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SUPREME COURT  
OF THE STATE OF WASHINGTON

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LAWRENCE HILL, ADAM WISE, and ROBERT MILLER,  
on behalf of themselves and all persons similarly situated, Petitioners,

v.

GARDA CL NORTHWEST, INC., Respondent.

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**RESPONDENT'S ANSWER TO PETITION FOR REVIEW**

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Clarence M. Belnavis, WSB#36681  
Fisher & Phillips LLP  
111 SW 5<sup>th</sup> Avenue, Suite 1250  
Portland, Oregon 97204-3604  
Telephone: (503) 242-4262  
Facsimile: (503) 242-4263

Attorney for Respondent

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## I. INTRODUCTION

This matter is before the Court on a petition for review of the Washington Court of Appeals' July 30, 2012 Decision reversing, in part, the Washington Superior Court's September 24, 2010 Order compelling Petitioners Lawrence Hill, Adam Wise, and Robert Miller (collectively "Petitioners") to arbitrate their statutory wage claims against their former employer, Respondent Garda CL Northwest, Inc. ("Garda" or "the Company"), on a class-wide basis. The Court of Appeals upheld the Superior Court's Order to the extent it compelled Petitioners to arbitrate their claims, but reversed the Order to the extent it compelled them to arbitrate as a class. Consequently, the Court of Appeals remanded the case for individual arbitration.

## II. STATEMENT OF THE CASE

Petitioners are former driver/messenger guards of Garda, an armored car company with seven branches in the state of Washington. CP 4, ¶ 8. All of Garda's Washington driver/messenger guards are and were at all times relevant to this lawsuit represented by unions specific to each branch. CP 133. Each union negotiated a collective bargaining agreement ("CBA") with Garda. CP 65-66. Each CBA included a mandatory grievance/arbitration procedure covering, in pertinent part, "any claim under any . . . state . . . law, statute or regulation . . . or any other claim

related to the employment relationship.” CP 142-143, 206-207, 229-230.

Ignoring the grievance/arbitration procedure in their respective CBAs, Petitioners filed this lawsuit on February 11, 2009, alleging that Garda denied employees meal and rest breaks, altered their time records, and failed to pay them for “off-clock” work. CP 3-8. On April 23, 2009, Garda filed its Answer to Petitioners’ Complaint, in which it unambiguously asserted as affirmative defenses, *inter alia*, that Petitioners’ claims (1) could only be resolved by interpreting the CBAs; (2) must be resolved by arbitration under the CBAs; and (3) were waived in whole or in part by the CBAs. CP 12.

On March 26, 2010, Petitioners filed a Motion for Class Certification. CP 806-807. On July 1, 2010, Garda filed a Motion to Compel Arbitration or for Partial Summary Judgment. CP 15-40. On July 23, 2010, the Superior Court granted Petitioners’ Motion for Class Certification. CP 519-521. On September 24, 2010, the Superior Court granted Garda’s Motion to Compel Arbitration, but directed the parties to arbitrate the dispute as a class “in light of its prior decision to certify a class.” CP 767-768.

On October 20, 2010, Garda appealed the Superior Court’s Order to the extent it compelled Petitioners to arbitrate the dispute *as a class*. CP 913-917. On October 28, 2010, Petitioners cross-appealed the

Superior Court's Order to the extent it compelled arbitration. CP 918-920. On July 30, 2012, the Court of Appeals issued its Decision upholding arbitration, but on an individual basis. *See Hill v. Garda CL Northwest, Inc.*, 281 P.3d 384 (Wash. Ct. App. 2012).

### III. ARGUMENT

Petitioners contend that discretionary review of the Court of Appeals' Decision is warranted pursuant to RAP 13.4(b)(1), (2) & (4). On all accounts, Petitioners' contentions are meritless.

#### A. THE COURT OF APPEALS PROPERLY RULED THAT GARDA DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

Petitioners first argue that Garda waived its right to compel arbitration by actively litigating this case without taking any steps to enforce its right until a class had been certified and Petitioners had been severely prejudiced. Pet. Rev. 8-11. Petitioners' arguments are not supported by the record.

##### 1. Garda timely invoked its right to arbitration at the beginning of, and throughout, the proceedings.

In its Answer to Petitioners' Complaint, Garda unambiguously asserted the following affirmative defenses:

1. Plaintiffs' claims may only be resolved by interpreting the terms of the respective collective bargaining agreements with the applicable collective bargaining units.

2. Plaintiffs' claims must be resolved by arbitration pursuant to arbitration agreements.

\* \* \*

4. Plaintiffs' claims have been waived in whole or in part by contract or collective bargaining agreement.

CP 12.

After the initial pleadings were filed, “[t]he parties delayed significant investment in prosecuting and defending the case because trial was imminent in a very similar matter, *Pellino v. Brinks* . . . .” CP 841. *Brinks* was decided in January 2010, after which “the parties . . . spent some time discussing the possibility of settlement, but nothing materialized . . . .” CP 580.

On February 1, 2010, Petitioners' counsel sent the following email to Garda's former counsel acknowledging Garda's intent to litigate the arbitration issue: “As we discussed this morning, if we proceed to litigate the arbitration issue—we'll want discovery on it, so we are providing these written requests now to keep things moving.” CP 625.

On March 10, 2010, the parties filed a joint motion to extend the trial date. CP 799-801. The joint motion provided, “Plaintiffs and Garda agree that this stipulation and motion is made without prejudice to Garda's position (which is contrary to Plaintiffs' position) that this matter is properly subject to arbitration under the applicable Labor Agreements.”

CP 799. The Superior Court granted the joint motion, continuing the trial date to December 6, 2010. CP 802-803.

According to Petitioners' counsel, "because nothing materialized in settlement discussions," Petitioners moved for class certification on March 26, 2010. CP 841. On April 1, 2010, Petitioners' counsel emailed Garda's former counsel and stated, "Plaintiffs are willing to postpone further briefing on class certification in order to attempt a class-wide settlement through mediation . . . ." CP 626. In the same email, Petitioners' counsel unequivocally acknowledged that *Petitioners* would consider agreeing to arbitration, *but only after mediation*:

We also remain willing to give serious and good faith consideration to a comprehensive proposal for arbitration, should mediation fail. *However, we are not prepared to make a decision on arbitration vs. litigation prior to mediation*, and prefer to spend our immediate resources on that effort.

CP 626 (emphasis added).

The parties unsuccessfully mediated the case on May 6, 2010. CP 841. On June 1, 2010, Garda substituted the undersigned counsel. CP 821-822. On June 4, 2010, Garda filed an unsuccessful Motion to Continue Plaintiffs' Motion for Class Certification, which was set for hearing on July 16, 2010. CP 823-830, 921-922.

Soon thereafter, Garda deposed all three Petitioners. CP 42. During each deposition, Garda's counsel solicited substantial testimony from Petitioners directly relevant to Garda's affirmative defenses concerning arbitration under the CBAs.<sup>1</sup>

On July 1, 2010 – less than two months after the failed mediation and one month after substituting counsel – Garda filed its Motion to Compel Arbitration or for Partial Summary Judgment. CP 15-39. The Superior Court granted Plaintiffs' Motion for Class Certification on July 23, 2010. CP 519. The Court then heard oral arguments on Garda's motion on August 28, 2010, and subsequently granted the motion in part by ordering class arbitration. CP 772.

**2. Garda did not act inconsistently with its right to compel arbitration.**

From the outset of the case, Garda unambiguously invoked its contractual right to require Petitioners to arbitrate their statutory wage claims. This alone distinguishes the matter from the cases relied on by Petitioners. Pet. Rev. 8-11. *Cf. Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 585, 201 P.3d 309 (2009) (“OHA did not invoke the arbitration clause in

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<sup>1</sup>For example, Garda's counsel asked Petitioners to confirm that (1) they received a copy of their respective CBA (CP 55, 64, 77, 81); (2) the CBAs provided a procedure for the equitable resolution of grievances (CP 56, 66, 78); (3) they could grieve claims arising under state law, including the state wage claims at issue in this case (CP 59, 66-67, 79); (4) they were supposed to present their specific grievances to the Company within fourteen days (CP 56, 67, 79); and (5) they failed to pursue the grievance/arbitration process with respect to their current claims (CP 67, 79).

its answer.”); *Ives v. Ramsden*, 142 Wn. App. 369, 384, 174 P.3d 1231 (2008) (“[The] answer does not use the term ‘arbitration[.]’”); *Steele v. Lundgren*, 85 Wn. App. 845, 853, 935 P.2d 671 (1997) (defendant acted inconsistently where he did not express intent to arbitrate claim in answer or for 10 months thereafter); *River House Dev. v. Integrus*, 167 Wn. App. 221, 237-238, 272 P.3d 289 (2012) (plaintiff acted inconsistently where it initiated suit in superior court rather than filing for arbitration).

That Garda delayed moving to compel while the parties waited for *Brinks* to be decided and participated in mediation is insignificant, as the Court of Appeals aptly recognized. *See Hill*, 281 P.3d at 337-338 (“Because the delay in filing the motion to compel resulted in part from an effort to resolve this case without resorting to litigation and Garda asserted its arbitration rights in its answer, we do not find Garda’s acts to be inconsistent with arbitration.”) (citing *Steele*, 85 Wn. App. at 854).

Nor is it significant that Garda participated in limited discovery prior to moving to compel arbitration. Once the Superior Court denied Garda’s motion to continue, Garda responded quickly by deposing the named Petitioners and obtaining additional evidence to support its motion to compel.<sup>2</sup> By engaging in this limited discovery, Garda was not acting

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<sup>2</sup>Contrary to Petitioners’ assertion, nowhere in its motion does Garda represent an intention to litigate this dispute rather than exercise its right to compel arbitration. Garda

inconsistently with its desire to arbitrate. *See Lake Wash. School Dist. v. Mobil Modules*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980) (“Mobile Modules’ limited use of discovery was not inconsistent with its right to compel arbitration.”). Further, the discovery process was not “contentious” or “overly aggressive” as it was in the *Steele*, *Ives*, and *River House* cases cited by Petitioners. Pet. Rev. 9-10.

Finally, contrary to Petitioners’ assertion, Garda’s “tactics” did *not* allow it to see whether a class was certified before changing forums. Pet. Rev. 11. The record plainly establishes that Garda moved to compel arbitration on July 1, 2010, *twenty-two days before* the Superior Court issued its Order Granting Plaintiffs’ Motion for Class Certification, CP 15-39, 519. Clearly then, Garda gained no advantage – nor did it attempt to gain an advantage – by moving to compel when it did.

**B. THE COURT OF APPEALS PROPERLY FOUND THAT THE CBAS CLEARLY AND UNMISTAKABLY REQUIRE PETITIONERS TO ARBITRATE THEIR STATUTORY WAGE CLAIMS.**

Petitioners next argue that the Court of Appeals erroneously found they “clearly and unmistakably” waived the right to have their statutory wage claims heard in court. Pet. Rev. 11-15. Again, Petitioners’ arguments are without merit.

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merely asked for a reasonable extension of time to allow its newly substituted counsel to become familiar with the legal and factual intricacies of the case.

**1. Petitioners' argument is grounded in a narrow, illogical reading of the contract.**

While acknowledging that the CBAs define a "grievance" as including their statutory wage claims, Petitioners argue that not all "grievances" are subject to arbitration. Pet. Rev. 13-14. Petitioners contend that only grievances involving a "legitimate as well as significant issue of contract application" are subject to arbitration. Pet. Rev. 14. Because their claims allegedly do not fall into that category, Petitioners argue, they are not subject to arbitration. Pet. Rev. 14.

Petitioners rely on *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998), in which the Supreme Court purportedly found "similarly ambiguous provisions to mean . . . the CBA did not preclude employees from bringing statutory claims in court." Pet. Rev. 14. *Wright* is easily distinguishable. In *Wright*, the Court of Appeals for the Fourth Circuit found that the following provision in the collective bargaining agreement was sufficiently broad to encompass the employees' claims under the Americans with Disabilities Act ("ADA"): "The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment . . . ." 525 U.S. at 73. The Supreme Court reversed the Fourth Circuit, finding that the arbitration provision was "very general" and contained "no

explicit incorporation of statutory antidiscrimination requirements.” *Id.* at 80. Consequently, the Court held, the agreement lacked “a clear and unmistakable waiver of the covered employees’ rights to a judicial forum for federal claims of employment discrimination.” *Id.* at 82.

*Wright* is more analogous to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), which the Court in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 261, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), explicitly distinguished because the agreement in *Gardner-Denver* did not expressly provide for the arbitration of statutory claims: “*Gardner-Denver* and its progeny thus do not control the outcome where . . . the collective-bargaining agreement’s arbitration provision expressly covers both statutory and contractual discrimination claims.”

Here, as in *14 Penn Plaza* – and unlike in *Wright* and *Gardner-Denver* – the CBAs expressly cover Petitioners’ statutory wage claims and mandate that arbitration is the next step following an unsatisfactory grievance response by the Company. CP 142-143, 206-207, 229-230.

## **2. Petitioners’ argument ultimately proves irrelevant.**

Petitioners’ theory that only grievances involving a “legitimate as well as significant issue of contract application” are arbitral is a mere academic exercise because the claims *do* involve a “legitimate as well as significant issue of contract application.” Petitioners plainly challenge the

lawfulness of Garda's meal and rest break policy set forth in the CBAs. CP 6, ¶ 28(c); 7, ¶ 31. Consequently, an arbitrator must *apply* the contract to determine if the policy violates Washington state law. *See Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir. 1993) (where plaintiff argued provision in CBA itself violated state law, the "claim, without a doubt, is substantially dependent upon the meaning of a term of the CBA *and its applicability*") (emphasis added), *cert. denied*, 510 U.S. 822 (1993).

Moreover, Petitioners' statutory right to a meal break is a waivable right under Washington law. *See Washington Dept. of Labor & Industries Administrative Policy ES.C.6* ("If an employee wishes to waive [the right to a] meal period, the employer may agree to it."). Thus, an arbitrator must apply the CBAs to determine whether Petitioners waived their rights consistent with Washington law.

### **3. The CBAs allow employees to vindicate their rights.**

In a last-ditch effort to avoid the impact of their waiver, Petitioners argue that regardless of what the CBAs say, they cannot be compelled to arbitration because the arbitral forum is not actually available. Pet. Rev. 14. Petitioners' argument is misplaced.

First, try as they might to litigate the issue in state court, the legitimacy of Petitioners' unions is not properly before the Court. The Supreme Court has long recognized that the National Labor Relations

Board (“NLRB”) exercises primary jurisdiction to decide whether certain activity violates the National Labor Relations Act (“NLRA”), including whether a union is an employer-dominated union in violation of Section 8(a)(2) of the NLRA. *See San Diego Unions v. Garmon*, 359 U.S. 236, 245, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959). Thus, if Petitioners believe they are members of a “sham” union in violation of the NLRA, the proper avenue for relief is through the NLRB.<sup>3</sup>

Second, Petitioners unpersuasively rely on *Brown v. Services for the Underserved*, 12-CV-317, 2012 U.S. Dist. LEXIS 106207, at \*5 (E.D.N.Y. July 31, 2012), for the proposition that a contractual waiver is unenforceable if the union can prevent the employees from pursuing arbitration. Pet. Rev. 14. Notwithstanding that *Brown* is an unreported decision from a federal court in New York, it is of no relevance here.

The plaintiff in *Brown* sued his employer under Title VII of the Civil Rights Act of 1964. *Id.* at \*1. The employer argued that under the collective bargaining agreement, the plaintiff’s exclusive remedy was through arbitration. *Id.* at \*2. The agreement, however, provided that,

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<sup>3</sup>According to Petitioners, “it is undisputed that the ‘union’ is essentially a creation of the company, with no independent resources or bargaining power.” Pet. Rev. 15. Petitioners cite exclusively to an August 15, 2010 affidavit from Garda employee and shop steward Raymond Overgaard, who vaguely attested that he “is still not sure what [the union] is” and does not “consider it to be a ‘union’ because it does not have any power.” CP 606-607. In doing so, Petitioners ignore their own acknowledgment that each union negotiated their respective CBAs with Garda, and employees participated in the negotiation process. CP 65-66, 82.

following the grievance procedure, the union “*may*, within ten (10) days, proceed to binding arbitration.” *Id.* at \*3 (emphasis added). After his discharge, the plaintiff attempted to proceed to arbitration, but the union refused to arbitrate his claims. *Id.* at \*5.

The court held that because the arbitration provision effectively deprived the plaintiff of any remedy for his statutory claims, it could not be enforced against him. *Id.* at \*5-6. Of critical significance, the court pointed out, was not that the arbitration provision permitted the union to decline to pursue his claims in arbitration, but that the union indeed refused to arbitrate: “I thus conclude that the CBA’s arbitration provision is unenforceable – at least as against Brown – because it gave the Union exclusive authority to decide whether to pursue Brown’s discrimination claims, *and the Union in fact denied Brown the opportunity to pursue those claims.*” *Id.* at \*5 (emphasis added).

Neither *Brown* nor the cases cited therein stands for the proposition that whenever a collective bargaining agreement allows a union to decide whether to pursue a grievance in arbitration, it is *per se* unenforceable. On the contrary, the *Brown* court held that when an agreement “allows the union to block arbitration of its members’ claims, the arbitration clause *may* be unenforceable.” *Id.* at \*4 (emphasis added). To hold otherwise plainly ignores the union’s role as the employees’ exclusive bargaining

representative and would serve to invalidate virtually all grievance/arbitration provisions that unions are charged with enforcing consistent with their duty of fair representation. *See 14 Penn Plaza*, 556 U.S. at 253 (“[T]he Union enjoys broad authority . . . in the . . . administration of [the] collective bargaining contract. . . . But this broad authority is accompanied by a . . . duty of fair representation.”) (citations omitted).

Here, the condition which compelled the *Brown* court to hold that the arbitration clause was enforceable does not exist – there is no evidence that Petitioners attempted to utilize the grievance procedure, let alone that their unions refused to pursue those claims in arbitration. CP 67, 79.

**C. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONERS’ UNCONSCIONABILITY ARGUMENT DID NOT WARRANT DISCRETIONARY REVIEW.**

Petitioners next argue that review is warranted because the Court of Appeals’ decision to deny discretionary review of the Superior Court’s refusal to address their unconscionability argument raises an issue of “substantial public interest” under RAP 13.4(b)(4). Pet. Rev. 15-17. The Court of Appeals’ decision in no way affects the public’s interest. Rather, the holding addresses the specific remedies available to Garda employees under their CBAs, which they ratified following negotiations between Garda and their exclusive bargaining representatives. *See* CP 65-66.

This is a far cry from the types of cases that raise issues of substantial public interest warranting appellate review. *Cf. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (“This case presents a prime example of an issue of substantial public interest. The Court of Appeals’ holding, while affecting parties to this proceeding, also has the potential to affect every [drug offender] sentencing proceeding in Pierce County after November 26, 2001 . . .”).

**D. THE COURT OF APPEALS CORRECTLY FOUND THAT THE PARTIES COULD NOT BE COMPELLED TO ARBITRATE AS A CLASS.**

As a final matter, Petitioners contend the Court of Appeals erred in finding that the parties did not agree to class arbitration. Pet. Rev. 17-20. Again, Petitioners’ arguments are baseless and should be rejected.

**1. *Stolt-Nielsen* controls the result in this case.**

In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1766, 176 L. Ed. 2d 605 (2010), an arbitration panel compelled the parties to submit to class-wide arbitration despite the agreement’s silence as to the handling of class disputes. The Supreme Court reversed the panel, holding that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 1775.

Properly applying *Stolt-Nielsen* to the facts of this case, the Court of Appeals held:

Turning to the arbitration agreements in this case, the contracts here, as in *Stolt-Nielsen*, are silent on the issue of class arbitration. When it compelled the parties to arbitrate on a class-wide basis, the trial court did not ascertain the parties' intent from the language of the agreement. Because no contractual basis existed allowing the court to order class arbitration, the trial court erred by doing so.

*Hill*, 281 P.3d at 341.

**2. The CBAs do not include an implied agreement between the parties to submit to class arbitration.**

Petitioners next contend that the CBAs *implicitly* permit class arbitration. Pet. Rev. 18-19. None of Petitioners' arguments offered in support of this position are valid.

**a. History of class arbitration in labor context**

First, Petitioners argue the Court overlooked the long tradition of class arbitrations arising from collective bargaining agreements. Pet. Rev. 19. Aside from Petitioners' failure to offer even a scintilla of record support in support of this proposition, *see State v. Weber*, 159 Wn. App. 779, 787, 247 P.3d 782 (2011) (“[A] reviewing court must only infer facts that have substantial evidentiary support in the record.”), their argument is squarely foreclosed by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

In *Concepcion*, the Supreme Court rejected the argument that a common practice of parties agreeing to class arbitration is evidence that they did so in the subject contract:

The *Concepcions* contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the *Concepcions* admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.

*Concepcion*, 131 S. Ct. at 1752.

Accordingly, *Concepcion* instructs that even though parties can and do sometimes agree in labor collective bargaining agreements to submit disputes to class arbitration, that fact has no impact on what the parties agreed to in the case at hand.

**b. Arbitrator's decision binding on all parties**

Petitioners next argue that class arbitration can be inferred because the CBAs provide that an arbitrator's decision is "binding upon the grievant *and all parties to this Agreement*." Pet. Rev. 20 (emphasis in original). Petitioners' strained construction of this language is not only illogical, it is irrelevant.

That the arbitrator's decision is binding on "all parties" to the CBA plainly means that the decision is binding *on the union and Garda*, who

are the only “parties” to the CBA. *See* CP 137, 201, 262. It defies logic to infer a “contractual basis” for class arbitration under *Stolt-Nielsen* from this plain language.

Regardless, Petitioners’ argument is irrelevant because, at best, they raise an ambiguity regarding whether or not the CBAs authorize class arbitration. As the Supreme Court’s decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), confirms, the issue of whether the parties agreed to class arbitration is a procedural question for the arbitrator to decide. Thus, if the Court finds that the CBAs are *not* silent on the issue of class arbitration, it must remand the case for the arbitrator to decide the issue.<sup>4</sup>

**c. Deprivation of NLRA rights**

Petitioners finally argue that compelling individual arbitration would effectively deprive them of their substantive rights under the NLRA. Pet. Rev. 20, fn. 14. This argument is mistakenly premised on the NLRB’s decision in *D.R. Horton*, 357 NLRB No. 184, slip op. (2012).

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<sup>4</sup>*Stolt-Nielsen* does not require a contrary result. There, the Court held that class arbitration cannot be compelled where the agreement is silent on the issue. 130 S. Ct. at 1762. Because the parties in that case stipulated that their agreement was silent, it was unnecessary to remand the case to an arbitrator to decide because there could only be “one possible outcome on the facts . . .” *Id.* at 1770. The Court of Appeals in the instant case recognized this concept: “As in *Stolt-Nielsen*, only one possible outcome exists . . .; therefore, we do not remand to either the court or the arbitrator for determination of whether the arbitration agreement allows class arbitration.” *Hill*, 281 P.3d at 341.

In *D.R. Horton*, the Board held that an employer violates the NLRA when it requires employees, as a condition of employment, to sign an agreement precluding them from filing class claims addressing their wages, hours, or other working conditions. Notwithstanding that NLRB decisions are not binding on this Court, *D.R. Horton* undermines, rather than supports, Petitioners' position, because the class waiver found to be unlawful in that case was not in a collective bargaining agreement.

The waiver in *D.R. Horton* was in an arbitration agreement that all employees (unrepresented by a union) were required to execute as a condition of employment. The Board aptly recognized the significance of this distinction: “[F]or purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.” *D.R. Horton*, 357 NLRB at 10.

Consequently, the Board rejected the employer's attempt to rely on *14 Penn Plaza*, 556 U.S. at 255, in which the Supreme Court held that a union, in collective bargaining, may agree to an arbitration clause that waives employees' rights to bring an action in court alleging employment discrimination under Title VII and the ADEA. The Board explained that

the "negotiation of such a waiver stems from an exercise of Section 7 rights: the collective-bargaining process." *D.R. Horton*, 357 NLRB at 10.

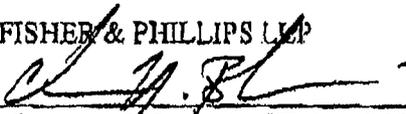
Like the employees in *14 Penn Plaza*, Petitioners exercised their Section 7 rights by agreeing, during the collective bargaining process, to waive the right to have their statutory wage claims heard in a judicial forum. Thus, the NLRB would not find that the class waiver in Petitioners' CBA violates the Act, and neither should this Court.<sup>5</sup>

#### IV. CONCLUSION

For these reasons, the Court should affirm the Court of Appeals' Decision reversing the Superior Court's Order compelling class arbitration and remanding the case for individual arbitration.

Respectfully submitted,

FISHER & PHILLIPS LLP

  
Clarence M. Belnavis, WSBA #36681  
E-mail: cbelnavis@laborlawyers.com  
111 SW Fifth Avenue, Suite 1250  
Portland, Oregon 97204  
Telephone: (503) 242-4262  
Attorney for Respondent

<sup>5</sup>Since *D.R. Horton* was decided, courts have consistently rejected it. See, e.g., *Truby Nolen of America v. The Superior Court of San Diego County*, 208 Cal. App. 4th 487, 514, 145 Cal. Rptr. 3d 432 (2012) ("As have other courts, we find the NLRB's conclusion . . . to be unpersuasive and we decline to follow it."); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1133, 144 Cal. Rptr. 3d 198 (2012) ("For a number of reasons, we decline to follow *Horton* here."); *LaVoie v. UBS Fin. Servs., Inc.*, 11 Civ. 2308, 2012 U.S. Dist. LEXIS, 5277 (S.D.N.Y. Jan. 13, 2012).

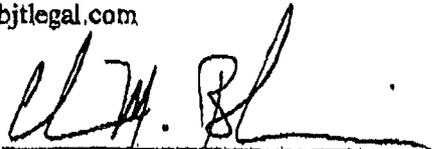
**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 18<sup>th</sup> day of October 2012, I caused a true and correct copy of the:

**Respondent's Answer to Petition for Review**

to be delivered by email to the following:

Daniel F. Johnson  
Breskin Johnson & Townsend  
1111 - 3<sup>rd</sup> Avenue, Suite 2230  
Seattle, Washington 98101-3292  
djohnson@bjtlegal.com



Clarence M. Belnavis, WSBA #36681  
Attorney for Respondent



LARRY LAVOICE, on behalf of himself and all others similarly situated, Plaintiff,  
v. UBS FINANCIAL SERVICES, Inc., UBS AG, Defendants.

11 Civ. 2308

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

2012 U.S. Dist. LEXIS 5277

January 13, 2012, Decided

January 13, 2012, Filed

**COUNSEL:** [\*1] For Larry Lavoice, on behalf of himself and all others similarly situated, Plaintiff: Jeffrey G. Smith, Matthew Moylan Guiney, Robert Abrams, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY.

For UBS Wealth Management Americas, UBS Group, UBS AG, UBS Financial Services, Inc., Defendants: Andrew Jay Schaffran, LEAD ATTORNEY, Michael Jonathan Puma, Sam Scott Shaulson, Morgan, Lewis & Bockius LLP (New York), New York, NY.

**JUDGES:** BARBARA S. JONES, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** BARBARA S. JONES

**OPINION**

Memorandum and Order

**BARBARA S. JONES**  
**UNITED STATES DISTRICT JUDGE**

Plaintiff Larry LaVoice ("LaVoice") was employed as a Financial Advisor for Defendant UBS Financial

Services Inc. ("UBS")<sup>1</sup> from August 2002 to July 2010. LaVoice brings the instant action asserting class and collective action claims for UBS Financial Services, Inc. and UBS AG's (collectively "Defendants") alleged violations of the Fair Labor Standards Act ("FLSA"), the New York State Labor Department's Codes, Rules and Regulations ("NYCRR"), and the New York Labor Law ("NYLL"). In response to LaVoice's Amended Complaint, Defendants have filed the present Motion to Compel Arbitration and to Stay the Action pending the Completion of Arbitration. [\*2] Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, Defendants move on the grounds that, in arbitration agreements signed by LaVoice during the course of his UBS employment, LaVoice agreed to individually arbitrate the claims made in his Amended Complaint. For the reasons discussed, the Court **GRANTS** Defendants' motion.

1 In his Amended Complaint, LaVoice identifies UBS Financial Services, Inc. and UBS AG as Defendants in this action. In their Memorandum of Law in Support of their Motion to Compel Arbitration and Stay this Action, Defendants allege that UBS Financial Services, Inc. was LaVoice's sole UBS employer. Mem. of Law in Support of Mot. to Compel Arbitration at FN1. Defendants therefore argue that UBS Financial Services, Inc. is the only proper defendant in the

instant action. Id. LaVoice does not contest this assertion by Defendants, and his Opposition to Defendant's Motion to Compel Arbitration refers only to "Defendant UBS" and "UBS." Opp'n to Def.'s Mot. to Compel Arbitration. Since neither LaVoice nor Defendants have provided any further information regarding Defendant UBS AG, the Court assumes that Defendants arguments are made on behalf of both named [\*3] Defendants.

### FACTUAL BACKGROUND

To support their argument that LaVoice agreed to limit his claims to arbitration, Defendants rely on several documents. The relevant documents are: (1) UBS' Financial Advisor Compensation Plan ("FA Compensation Plan") for the years 2007 through 2010; (2) an Employee Forgivable Loan Agreement dated August 26, 2002; (3) a Strategic Advance dated April 8, 2009; (4) a 2009 Promissory Note dated April 8, 2009; (5) a GrowthPlus Agreement dated April 30, 2010; and (6) a 2010 Promissory Note dated May 14, 2010.

With respect to the FA Compensation Plans, all of the plans contain the following individual arbitration agreement:

[Y]ou and UBS agree that . . . any disputes between you and UBS including claims concerning compensation, benefits or other terms or conditions of employment and termination of employment . . . or any other claims whether they arise by statute or otherwise, including but not limited to claims arising under the Fair Labor Standards Act . . . or any other federal, state or local employment or discrimination laws, rules or regulations, including wage and hour laws, will be determined by arbitration . . . By agreeing to the terms of this Compensation [\*4] Plan . . ., you waive any right to commence, be a party to or an actual or putative class member of any class or collective action arising out of or relating to your employment with UBS . . .

Decl. of Matthew Levitan, Exh. 1 at p. 19.<sup>2</sup> The 2007 FA Compensation Plan states that the arbitration "will be

determined by arbitration as authorized and governed by the arbitration law of the state of New York." Id., Exh. 4 at p. 26. The 2008, 2009, and 2010 plans are instead governed by the "arbitration law of the state of New Jersey." Id., Exh. 1, 4, 5, and 6. The 2007 and 2009 plans include LaVoice's signature, but the 2008 and 2010 plans provided to the Court are without signature. Id., Exh. 1, 4, 5, and 6.

2 The language quoted is taken from the FA Compensation Plan for 2008, but the FA Compensation Plans for 2007, 2009, and 2010 each contain identical language.

The Loan Agreement, Strategic Advance, Promissory Notes, and GrowthPlus Agreement (collectively the "UBS Loan Agreements") all contain arbitration clauses. Although the exact terms of each clause differ slightly, each clause states that the parties will arbitrate "any disputes . . . including claims concerning compensation, benefits [\*5] or other terms or conditions of employment and termination of employment," as well as, claims arising under "any [] federal state or legal employment or discrimination laws, rules or regulations." Id., Exh. 7, 8, 9, 10, and 11. In addition, the four most recent UBS Loan Agreements (those dated in 2009 and 2010) also include a class and collective action waiver which states that "Employee waives any right to commence, be a party to or an actual or putative class member of any class or collective action arising out of or relating to Employee's employment . . ." Id., Exh. 8, 9, 10, and 11. The 2002 Employee Forgivable Loan Agreement states that any ensuing arbitration will be governed by "the arbitration laws of the state of New York," whereas the later UBS Loan Agreements are governed by New Jersey's arbitration laws. Although the 2002 Employee Forgivable Loan Agreement is unsigned, the remaining UBS Loan Agreements are all signed by LaVoice.

### STANDARD OF REVIEW

"Courts apply a summary judgment standard when evaluating whether to compel arbitration pursuant to the FAA." *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 549 (S.D.N.Y. 2011) (internal citations omitted). A motion to compel [\*6] arbitration may be granted when "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." Id. (citing

*Fed.R.Civ.P. 56(c)*). "A party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) (internal citations omitted). "[W]here [] a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

"Once a court is satisfied that an arbitration agreement is valid and the claim before it is arbitrable, it must stay or dismiss further judicial proceedings and order the parties to arbitrate." *Nunez v. Citibank, N.A.*, No. 08 Cv. 5398, 2009 U.S. Dist. LEXIS 7783, 2009 WL 256107 at \*2 (S.D.N.Y. Feb. 3, 2009) (internal citations omitted).

## **DISCUSSION**

In the instant action, LaVoice asserts causes of action grounded in the FLSA and New York state statutes. As a general matter, when a party bound by an arbitration agreement [\*7] raises a claim founded on statutory rights, a district court must determine: "(1) whether the parties agreed to arbitrate; (2) the scope of that agreement; [and] (3) if federal statutory claims are asserted, whether Congress intended those claims to be nonarbitrable." 2009 U.S. Dist. LEXIS 7783, [WL] at \*3.

With respect to the first prong of the analysis, whether the parties intended to arbitrate, LaVoice has only challenged the existence of an agreement to arbitrate for the year 2008. LaVoice bases this argument on the grounds that UBS has not produced any signed agreement for that year. Since LaVoice does not contest that the 2007 FA Compensation Plan contains an applicable arbitration agreement without temporal limitation, and the Second Circuit has held that in the absence of such a limitation "the relevant inquiry is whether [the party's] claims relate to any obligation or claimed obligation under the [arbitration] agreement, not when they arose," *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Intern., Inc.*, 198 F.3d 88, 99 (2d Cir. 1999), the Court finds LaVoice's arguments regarding his 2008 claims unavailing.

Turning to the second prong of the analysis, the scope of the agreements themselves, [\*8] LaVoice argues that the agreements governed by New Jersey law<sup>3</sup>

cannot be enforced because they are ambiguous. In support of this argument, LaVoice asserts that the class waiver provisions of the relevant agreements contradict the New Jersey Arbitration Act, which encourages class arbitration. The Court disagrees with LaVoice's reading of the agreements and the law of New Jersey.<sup>4</sup> Even if the Court accepts LaVoice's argument that the New Jersey Arbitration Act encourages class arbitration, it does not follow that the Act prohibits arbitration agreements which waive the right to collective relief. The agreements and class waiver provisions at issue are clear on their face. The Court therefore finds that LaVoice has provided insufficient grounds to find that the arbitration agreements between LaVoice and UBS are unenforceable.<sup>5</sup>

3 The 2009 FA Compensation Plan and the 2009 and 2010 UBS Loan Agreements state that they will be governed by the "arbitration law of the state of New Jersey."

4 In a letter brief to the Court, LaVoice cites *Dreyfuss v. eTelecar Global Solutions-U.S., Inc.*, 2008 U.S. Dist. LEXIS 96945 at \*3 (S.D.N.Y. Nov. 19, 2008), in further support of his argument that the agreement [\*9] is unenforceable as ambiguous. The Court finds *Dreyfuss* inapposite to the present case because that case involved an arbitration agreement which was missing several pages, including pages alleged to contain essential terms. LaVoice has also referred the Court to *JetBlue Airways Corp. v. Stephenson*, 88 A.D.3d 567, 931 N.Y.S.2d 284 (N.Y. App. Div. 2011) and *NAACP of Camden County East v. Foulke Management Corp.*, 421 N.J. Super. 404, 24 A.3d 777 (N.J. Super. Ct. App. Div. 2011). The Court does not read either *JetBlue Airways* or *NAACP of Camden County East* as supporting LaVoice's arguments. Both cases involved arbitration agreements which differ significantly from the present case, *JetBlue* involved an agreement without a class waiver provision and the *NAACP* case involved an agreement with "multiple, conflicting, and unclear clauses spanning three different documents." *NAACP of Camden County East v. Foulke Management Corp.*, 421 N.J. Super. at 437. In addition, the *JetBlue* case involved a motion to stay arbitration, whereas the current motion is one to compel arbitration. Given the inapposite facts presented, the Court finds both of these cases unpersuasive for LaVoice's

argument.

5 The Court's position would remain unchanged [\*10] even if LaVoice were to make the argument that the class waiver provisions were unenforceable as a matter of New Jersey Law. The Third Circuit recently held that such arbitration agreements are enforceable in New Jersey even in the face of New Jersey Supreme Court precedent that the class waivers contained therein are unconscionable as a matter of law. See *Litman v. Cellco P'ship*, 655 F.3d 225 (3d Cir. 2011).

Beyond his arguments regarding 2008 and the application of New Jersey law, LaVoice does not otherwise appear to contest that: (1) LaVoice and UBS agreed to arbitrate in the FA Compensation Plans and the UBS Loan Agreements; and (2) the scope of the arbitration agreements captures the FLSA and New York employment claims made in the Amended Complaint. Nor does LaVoice appear to claim that Congress intended for FLSA and state labor law claims to be nonarbitrable.

LaVoice does, however, challenge the essential arbitrability of his claims. Under Section 2 of the FAA, an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Relying on this provision, [\*11] LaVoice's Opposition to the Motion to Compel Arbitration primarily rests on a general argument that, as a result of Section 2's "sav[ing]" clause for agreements unenforceable "upon such grounds as exist at law," his claims are unarbitrable under the FAA. *Id.* Relying on his reading of the Second Circuit's opinion in *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) ("Amex I") as reaffirmed in *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011) ("Amex II"), LaVoice specifically argues that the class waiver provisions contained in the arbitration agreements between LaVoice and UBS are unenforceable. LaVoice therefore argues that, since enforcement of the class waiver provisions would be contrary to the law of this Circuit, his claims are unarbitrable.

In order to commence its analysis, the Court now turns to Amex I and II, as well as, to the recent Supreme Court decision in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

### Amex I and II

In Amex I, the Second Circuit considered the enforcement of a mandatory arbitration clause which forbid the parties to the contract from pursuing anything other than individual claims in the arbitral forum. [\*12] *Amex I*, 554 F.3d at 302.

Plaintiffs in Amex I were merchants who had accepted the Defendant, American Express', charge cards and were forced to agree to accept American Express credit and debit cards. *Id.* at 305. Plaintiffs alleged that American Express had used an illegal "tying arrangement" to compel merchants to accept American Express' revolving credit card products at a rate which vastly exceeded the rate for comparable competitor products. *Id.* at 308. Responding to American Express' motion to compel arbitration, plaintiffs argued that enforcement of the class action waiver incorporated in the arbitration agreement between the parties would effectively strip them of their ability to assert claims. *Id.* In support of this argument, plaintiffs asserted that the discovery costs associated with pursuing an individual claim would amount to hundreds of thousands of dollars, whereas the average damages sought by each plaintiff was only \$5000. *Id.*

Deciding the motion to compel, the district court held that "the enforceability of the collective action waivers is a claim for the arbitrator to resolve" and concluded that all of the plaintiffs' substantive antitrust claims were subject to arbitration. [\*13] *Id.* at 309.

Reversing the decision of the district court, the Second Circuit Court of Appeals first held that the district court erred in holding that the question of the class action waiver's enforceability was a matter for the arbitrator. *Id.* at 310-11. The Second Circuit then proceeded to consider the enforceability of the class action waiver contained in the arbitration agreement between the parties. *Id.* After finding that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, the party bears the burden of showing the likelihood of incurring such costs," *Id.* at 315 (citing *Randolph*, 531 U.S. at 92), the Second Circuit went on to hold that "plaintiffs here have [] demonstrated that their antitrust claims against Amex can, for all intents and purposes, only be pursued through the aggregation of individual claims, either in class action litigation or in class arbitration," *Id.* at 317. The Second Circuit therefore ultimately held that "the class action

waiver in the Card Acceptance Agreement [arbitration agreement between the parties] cannot be enforced in this case because to do so would grant Amex de facto immunity [\*14] from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." *Id.* at 320.

Subsequent to the Second Circuit's decision in Amex I, the Supreme Court decided *Stolt-Nielsen S.A. et al., v. Animal Feeds International Corp.*, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). In *Stolt-Nielsen*, the Supreme Court vacated a Second Circuit decision and held that a panel of arbitrators could not compel class arbitration when the arbitration agreement was silent on the issue and the parties had stipulated that there was no agreement on this question. *Id.* at 1776. Weighing into the Supreme Court's decision was its view that "the arbitration panel [had] imposed its own policy choice and thus exceeded its powers." *Id.* at 1770. Following its decision in *Stolt-Nielsen*, the Supreme Court granted Defendant American Express' writ for certiorari, vacating and remanding to the Second Circuit for reconsideration in light of its recent decision.

Once the Amex I case returned to it from the Supreme Court, the Second Circuit again considered in Amex II the question that had been presented for its consideration in Amex I: "whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable [\*15] even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity." *Amex II*, 634 F.3d at 196. Disagreeing with the Defendant that *Stolt-Nielsen* compelled a different result, the Second Circuit reaffirmed its earlier decision in Amex I and held in Amex II that the arbitration agreement was unenforceable because "the class action waiver in this case precludes plaintiffs from enforcing their statutory rights." *Id.* at 199.

#### AT&T Mobility

Since the Second Circuit issued its opinion in Amex II, and prior to Defendants filing their present Motion to Compel Arbitration, the Supreme Court re-examined the question of class action waivers in an arbitration context in the case *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) ("AT&T Mobility"). Plaintiffs in *AT&T Mobility* were individual cell phone customers who argued that, because the class waiver

provision contained in their arbitration agreement was unconscionable under California law, their claims were unarbitrable under Section 2 of the FAA. *Id.* at 1746.<sup>6</sup> The Ninth Circuit had affirmed [\*16] the district court's denial of the motion to compel arbitration on the grounds that the class waiver provision was unconscionable under California law as announced in the California Supreme Court's decision in *Discover Bank v. Superior Court. Laster v. AT&T Mobility LLC*, 584 F.3d 849, 853-55 (9th Cir. 2009) (internal citations omitted).

6 As a result of the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005), California applies the following framework to class action waivers in arbitration agreements. "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then. . . the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Id.* at 162.

Writing [\*17] the majority opinion for the court, Justice Scalia noted that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility*, 131 S. Ct. at 1747. Justice Scalia observed, however, that *AT&T Mobility* presented a case where "the inquiry becomes more complex" because it involves "a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, [that] is alleged to have been applied in a fashion that disfavors arbitration." *Id.*

Analyzing the goals of the statute, the Supreme Court first determined that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748. The Supreme Court further defined the principal objective of the FAA as "ensur[ing]

that private arbitration agreements are enforced according to their terms." *Id.* With this view of the FAA in mind, the Supreme Court therefore overturned the Ninth Circuit's decision to deny the motion to compel and held [\*18] that "[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's Discover Bank rule is preempted by the FAA." *Id.* at 1753. In reaching its decision, the Supreme Court held both that "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," *Id.* at 1748, and that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

### Analysis

Turning now to the present action, the Court finds that LaVoice has provided insufficient evidence to support a finding that his claims are unarbitrable under the FAA. Although Defendants argue in the first instance that the Second Circuit's Amex I and II decisions do not survive the Supreme Court's decision in AT&T Mobility, the Court need not reach the question of whether the Second Circuit's Amex holding has been overturned by AT&T Mobility because it finds that LaVoice's claims are arbitrable under both decisions.<sup>7</sup>

<sup>7</sup> The Court notes that an interlocutory appeal to the Second Circuit has been certified in *D'Antuono, et al. v. Serv. Rd. Corp, et al., No. 3:11cv33, 2011 U.S. Dist. LEXIS 60721 (D. Conn. June 7, 2011)* [\*19]. The appeal seeks for the %Circuit to respond precisely to the question of whether Amex II remains good law in light of the Supreme Court's decision in AT&T Mobility.

### **Absolute Rights to Collective Action under the FAA**

In his opposition, LaVoice makes the argument that the "FLSA cannot be gutted by the FAA." Pl. Mem. of Law in Opp'n to Def.'s Mot. to Compel Arbitration at 22. This argument effectively suggests that the FLSA "guarantees the right ' to-collective action" which cannot be "lawfully waived in a non-negotiated arbitration agreement, or at all," *Id.* The Court finds this argument, which assumes that a collective action requirement can be consistent with the FAA, precluded in light of the Supreme Court's decision in AT&T Mobility. Given that the Supreme Court held in AT&T Mobility that

"[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," this Court must read AT&T Mobility as standing against any argument that an absolute right to collective action is consistent with the [\*20] FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility, 131 S. Ct. at 1748.* To the extent that LaVoice relies on the decision in *Raniere, et al. v. Citigroup, Inc., 827 F. Supp. 2d 294, 2011 U.S. Dist. LEXIS 135393 (Nov. 22, 2011, S.D.N.Y.)* or the recent decision of the National Labor Relations Board ("NLRB") in *D.R. Horton, Inc. and Michael Cuda, Case 12-CA-25764, 2012 NLRB LEXIS 11, January 3, 2012*, as authority to support a conflicting reading of AT&T Mobility, this Court declines to follow these decisions.

### **Preclusion of Statutory Rights**

In addition to arguing that the FLSA creates an unwaivable right to collective action, LaVoice also argues that the arbitration agreements between him and UBS are unenforceable because they would preclude him from exercising his statutory rights. To support this position, LaVoice likens the class waivers in the instant case with those that were found unenforceable in the Amex line of cases. LaVoice also draws comparison between his circumstances and those of the plaintiff in *Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547 (S.D.N.Y. 2011)*.

The enforceability of a class action [\*21] waiver in an arbitration agreement must be considered on a case-by-case basis "on its own merits, governed with a healthy regard for the fact that the FAA is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Amex II, 634 F.3d at 199.* Turning to the class waiver at issue and LaVoice's specific circumstances, this Court finds that the "practical effect of enforcement of the waiver" in the instant case would not "preclude" LaVoice from exercising his rights under the statutes. *Id.* at 196. The Court comes to its finding that LaVoice's statutory rights will not be precluded by enforcement of the class waiver after reviewing his submissions regarding: his estimated damages claim, his estimated attorneys' fees, his estimated expert fees, his disinclination to pursue his claims individually, his counsel's disinclination to pursue the claims individually, and his likelihood of success at arbitration.

Although LaVoice and Defendants contest the value of LaVoice's overtime claim, in reaching its decision, the Court accepts the figure cited in LaVoice's own opposition papers of overtime claims between \$127,000 to \$132,000. *Aff. Jeffrey G. Smith in Supp. of* [\*22] *Opp'n. to Mot. to Compel Arbitration at* ¶ 5. Assuming this self-reported value of claims, the Court finds that LaVoice's circumstances differ drastically on their face from those of the plaintiffs in either the Amex line of cases or Sutherland. Plaintiffs in those cases could each only claim *de minimus* damages of less than \$6000.<sup>8</sup>

<sup>8</sup> Plaintiffs in Amex I and II claimed median damages of \$5,252 with treble damages. *Amex I, 554 F.3d at 317*. Plaintiff in Sutherland claimed damages of \$3,734.04 with liquidated damages. *Sutherland, 768 F. Supp. 2d at 551*.

With respect to the estimated attorneys' fees, the Court finds that, unlike the arbitration agreement at issue in Sutherland, the arbitration agreements at issue in the instant case would permit LaVoice to recover an award of attorneys' fees. Since the agreements authorize the arbitrator(s) to "award whatever remedies would be available to the parties in a court of law" and awards of attorneys' fees are mandatory for the prevailing party under the FLSA, the agreements themselves create no impediment to LaVoice's recovery of fees. See Ex. 6 to Decl. of Matthew Levitan at 20; Ex. 10 to Decl. of Matthew Levitan at 3; and 29 U.S.C. § 216(b) ("The [\*23] court in such action shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.") The instant case is therefore distinguishable from Sutherland and its consideration of attorneys' fees in determining whether plaintiff's claims were unarbitrable. See also *Banus v. Citigroup Global Mkts., Inc., No. 09-7128, 2010 U.S. Dist. LEXIS 40072, 2010 WL 1643780, at \*10 n.61 (S.D.N.Y. Apr. 23, 2010)* (enforcing class action waiver in arbitration agreement where plaintiff's estimated recovery was \$45,675.36 and attorney's fees would be "at least \$100,000.")

Turning to LaVoice's estimated expert costs, the Court finds that these estimated costs are "too speculative to justify the invalidation of an arbitration agreement." *Randolph, 531 U.S. at 91*. Two factors figure prominently in the Court's finding that the proposed costs are speculative: (1) LaVoice concedes that he cannot be certain that he will utilize an expert witness, Pl's Mem. of Law in Opp'n. to Def.'s Mot. to Compel Arbitration at 5;

and (2) whether LaVoice's expert's testimony would even be admissible remains unclear to the Court.

With respect to the second factor, LaVoice states that his expert's testimony will be used to rebut [\*24] the affirmative defense that LaVoice is exempt from the FLSA and New York state law under the "administrative" and "professional" exemptions of both laws. In support, LaVoice's expert states that he has been asked by counsel to "clarify the difference between financial or investment advisors . . . from stock or investment brokers." *Aff. Of James L. Bicksler in Supp. of Opp. to Mot. to Compel Arbitration at* ¶ 7. LaVoice has provided no guidance to the Court, however, for how this testimony relates to determining whether either the "administrative" or "professional" FLSA exemption applies.<sup>9</sup> This lack of clarity, coupled with LaVoice's uncertainty as to whether he would even seek to introduce the expert's testimony, leads the Court to find that the estimated expert costs are insufficient to support a finding that the arbitration agreements are unenforceable.

<sup>9</sup> In order to determine whether an exemption to the FLSA applies, the Court looks first to the activities of the employee, and then to whether those activities exempt the employee from FLSA requirements. See *Mota v. Imperial Parking Sys., No. 08-Civ-9526, 2010 U.S. Dist. LEXIS 87593, 2010 WL 3377497, at \*2-3 (S.D.N.Y. Aug. 24, 2010)*. The first question as to activities [\*25] of the employee is "a question of fact," while the second question of whether his particular activities excluded him from the benefits of the FLSA "is a question of law." *2010 U.S. Dist. LEXIS 87593, [WL] at \*3*.

On the issue of both LaVoice and his counsel's professed disinclination to pursue LaVoice's claims individually, the Court finds no legal basis for giving weight to these statements. LaVoice has cited to no authority to support any argument that the Court should give consideration to his and counsel's unwillingness to pursue his claims in the absence of a class, and particularly given the real damages at issue, the Court cannot help but find LaVoice and counsel's statements to be self-serving and irrelevant.

Finally, in an apparent attempt to minimize the Court's valuation of his claims, LaVoice argues that the Court should take into account his probability of success and reduce any estimate of his maximum damages by as

much as 90%. Pl. Sur. Mem. of Law in Opp'n. to Defs. Mot. to Compel Arbitration at 5. In support of this argument, LaVoice relies upon dicta from Amex I which states that "[e]ven with respect to reasonable attorney's fees . . . the plaintiffs must include the risk of losing, and thereby not [\*26] recovering any fees, in their evaluation of their suit's potential costs." *554 F.3d at 318*. The Court finds LaVoice's arguments entirely unpersuasive. As an initial matter, the Amex decisions themselves did not adopt the type of probability offset proposed by LaVoice, and LaVoice has cited to no other authority which would support such an approach. Secondly, even if the Court were to accept LaVoice's argument that Amex I requires courts to consider "risk of losing" as a factor in evaluating the enforceability of an arbitration agreement's terms, LaVoice has provided no support for why his proposed 10% probability of success is anything more than pure speculation.

In light of the foregoing, the Court finds that LaVoice has not met his "burden of showing the likelihood of incurring" such "prohibitively expensive" costs such that the class waiver provisions in the instant action would preclude him from bringing his claims

against Defendants in an individual or collective capacity. *Amex II, 634 F.3d at 197* (citing *Randolph, 531 U.S. at 92.*)

#### **CONCLUSION**

For [\*27] the reasons discussed, the Court GRANTS Defendants' Motion to Compel Arbitration and Stay the Action pending the completion of arbitration.

The Clerk of the Court is directed to terminate motion #10 from the ECF docket.

**SO ORDERED:**

/s/ Barbara S. Jones

**BARBARA S. JONES**

**UNITED STATES DISTRICT JUDGE**

Dated: New York, New York

January 13, 2012



**CHRISTOPHER BROWN, Plaintiff - versus - SERVICES FOR THE  
UNDERSERVED, Defendant.**

12-CV-317

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW  
YORK**

*2012 U.S. Dist. LEXIS 106207*

**July 31, 2012, Decided  
July 31, 2012, Filed**

**NOTICE:** FOR ELECTRONIC PUBLICATION  
ONLY

**PRIOR HISTORY:** *Brown v. Servs. for the  
Underserved*, 2012 U.S. Dist. LEXIS 12807 (E.D.N.Y.,  
Feb. 2, 2012)

**COUNSEL:** [\*1] CHRISTOPHER BROWN, Plaintiff,  
Pro se, Staten Island, New York.

For Defendant: Stefanie Robin Munsky, CLIFTON  
BUDD & DEMARIA, LLP, New York, New York.

**JUDGES:** JOHN GLEESON, United States District  
Judge.

**OPINION BY:** JOHN GLEESON

**OPINION**

**MEMORANDUM AND ORDER**

JOHN GLEESON, United States District Judge:

On January 18, 2012, Christopher Brown,  
proceeding *pro se*, filed an *in forma pauperis* ("IFP")  
action against Services for the Underserved ("SUS"),  
alleging gender discrimination under Title VII of the

Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e  
*et seq.* By Order dated February 2, 2012, I *sua sponte*  
dismissed the complaint without prejudice for failure to  
state a plausible claim, pursuant to 28 U.S.C. §  
1915(e)(2)(B), and granted 30 days' leave to replead. On  
March 2, 2012, Brown filed an amended complaint, and I  
granted IFP status. SUS now moves to compel arbitration  
or, in the alternative, to dismiss the amended complaint.  
For the reasons that follow, I deny the motion to compel  
arbitration and grant the motion to dismiss.

**BACKGROUND**

According to the amended complaint, Brown began  
his employment with SUS in January of 2009. Am.  
Compl. at 4. Brown served as a case manager in a SUS  
residential program for clients [\*2] with mental health  
needs. *Id.* at 4, 6. Brown was a model employee and, for  
the first several months after he was hired, received high  
performance reviews. *Id.* at 4, 8-12. However, during a  
staff meeting in October of 2009, he questioned his  
supervisor, Residential Director Jeanette Donaldson,  
about imposing a curfew for the residents. *Id.* at 6. After  
that incident, Brown became the subject of a series of  
increasingly severe disciplinary actions, including  
write-ups and, ultimately, termination. *Id.* at 6-7, 13-15.

The discipline to which Brown was subject was  
unjustified, and female employees who performed in

ways similar to Brown were not disciplined. *Id.* at 6-7. For example, shortly after the staff-meeting dispute, Donaldson issued Brown a write-up for improper client documentation. *Id.* at 6-7, 13. However, Donaldson did not discipline female employees who also failed to maintain proper client documentation. *Id.* at 6-7. Brown was ultimately terminated on May 24 or 28, 2010, for psychologically abusing a resident. *Id.* at 7, 20-21. He contends that SUS discharged him because of his gender and retaliated against him in violation of Title VII.

## DISCUSSION

### A. *The Motion to Compel Arbitration*

SUS [\*3] moves to dismiss for lack of subject matter jurisdiction on the ground that Brown agreed to arbitrate his discrimination claims. I construe SUS's motion as a motion to compel arbitration.

During his employment with SUS, Brown was a member of the United Service Workers Union (the "Union"), which signed a collective bargaining agreement ("CBA") with SUS. Under the CBA, the Union agreed to arbitrate discrimination claims that arose in the workplace. Specifically, Article 19A of the CBA states:

MANDATORY ARBITRATION OF ALL CLAIMS 1. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, retaliation, whistleblowing, or any characteristic protected by law, including, but not limited to claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, *New York Labor Law* § 740 or 741, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure set out in Article 8 of this Agreement [\*4] as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in

rendering decisions based upon claims covered by this section

Munsky Aff. Ex. D, at 14, ECF No. 21. Article 8 of the CBA, in turn, outlines the three-step grievance procedure for disputes that arise between SUS and members of the Union. *Id.* at 8. At each of the three steps, a representative of the Union meets with a supervisor or manager at SUS to try to resolve the matter informally. If the dispute is not resolved through this process, "the Union may, within ten (10) days, proceed to binding arbitration." *Id.*

SUS contends that Brown's discrimination claims are subject to mandatory arbitration in light of the express language in the CBA. Under the Federal Arbitration Act, private agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, when a contract "clearly and unmistakably" requires the parties to arbitrate a dispute, courts will enforce that arbitration agreement. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). This is true even when the dispute arises from a [\*5] right created by statute, unless Congress has expressly determined that a judicial forum must be available to secure that right. *Id.* at 257-58.

The Supreme Court has left open one potential exception to this rule: When a CBA contains a mandatory arbitration clause for claims that vindicate statute-based rights and the CBA also allows the union to block arbitration of its members' claims, the arbitration clause may be unenforceable. *See id.* at 273-74. This is because such a CBA arguably extinguishes its members' statutory rights by denying them the unfettered ability to seek *any* remedy -- either judicial or arbitral -- for a violation of those rights. And an agreement to extinguish a party's statutory civil rights is unenforceable; parties cannot overcome Congress's express intention -- here, to ensure that the workplace is free from discrimination -- by private accord. *Id.* at 273.

Several district courts have adopted this reasoning and invalidated arbitration clauses when unions have prevented their members from arbitrating statutory discrimination claims. *See, e.g., de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, No. 09 Civ. 6194, 2010 U.S. Dist. LEXIS 84885, 2010 WL 3291810

(S.D.N.Y. Aug. 12, 2010); [\*6] *Kravar v. Triangle Servs., Inc.*, No. 06 Civ. 7858, 2009 U.S. Dist. LEXIS 42944, 2009 WL 1392595 (S.D.N.Y. May 19, 2009). For example, in *Kravar v. Triangle Services, Inc.*, 2009 U.S. Dist. LEXIS 42944, 2009 WL 1392595, the plaintiff filed suit against her employer for retaliation and discrimination on the basis of national origin and disability, in violation of federal and local antidiscrimination laws. 2009 U.S. Dist. LEXIS 42944, [WL] at \*1. Although the plaintiff's CBA included an arbitration clause that expressly applied to her discrimination claims, she lacked the "unfettered right to demand arbitration" because the Union had the authority to prevent her from pursuing a claim for arbitration. 2009 U.S. Dist. LEXIS 42944, [WL] at \*1-2. The court held that because the plaintiff's union precluded her from arbitrating her discrimination claims, the CBA's arbitration provision could not be enforced against her. 2009 U.S. Dist. LEXIS 42944, [WL] at \*3. Although the employer argued that it was willing to arbitrate notwithstanding any refusal by the union, the court reasoned that this "confuse[d] the issue." 2009 U.S. Dist. LEXIS 42944, [WL] at \*4. The "arbitration provision that the Court must enforce is the one the union and the [employer] entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical." *Id.*

I agree [\*7] with and adopt the *Kravar* court's reasoning. Thus, although I agree with SUS that the arbitration clause at issue extends to Brown's claims -- the CBA specifically commits Title VII claims to arbitration -- I find the arbitration clause invalid because it impermissibly operated as a waiver of Brown's statutory antidiscrimination rights.

The CBA states that "if a dispute is not resolved, *the Union may*, within ten (10) days, proceed to binding arbitration." Munsky Aff. Ex. D. at 8 (emphasis added). The CBA does not contain a provision allowing members to proceed with arbitration without support from the Union. Brown attempted to proceed to arbitration regarding his discharge, but the Union refused to bring his claims to arbitration. Indeed, in a letter to Brown, the Union stated that it would "take no further action" because, "[a]fter consultation with [its] counsel," it "determined that it [could] not prevail in an arbitration contesting [Brown's] separation from employment." Pl. Aff. App. 5, ECF No. 26. I thus conclude that the CBA's arbitration provision is unenforceable--at least as against

Brown--because it gave the Union exclusive authority to decide whether to pursue Brown's discrimination [\*8] claims, and the Union in fact denied Brown the opportunity to pursue those claims.<sup>1</sup> Because the arbitration clause has effectively deprived Brown of any remedy for his statutory discrimination claims, it is invalid, and I decline to compel arbitration.

I Although SUS appears to acknowledge that Brown attempted to pursue arbitration regarding his discharge generally and was blocked by the Union, SUS contends that Brown did not inform the Union that his specific complaint regarding his discharge was discrimination. However, Brown submitted an affidavit in which he states, "I had informed my union rep[resentative] that as the only male on the night shift[,] I was being subjected to unfair practices while the other two employees, both female[, were] never written up or reprimanded." Pl. Aff. ¶ 4. SUS does not contradict this representation, and I conclude that Brown attempted to grieve and bring to arbitration his discrimination claims. *See Kravar*, 2009 U.S. Dist. LEXIS 42944, 2009 WL 1392595, at \*3 (finding that plaintiff's sworn declaration demonstrated that she was precluded from arbitrating her discrimination claims).

#### B. *The Motion to Dismiss*

Defendants ask that, if I do not compel arbitration, I dismiss the amended [\*9] complaint because Brown failed to exhaust his administrative remedies. On a motion to dismiss, the Court accepts the complaint's factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995).

Before bringing suit in federal court under Title VII, an individual must timely file a charge with the Equal Employment Opportunity Commission ("EEOC") and obtain a right-to-sue letter. *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001). Such timely "[e]xhaustion of administrative remedies through the EEOC is 'an essential element' of the Title VII . . . statutory scheme[] and . . . a precondition to bringing such claims in federal court." *Id.* (quoting *Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000)); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). In order to timely exhaust administrative remedies, a "Title

VII plaintiff must file a charge with the EEOC within 180 days of the violation or, where the plaintiff first files with a state or local equal employment agency, within 300 days of the violation." *Gomes v. Avco Corp.*, 964 F.2d 1330, 1332-33 (2d Cir. 1992); [\*10] 42 U.S.C. § 2000e-5(e).

Here, Brown alleges that the last discriminatory act committed by SUS occurred on May 24 or May 28, 2010, when he was fired. Am. Compl. at 20-21. However, Brown did not file his charge with the New York equal employment agency (the New York State Division of Human Rights) or the EEOC until April 6, 2011, more than 300 days after he was fired. *Id.* at 4, 21-26. Because Brown's EEOC charge was not timely filed, his Title VII claims are administratively unexhausted. There is no basis for equitable tolling, and his claims are therefore dismissed.<sup>2</sup>

2 SUS also alleges that Brown's discrimination claims are implausible on their face and asks that I dismiss the amended complaint on that basis. Because I dismiss on exhaustion grounds, I need not and do not consider the plausibility of the claims.

#### CONCLUSION

For the reasons set forth herein, the motion to compel is denied and the motion to dismiss is granted.

So ordered.

John Gleeson, U.S.D.J.

Dated: July 31, 2012

Brooklyn, New York

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**Subject:** Lawrence Hill, et al. v. Garda CL Northwest, Inc., Supreme Court Case No. 87877-3 - Respondent's Answer to Petition for Review

Dear Clerk of the Court,

Attached please find Respondent's Answer to Petition for Review in the above-referenced matter.

Sincerely,

**Danielle Cerdas**

Legal Secretary  
Suite 1250  
111 SW Fifth Avenue  
Portland, OR 97204

Tel: (503) 205-8060 E-mail: [dcerdas@laborlawyers.com](mailto:dcerdas@laborlawyers.com)

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