (where bankruptcy debtor is contractually obligated to indemnify the non-debtor defendant in the same lawsuit, it may be necessary to extend the automatic stay to the non-debtor party). Even in that particular circumstance, however:

> [T]he bankruptcy court would first need to extend the automatic stay under its equity jurisdiction. Such extensions, although referred to as extensions of the automatic stay, are in fact injunctions **[*55]** *issued by the bankruptcy court* after hearing and the establishment of unusual need to take this action to protect the administration of the bankruptcy estate.

572 F.3d at 1093 n.3 (internal quotation marks and citation omitted) (emphasis added).

Bankruptcy courts are in accord. *See, e.g., Kenoyer v. Cardinale (In re Kenoyer)*, 489 B.R. 103, 120-121 (Bankr. N.D. Cal. 2013) ("[T]he unusual circumstances doctrine typically is not used to extend the automatic stay to actions against non-debtors under § 362, but instead is used to obtain an injunction under § 105.") (citing *In re Chugach Forest Products*, 23 F.3d at 247 n.6). According to the Bankruptcy Appellate Panel, "any extension of the automatic stay to nondebtors does not occur automatically but requires the filing of an adversary proceeding requesting the bankruptcy court to act under § 105(a)." *In re Ripon Self Storage, LLC*, 2011 Bankr. LEXIS 1785, 2011 WL 3300087, *6 (B.A.P. 9th Cir. 2011) (citing *Boucher v. Shaw*, 572 F.3d at 1093 n. 3).

In the absence of a bankruptcy court order extending the automatic stay to the non-debtor in this action, this case will go forward as to Defendant KBR.

IV.

CONCLUSION

In light of the foregoing:

1. Defendants' motion to compel arbitration is **GRANTED** as to Totten's individual claims;

2. The motion to dismiss is **DENIED** as to Totten's class action claims;

3. The motion to dismiss is **DENIED** as to Totten's claims under PAGA, Cal. Lab. Code § 2698 *et seq.*;

4. Defendant KBR shall file its Answer within 21 days from the date of this **[*56]** Order; and

5. The Court's Order to Show Cause why the action should not be stayed [Doc. # 41] is discharged.

IT IS SO ORDERED.