UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D.R. HORTON, INC.	*	
	*	
and	*	Case 12-CA-25764
	*	
MICHAEL CUDA,	*	
an Individual	*	
	*	

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 5

IN CONSTRUING SECTION 8(a)(1), THE BOARD SHOULD CAREFULLY ACCOMMODATE THE CRITICAL ROLE THAT CLASS OR COLLECTIVE ACTIONS PLAY IN LAWS ADMINISTERED BY THE SECRETARY OF LABOR AND THE EEOC 5

I. When an Employee Cannot Effectively Vindicate His or Her Federal Statutory Rights Without Using a Class or Collective Action, a Class Action Waiver in a Mandatory Arbitration Agreement is Impermissible as a Matter of Federal Law 5

A. Class or collective actions are critical to enforcement of laws administered by the Secretary of Labor and the EEOC 5

B. Mandatory arbitration of these statutory claims is permissible only when the employee can effectively vindicate his or her statutory rights 10

C. A class or collective action waiver in a mandatory arbitration agreement is unenforceable when it prevents an employee from effectively vindicating his or her statutory rights 12

II. The Position Advanced in This Brief is Consistent With Supreme Court and Court of Appeals Decisions 16

A. The position is consistent with *Gilmer* and court of appeals decisions 16

B. The position is consistent with *AT&T Mobility v. Concepcion* 18

CONCLUSION 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases: Page

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 11

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 11,17,18

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 7

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 8

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997) 7

Ansoumana v. Gristede's Operating Corp.,
201 F.R.D. 81 (S.D.N.Y. 2001) 15

AT&T Mobility v. Concepcion,
131 S. Ct. 1740 (2011) 4,5,16,18,19,20

Awuah v. Coverall N. Am., Inc.,
554 F.3d 7 (1st Cir. 2009) 15

Bailey v. Ameriquest Mrtg. Corp.,
346 F.3d 821 (8th Cir. 2003) 11

Booker v. Robert Half Int'l, Inc.,
413 F.3d 77 (D.C. Cir. 2005) 11

Brooklyn Sav. Bank v. O'Neil,
324 U.S. 697 (1945) 6

Caley v. Gulfstream Aerospace Corp.,
428 F.3d 1359 (11th Cir. 2005) 11,17,18

Califano v. Yamasaki,
442 U.S. 682 (1979) 10

Carter v. Countrywide Credit Indus., Inc.,
362 F.3d 294 (5th Cir. 2004) 11,17,18

Cases--continued: Page

Chen-Oster v. Goldman, Sachs & Co.,
___ F. Supp. 2d ___, No. 10-6950,
2011 WL 1795297 (S.D.N.Y. Apr. 28, 2011),
reconsideration denied, 2011 WL 2671813
(S.D.N.Y. July 7, 2011) 13,14,15,20,21

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 8

D.R. Horton, Inc. v. Cuda,
No. 12-CA-25764, 2011 WL 11194 (ALJ Jan. 3, 2011) 2,3,4

D'Antuono v. Service Road Corp.,
___ F. Supp. 2d ____, No. 3:11cv33(MRK),
2011 WL 2175932 (D. Conn. May 25, 2011),
petition for permission to appeal filed,
No. 11-2451 (2d Cir. June 17, 2011) 16

Daugherty v. Encana Oil & Gas (USA), Inc.,
No. 10-cv-02272, 2011 WL 2791338 (D. Colo. July 15, 2011) 11,20

Delise v. Federal Express Corp.,
No. 99 C 4526, 2001 WL 321081 (N.D. Ill. Mar. 30, 2001) 9

Dernovish v. AT&T Operations, Inc.,
720 F. Supp. 2d 1085 (W.D. Mo. 2010) 7

Ebbert v. Nassau County,
No. 05-CV-5445, 2007 WL 2295581 (E.D.N.Y. Aug. 9, 2007) 9

EEOC v. Associated Dry Goods Corp.,
449 U.S. 590 (1981) 8

Fast v. Applebee's Int'l, Inc.,
638 F.3d 872 (8th Cir. 2011) 6

General Tel. Co. of Sw. v. Falcon,
457 U.S. 147 (1982) 9

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 4,10,11,16,17,18

Gold v. Deutsche Aktiengesellschaft,
365 F.3d 144 (2d Cir. 2004) 11

Cases--continued: Page

Green Tree Fin. Corp. v. Randolph,
531 U.S. 79 (2000) 11

Henderson v. Holiday CVS, LLC,
No. 09-80909-CIV, 2010 WL 1854111 (S.D. Fla. May 11, 2010) 7

Hendricks-Robinson v. Excel Corp.,
164 F.R.D. 667 (C.D. Ill. 1996) 9

Hoffman-LaRoche Inc. v. Sperling,
493 U.S. 165 (1989) 6,9

Horenstein v. Mortgage Mkt., Inc.,
9 Fed. Appx. 618, 2001 WL 502010 (9th Cir. 2001) (unpub'd) 17,18

In re Am. Express Merchs. Litig.,
634 F.3d 187 (2d Cir. 2011) 17,18

In re Novartis Wage & Hour Litig.,
611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011) 6-7

International Bhd. of Elec. Workers, Local 48,
332 N.L.R.B. 1492 (2000), *aff'd*, 345 F.3d 1049 (9th Cir. 2003) 2

International Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 7

Latino Police Officers Ass'n v. City of New York,
209 F.R.D. 79 (S.D.N.Y. 2002) 8

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995) 7,8

Metz v. Joe Rizza Imports, Inc.,
700 F. Supp. 2d 983 (N.D. Ill. 2010) 9

Morrison v. Circuit City Stores, Inc.,
317 F.3d 646 (6th Cir. 2003) (en banc) 11

Robinson v. Metro North Commuter R.R. Co.,
267 F.3d 147 (2d Cir. 2001) 10

Sandoz v. Cingular Wireless LLC,
553 F.3d 913 (5th Cir. 2008) 6

Cases--continued: Page

Skirchak v. Dynamics Research Corp.,
508 F.3d 49 (1st Cir. 2007) 18

Southern S.S. Co. v. NLRB,
316 U.S. 31 (1942) 2

Sutherland v. Ernst & Young LLP,
768 F. Supp. 2d 547 (S.D.N.Y. 2011) 12,13,14,16,20,21

Thiessen v. General Elec. Capital Corp.,
267 F.3d 1095 (10th Cir. 2001) 9

Tony & Susan Alamo Found. v. Secretary of Labor,
471 U.S. 290 (1985) 6

Veliz v. Cintas Corp.,
No. C03-1180 RGS SBA, 2009 WL 1766691
(N.D. Cal. June 22, 2009) 7

Wilfong v. Rent-A-Center, Inc.,
No. 00-680, 2001 WL 1728985 (S.D. Ill. Dec. 27, 2001) 8-9

Williams v. Securitas Sec. Servs. USA, Inc.,
No. 10-7181, 2011 WL 2713741 (E.D. Pa. July 13, 2011) 20

Statutes:

Age Discrimination in Employment Act,
29 U.S.C. 621 *et seq* 5

Americans with Disabilities Act,
42 U.S.C. 12101 *et seq.* 5

Fair Labor Standards Act of 1938,
29 U.S.C. 201 *et seq.*:

Section 6(a), 29 U.S.C. 206(a) 5

Section 6(d), 29 U.S.C. 206(d) 5

Section 7(a), 29 U.S.C. 207(a) 5

Section 13(a)(1), 29 U.S.C. 213(a)(1) 14

Statutes--continued: Page

Section 16(b), 29 U.S.C. 216(b) 6,20

Section 16(c), 29 U.S.C. 216(c) 6

Section 17, 29 U.S.C. 217 6

Federal Arbitration Act,
9 U.S.C. 1 *et seq.*:

9 U.S.C. 2 18,19

National Labor Relations Act,
29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 1,2,3,4,5,22

Section 8(a)(4), 29 U.S.C. 158(a)(4) 3,4

Portal-to-Portal Act of 1947,
29 U.S.C. 251 *et seq.*:

Section 11, 29 U.S.C. 260 6

Title VII of the Civil Rights Act,
42 U.S.C. 2000e *et seq.* 5

Rules:

Fed. R. Civ. P. 23 ..... **6,8,**10

Fed. R. Civ. P. 23(b)(3) 1 fn.1,6

7B Charles A. Wright, Arthur R. Miller & Mary K. Kane,
Federal Practice & Procedure § 1807 (3d ed. 2005) 1 fn.1

Regulations:

29 C.F.R. pt. 541 14

Miscellaneous:

2 Alba Conte & Herbert Newberg,
Newberg on Class Actions (4th ed. 2002).....10

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Newberg on Class Actions (4th ed. 2002).....9,10

Jan Michelsen, *A Class Act: Forces of Increased Awareness, Expanded Remedies, and Procedural Strategy Converge to Combat Hostile Workplace Environments*, 27 Ind. L. Rev. 607 (1994).....10

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U.S. Dep't of Labor, Employment Standards Admin., Wage & Hour Div., *Wage and Hour Collects Over $1.4 Billion in Back Wages for Over 2 Million Employees Since Fiscal Year 2001* (Dec. 2008), available at http://www.dol.gov/whd/statistics/2008FiscalYear.pdf) 14

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BRIEF FOR THE SECRETARY OF LABOR AND THE
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Introduction

Employees in this case attempted to collectively arbitrate claims that their employer misclassified them as exempt from overtime pay under the Fair Labor Standards Act (FLSA), a statute administered by the Secretary of Labor. The employer sought to enforce a provision in the mandatory arbitration agreement that prevents class or collective actions.[1] The Board's General Counsel filed a complaint alleging, among other things, that by maintaining and enforcing the agreement the employer interfered with the employees' right under the National Labor Relations Act (NLRA) to engage in concerted activity. On June 16, 2011, the Board invited interested amici to file briefs addressing the following question:

> Whether an employer violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by enforcing a mutual arbitration agreement that requires employees to agree to submit all employment disputes to individual

[1] A "class action" under the FLSA is called a "collective action" because employees must opt into the lawsuit, while individuals are members of a class under Fed. R. Civ. P. 23(b)(3) unless they opt out of it. *See* 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1807 at 468 (3d ed. 2005), for a discussion of the differences between collective and class actions.

> arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action.

The Secretary of Labor and the Equal Employment Opportunity Commission (EEOC) submit this amicus brief to inform the Board of the critical role that collective or class actions play in the enforcement of statutes they administer. The Secretary and the EEOC will additionally explain why waivers of collective or class actions in mandatory arbitration agreements are unenforceable when they interfere with an employee's ability to vindicate his or her statutory rights. This information may assist the Board in addressing the Section 8(a)(1) issue in this case because the Board has recognized that in interpreting the NLRA,

> "the Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

International Bhd. of Elec. Workers, Local 48, 332 N.L.R.B. 1492, 1501 (2000) (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)), *aff'd*, 345 F.3d 1049 (9th Cir. 2003).

Statement of Facts

1. In January 2006, D.R. Horton, Inc., a company that builds and sells homes, implemented a corporate-wide policy requiring each current and new employee to sign a mutual arbitration agreement as a condition of employment. *D.R. Horton, Inc. v. Cuda*, No. 12-CA-25764, 2011 WL 11194, p. 1 (ALJ Jan. 3, 2011). The agreement provides that all employment disputes and claims will be determined exclusively by final and

binding arbitration except for workers' compensation and unemployment compensation claims. *Ibid.* Paragraph 6 of the agreement states:

> [T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

Ibid.

In February 2008, Michael Cuda's attorney notified Horton that Cuda and a nationwide class of similarly situated "Superintendents" intended to contest Horton's misclassification of them as exempt employees under the FLSA. *D.R. Horton*, 2011 WL 11194, p. 2. Relying on paragraph 6 of the mutual arbitration agreement, Horton's attorney denied that Cuda or other employees could initiate such a "class" arbitration. *Ibid.* The employees filed charges with the Board, and the Board's General Counsel filed a complaint alleging that by maintaining and enforcing individual arbitration agreements that employees are required to sign as a condition of employment, Horton violated Sections 8(a)(1) and 8(a)(4) of the NLRA. *See id*, p. 1.

2. After a hearing, an administrative law judge (ALJ) issued a decision "declin[ing] to conclude that the [arbitration] provision in question violates Section 8(a)(1) by unlawfully prohibiting employees from engaging in concerted activities." *D.R. Horton*, 2011 WL 11194, p. 3. The ALJ recognized that the right of employees to engage in concerted activities for their mutual aid or protection has been construed to protect a broad range of employee concerns, including attempts to better their working conditions through resort to administrative and judicial forums. *Ibid.* The ALJ concluded, however, that because recent decisions of the Supreme Court and Eleventh Circuit (the governing

circuit) reflect a strong sentiment favoring arbitration as a means of dispute resolution, and because the Board had no direct precedents, Section 8(a)(1) does not prohibit an agreement requiring employees to arbitrate claims and prohibiting collective arbitrations. The ALJ also concluded, however, that the mandatory arbitration agreement violated Section 8(a)(4) of the NLRA because it could reasonably be construed to prevent employees from filing charges with the NLRA. *D.R. Horton*, 2011 WL 11194, pp. 3-4.

3. The General Counsel and Horton filed exceptions to the ALJ's decision and briefs in support of their exceptions. In relevant part, the General Counsel argues that the concerted filing of a class action lawsuit or class arbitral claim is protected activity and that a mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit violates Section 8(a)(1) of the NLRA. In an answering brief, D.R. Horton argues that the General Counsel's position contradicts *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991), which D.R. Horton reads to permit a waiver of a class or collective claim under the Age Discrimination in Employment Act, and court of appeals decisions rejecting arguments that the inability of an employee to bring a collective FLSA action in arbitration deprives employees of substantive rights under the FLSA.

After the parties filed their briefs, the Supreme Court held in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), that the Federal Arbitration Act preempts a California law under which a federal court applying state law had determined that a class action waiver in a commercial context was unconscionable. D.R. Horton filed a supplemental brief arguing that *AT&T Mobility* is equally applicable to the facts at issue

here. On June 3, 2011, the General Counsel filed a letter arguing that *AT&T Mobility* is inapplicable because preemption principles do not apply to the NLRA.

ARGUMENT

IN CONSTRUING SECTION 8(a)(1), THE BOARD SHOULD CAREFULLY ACCOMMODATE THE CRITICAL ROLE THAT CLASS OR COLLECTIVE ACTIONS PLAY IN LAWS ADMINISTERED BY THE SECRETARY OF LABOR AND THE EEOC

I. When an Employee Cannot Effectively Vindicate His or Her Federal Statutory Rights Without Using a Class or Collective Action, a Class Action Waiver in a Mandatory Arbitration Agreement is Impermissible as a Matter of Federal Law

A. Class or collective actions are critical to enforcement of laws administered by the Secretary of Labor and the EEOC

As discussed above, the Secretary of Labor administers and enforces the FLSA. The EEOC administers and enforces the Equal Pay Act part of the FLSA, 29 U.S.C. 206(d), as well as a number of other laws prohibiting employment discrimination such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.* These laws provide rights to employees and also allow employees to enforce those rights, either individually or through a collective or class action.

1. Under the FLSA, employers are required to pay covered employees a minimum wage and a premium rate, generally one and one-half times the employee's regular rate of pay, for overtime hours. 29 U.S.C. 206(a), 207(a). Any employer that violates these requirements shall be liable for liquidated damages equal to the amount of unpaid wages unless an employer proves that its failure to pay was in good faith and based on reasonable grounds to believe its act or omission was not a violation of the

FLSA. 29 U.S.C. 216(b) and (c), 260. Employees cannot prospectively waive their rights under the FLSA. See, *e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985).

Employees may enforce their rights by suing in any court of competent jurisdiction for unpaid wages and liquidated damages. 29 U.S.C. 216(b). The statute permits employees to sue individually and in behalf of "other employees similarly situated," provided 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." *Ibid.* Employees who prevail are entitled to reasonable attorney's fees. *Ibid.* This employee right of action assists the Department of Labor in its enforcement of the FLSA. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 & n.16 (1945); *see* 29 U.S.C. 216(c), 217.

Because of the written consent requirement in 29 U.S.C. 216(b), class actions under the FLSA are known as collective actions where an employee must "opt in" to be a party to the action, in contrast to class actions under Fed. R. Civ. P. 23(b)(3), where employees are members of a class unless they "opt out" of it. *See supra* note 1. In many respects, however, FLSA collective actions operate like class actions under Fed. R. Civ. P. 23. For example, when a plaintiff brings a collective action on behalf of similarly situated employees, a district court usually sends a notice of the action to potential class members. *See, e.g., Hoffman-LaRoche Inc v. Sperling*, 493 U.S. 165, 169-170 (1989); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008). A collective action may also include large numbers of employees, as shown by a sample of recent cases. *See, e.g., Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 874 (8th Cir. 2011) (5,543 servers and bartenders); *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 144 (2d Cir.

2010) (2,500 pharmaceutical sales representatives), *cert. denied,* 131 S. Ct. 1568 (2011); *Veliz v. Cintas Corp.*, No. C03-1180 RGS SBA, 2009 WL 1766691, at *2 (N.D. Cal. June 22, 2009) (2,400 service sales representatives); *Henderson v. Holiday CVS, LLC*, No. 09-80909-CIV, 2010 WL 1854111, *1 n.1 (S.D. Fla. May 11, 2010) (several thousand assistant store managers are possible class members); *Dernovish v. AT&T Operations, Inc.*, 720 F. Supp. 2d 1085, 1087 (W.D. Mo. 2010) (more than 1,000 customer service representatives opted in to date). A collective action under the FLSA therefore presents the same opportunities to aggregate small claims into something worth an attorney's time and thereby overcome "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation and internal quotation marks omitted).

Because the Department of Labor has limited resources, it can enforce the FLSA only in a fraction of cases involving violations. Collective actions are a necessary complement to the Department's enforcement because they allow employees to redress violations that otherwise could not be remedied.

2. Collective or class actions are also essential tools in enforcing laws prohibiting discrimination that the EEOC administers. Congress enacted these anti-discrimination statutes primarily to eliminate invidious discrimination in the workplace. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977). Congress's secondary goal was compensation: providing victims make-whole relief. *McKennon v. Nashville Banner Publ'g. Co.*, 513 U.S. 352, 358 (1995) (ADEA) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (Title VII)). Congress selected lawsuits brought by aggrieved employees or applicants as one of the principal mechanisms to achieve that goal.

McKennon, 513 U.S. at 358 ("'[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.'" (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974)) (brackets in *McKennon*). Congress amended Title VII in 1972 to authorize lawsuits by the Equal Employment Opportunity Commission, but private enforcement actions still play a leading role in enforcing these statutes. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("The private right of action remains an important part of Title VII's scheme of enforcement" (citing *Gardner-Denver*, 415 U.S. at 45)).

When an aggrieved employee or applicant sues an employer to enforce an anti-discrimination statute, she acts as a "'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." *Associated Dry Goods Corp.*, 449 U.S. at 602 (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)). Even when she seeks only individual monetary relief, she "vindicates both the deterrence and the compensation objectives" of the statutes. *McKennon*, 513 U.S. at 358 (ADEA); *Gardner-Denver*, 415 U.S. at 45 (Title VII).

Pursuing discrimination claims on a class or collective basis is a vital tool in enforcing each of the Commission's statutes. Class claims, brought under Fed. R. Civ. P. 23, are important in enforcing many Title VII claims, especially claims alleging discrimination on the basis of race, color, sex, or national origin. *See, e.g.*, *Latino Police Officers Ass'n v. City of New York*, 209 F.R.D. 79, 81 (S.D.N.Y. 2002) (certifying class of Latino and African American police officers alleging race discrimination and racially hostile work environment); *Wilfong v. Rent-A-Center, Inc.*, No. 00-680, 2001 WL

1728985, at *2–8 (S.D. Ill. Dec. 27, 2001) (certifying nationwide class alleging sex discrimination and sexually hostile work environment). Plaintiffs challenging company policies or practices under the Americans with Disabilities Act often appropriately bring class claims. *See, e.g.*, *Delise v. Federal Express Corp.*, No. 99 C 4526, 2001 WL 321081, at *1–2 (N.D. Ill. Mar. 30, 2001) (denying motion to dismiss class ADA claim challenging employer's company-wide policies and practices); *Hendricks-Robinson v. Excel Corp.*, 164 F.R.D. 667, 669–72 (C.D. Ill. 1996) (certifying class ADA claim challenging employer's medical-layoff policy).

Like employees alleging FLSA violations, employees alleging violations of the ADEA or Equal Pay Act may bring collective (opt-in) actions. *Hoffmann–La Roche*, 493 U.S. at 170 ("Congress has stated its policy that [they] should have the opportunity to proceed collectively"); *see also Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1105–08 (10th Cir. 2001) (district court abused its discretion in decertifying plaintiffs' ADEA pattern-or-practice claim); *Metz v. Joe Rizza Imports, Inc.*, 700 F. Supp. 2d 983, 990–92 (N.D. Ill. 2010) (denying in part defendant's motion to dismiss plaintiffs' EPA collective claim); *Ebbert v. Nassau County*, No. 05-CV-5445, 2007 WL 2295581, at *2–3 (E.D.N.Y. Aug. 9, 2007) (authorizing plaintiffs to pursue EPA collective action).

Employers tend to take class actions more seriously than individual actions because of their greater exposure. 8 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 24:59 at 257–58 (4th ed. 2002). Class actions allow plaintiffs to share the costs of litigation and pursue claims that would not justify individual actions. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982) ("'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class

member] to be litigated in an economical fashion under Rule 23'" (citing *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979))) (brackets in *Falcon*); 8 *Newberg on Class Actions* § 24:61 at 258–59. They allow plaintiffs to seek evidence during discovery of class-wide violations, and they provide some protection against retaliation. 8 *Newberg on Class Actions* §§ 24:61–63 at 258–59; Jan Michelsen, *A Class Act: Forces of Increased Awareness, Expanded Remedies, and Procedural Strategy Converge to Combat Hostile Workplace Environments*, 27 Ind. L. Rev. 607, 639 (1994). They use judicial resources more efficiently and can protect employers against conflicting obligations. 2 *Newberg on Class Actions* § 5:37 at 455, §§ 6:46–47 at 463-66. Indeed, class actions may be required for some kinds of discrimination suits. *Robinson v. Metro North Commuter R.R. Co.*, 267 F.3d 147, 161 n.6 (2d Cir. 2001) (e.g., cases where the number of qualified class members exceeds the number of available positions).

For all these reasons, the EEOC believes that it is crucial that the courts and the relevant government agencies whenever possible preserve the right of aggrieved employees and applicants to pursue their claims of employment discrimination on a class basis.

B. Mandatory arbitration of these statutory claims is permissible only when the employee can effectively vindicate his or her statutory rights

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-30 (1991), the Supreme Court held that an agreement to arbitrate age discrimination claims was enforceable because Congress did not show an intent in the ADEA to prevent employees from waiving their right to bring age discrimination claims in a judicial forum. Courts of appeals have applied that reasoning in enforcing agreements to arbitrate FLSA claims,

see, e.g., Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1364, 1367 (11th Cir. 2005); *Bailey v. Ameriquest Mrtg. Corp.*, 346 F.3d 821, 822-823 (8th Cir. 2003); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297-98 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002), and Title VII and ADA claims. *See, e.g., Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004).

The Supreme Court has also recognized, however, that arbitration may substitute for a court forum only "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28 (citation and internal quotation marks omitted). Accordingly, the Court stated that an agreement to arbitrate federal claims under the Truth in Lending Act is invalid and unenforceable if it specifies procedures that will prevent the plaintiff "from effectively vindicating her federal statutory rights." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *see also 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009) (recognizing principle and stating that "a substantive waiver of federally protected civil rights will not be upheld"). Courts of appeals have applied this principle to invalidate or sever provisions of arbitration agreements that prevented employees from vindicating their statutory rights. *See, e.g., Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 657-60 (6th Cir. 2003) (en banc) (deciding when cost-sharing deprives employees of substantive statutory rights); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81, 83 (D.C. Cir. 2005) (Roberts, J.) (bar on punitive damages); *Adkins*, 303 F.3d at 502 n.1 (FLSA right to attorney's fee applies in arbitration); *Carter,* 362 F.3d at 299 (same); *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10-cv-02272, 2011 WL 2791338, at *10-12 (D. Colo. July 15, 2011) (cost and

fee provisions in arbitration unenforceable because they prevent plaintiffs from pursuing their FLSA rights).

C. A class or collective action waiver in a mandatory arbitration agreement is unenforceable when it prevents an employee from effectively vindicating his or her statutory rights

Like other provisions in a mandatory arbitration agreement that are unenforceable if they prevent an employee from vindicating his or her statutory rights, a waiver of an employee's right to bring a class or collective action in a mandatory arbitration agreement is unenforceable if it prevents an employee from effectively vindicating his or her statutory rights. Recent court decisions and the experience of the Department of Labor support the need for this protection.

In *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547 (S.D. N.Y. 2011), a district court held that a class waiver provision in a mandatory arbitration agreement was unenforceable because it precluded an employee from vindicating her FLSA rights. The employee in that case claimed that she had been misclassified as exempt from the FLSA's overtime requirements and sought $1,867 in unpaid overtime wages and an equal amount in liquidated damages. *Id.* at 548, 551. After the employee brought a collective action in district court, the employer sought to enforce a mandatory arbitration agreement calling for binding arbitration on an individual rather than class-wide basis. *Id.* at 548. The district court held that the class waiver provision was unenforceable because the employee "has shown that it would be prohibitively expensive for her to pursue her statutory claims on an individual basis." *Id.* at 549. In particular, the employee would have to spend far more to pay her attorney and her expert witness than she could hope to recover, and it would therefore make no economic sense for her to pursue her individual

claim. *Id.* at 551-52. The court further reasoned that even if the employee decided to sue, she very probably could not retain an attorney because of the discretion given to arbitrators to decide whether to award attorney's fees and how much to award. *Id.* at 553. The employee presented evidence that she would have no difficulty obtaining legal representation if she could aggregate her claim with others similarly situated. *Id.* at 554. The court therefore concluded that the class waiver provision was unenforceable because it prevented the employee from vindicating her statutory rights. *Ibid.*

Similarly, in *Chen-Oster v. Goldman, Sachs & Co.*, ___ F. Supp. 2d ___, No. 10-6950, 2011 WL 1795297 (S.D. N.Y. April 28, 2011), the court concluded that a class action waiver in a mandatory arbitration agreement was unenforceable when it would prevent employees from pursuing an important Title VII claim that they had a statutory right to pursue. In *Chen-Oster*, three female former employees filed a putative class action raising individual, pattern-or-practice, and disparate impact claims of sex discrimination. Lisa Parisi, one of the named plaintiffs, had signed an employment contract containing an arbitration agreement, and the defendant moved to stay her claims and compel arbitration on an individual basis. The district court's analysis focused on Parisi's right under Title VII to bring a pattern-or-practice claim. The court stressed the significant differences between individual and pattern-or-practice claims: plaintiffs bringing pattern-or-practice claims can rely primarily on statistical evidence, and if they establish a discriminatory pattern or practice, they can secure prospective relief immediately and benefit from a rebuttable presumption that the pattern or practice caused their individual injuries. *Id.* at *11. At the same time, the court noted, courts do not permit an individual plaintiff to pursue a pattern-or-practice claim. *Ibid.* The court

concluded that Perisi therefore has a substantive statutory right to pursue a pattern-or-practice claim; she cannot pursue that claim in arbitration on an individual basis; and the defendant's motion to compel arbitration should be accordingly be denied. *Id.* at *12; *see also Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D.N.Y. July 7, 2011) (denying motion to reconsider decision).

The Secretary and the EEOC agree with the analysis in *Sutherland* and *Chen-Oster*. Consistent with the FLSA result in *Sutherland*, the Department of Labor's enforcement experience shows that individual awards in FLSA cases tend to be modest. In nine low-wage industries, for example, the Department's average recovery between FY 2001 and FY 2008 has ranged from $447 per employee to $748 per employee. *See* U.S. Dep't of Labor, Employment Standards Admin. Wage & Hour Div., *Wage and Hour Collects Over $1.4 Billion in Back Wages for Over 2 Million Employees Since Fiscal Year 2001* at 3 (Dec. 2008), available at http://www.dol.gov/whd/statistics/2008FiscalYear.pdf.[2] These recoveries are understandable because minimum-wage litigation by definition involves the lowest-paid workers, and overtime litigation often involves employees who are earning relatively modest amounts (because bona fide professional, executive, and administrative employees are generally exempt from FLSA overtime requirements). *See* 29 U.S.C. 213(a)(1); 29 C.F.R. pt. 541. The small individual amounts at issue make it difficult for employees to vindicate their rights through individual actions.[3]

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[2] The average figures are calculated by dividing back wages collected by the number of employees receiving back wages. The $447 is for FY 2002, and the $748 is for FY 2008.

[3] The amounts may nevertheless represent a substantial loss of compensation for employees affected. See Ruth Milkman, Anna Luz Gonzalez, Victor Narro, *Wage Theft*

Moreover, employees also have practical difficulties vindicating FLSA claims because they seldom have detailed personal records of hours worked, current employees may perceive a lawsuit as jeopardizing job security and prospects for promotion, and former employees face costs from having to travel and take time off from work to pursue their cases. Some individual employees, particularly immigrants with limited English-language skills, also may not sue because they are unaware that their legal rights have been violated, and the transient nature of work may prevent them from pursuing individual litigation against a former employer. *See, e.g. Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85-86 (S.D.N.Y. 2001) (for unskilled, low-paid workers assigned to deliver products from grocery and drug stores, the "lack of adequate financial resources or access to lawyers, their fear of reprisals (especially in relation to the immigrant status of many), the transient nature of their work, and other similar factors suggest that individual suits as an alternative to a class action are not practical"); *cf. Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 8, 9 n.1 (1st Cir.2009) (in a class action against company that "franchises" janitorial work to other companies or individuals, most of them recent immigrants and persons with limited education, and requires waiver of class action arbitration, court of appeals remands for district court to determine whether plaintiffs' remedy in arbitration is illusory). These factors also indicate that as a practical matter a collective action is necessary in many cases to enforce employees' FLSA rights.

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and Workplace Violations in Los Angeles 4 (2010) (employees in a survey of low-wage workers who experienced a pay-based violation lost an average of $39.81 out of average weekly earnings of $318, or 12.5% of their pay), available at www.irle.ucla.edu/publications/pdf/LAwagetheft.pdf.

Similarly, *Chen-Oster* shows that under some laws the EEOC administers, an employee may assert an important claim that by its very nature cannot be pursued on an individual basis. When an employee has a statutory right to pursue such a claim and a class action waiver would prevent an employee from doing so, courts should deem the class action waiver unenforceable.[4]

II. The Position Advanced in This Brief is Consistent With Supreme Court and Court of Appeals Decisions

As discussed above, D.R. Horton reads *Gilmer* and court of appeals decisions to permit a waiver of a class or collective action in a mandatory arbitration agreement. After the parties filed their briefs, the Supreme Court held in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), that the Federal Arbitration Act preempts a California law under which a federal court applying state law had determined that a class action waiver was unconscionable. *Id.* at 1753. D.R. Horton's reading of *Gilmer* and court of appeals decisions is incorrect, and *AT&T Mobility* does not preclude the arguments advanced in this brief.

A. The position is consistent with *Gilmer* and court of appeals decisions

In *Gilmer*, the Supreme Court stated that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that

[4] The Secretary of Labor and the EEOC are not saying that an employee can never vindicate his or her statutory rights in an individual action. Cf. *D'Antuono v. Service Road Corp.*, ___ F. Supp. 2d ____, No. 3:11cv33 (MRK), 2011 WL 2175932, at *30-31 (D. Conn. May 25, 2011) (distinguishing *Sutherland*, court found employee could vindicate FLSA claims through individual arbitration), *petition for permission to appeal filed*, No. 11-2451 (2d Cir. June 17, 2011). When an employer like D.R. Horton, however, mandates that all its employee agree in advance not to pursue statutory rights in a collective or class action, it is highly likely that the agreement will prevent employees from enforcing at least some legitimate statutory claims and will be invalid as a matter of federal law on that basis. The Board should consider this likely invalidity in assessing the permissibility of the waiver provision.

the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (citation and internal quotation marks omitted). Relying largely on this statement, some courts of appeals have stated that an inability to bring an FLSA collective action is not a ground to invalidate the arbitration agreement at issue in those cases. *See Caley*, 428 F.3d at 1378; *Carter*, 362 F.3d at 298; *Adkins*, 303 F.3d at 502-03; *Horenstein v. Mortgage Mkt., Inc.*, 9 Fed. Appx. 618, 619, 2001 WL 502010, at *1 (9th Cir. 2001) (unpub'd). D.R. Horton relies on these court of appeals decisions in arguing that it is permissible for a mandatory arbitration agreement to waive an employee's right to bring an FLSA collective action.

Neither *Gilmer* nor these court of appeals decisions hold that a waiver of a right to bring a collective action in arbitration is permissible in cases where an employee cannot adequately vindicate his or her FLSA rights in arbitration. The statement in *Gilmer* about a possible collective ADEA action not barring individual attempts at conciliation appears to mean only that while class actions are a *permissible* means of enforcing the ADEA, nothing in the statute precludes the execution and enforcement of agreements to resolve ADEA claims through individualized proceedings. Moreover, the statement was dicta because class actions were available in arbitration in *Gilmer*. *See Gilmer*, 500 F.3d at 32. *Gilmer* also recognizes the principle that mandatory arbitration of a statutory claim is permissible so long as a plaintiff may effectively vindicate his or her statutory rights. *Gilmer* therefore says nothing to preclude the invalidation of a waiver of a right to bring a collective action when the waiver prevents an employee from vindicating statutory rights. *See In re Am. Express Merchs. Litig.*, 634 F.3d 187, 196 (2d Cir. 2011) (statement in

Gilmer is dicta that does not apply to claim that mandatory class action waiver in a credit card agreement is unenforceable because it would preclude plaintiffs from bringing Sherman Act claims against the credit card company); *id.* at 197-99 (refusing to enforce class action waiver where plaintiffs showed that individual relief would be miniscule compared to costs of prosecuting the claim).

Nor did the court of appeals decisions that have applied *Gilmer* to the FLSA hold that a waiver of an employee's right to bring a collective action is permissible when the waiver would prevent the employee from effectively vindicating his or her rights under the FLSA. That question was not presented in *Caley*, *Carter*, *Adkins*, or *Horenstein*, where the courts concluded that the employees could vindicate their FLSA rights by arbitrating their FLSA claims individually. The courts did not decide whether a waiver is permissible when an employee cannot vindicate his or her FLSA rights by arbitrating a claim as an individual. *See also Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 62 (1st Cir. 2007) (finding *Caley*, *Carter*, *Adkins*, and *Horenstein* "are not so instructive" on issues that turn on facts of a case and not on attempt to invalidate the entire arbitration agreement). Accordingly, D.R. Horton incorrectly relies on *Caley*, *Carter*, *Adkins*, and *Horenstein* in arguing that its company-wide, mandatory arbitration agreement can preclude employees from bringing collective FLSA actions.

B. The position is consistent with *AT&T Mobility v. Concepcion*

In *AT&T Mobility*, the Court reasoned that although the Federal Arbitration Act's saving clause in 9 U.S.C. 2 preserves a generally applicable contract defense, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the [Federal Arbitration Act's] objectives." *AT&T Mobility*, 131 S.

Ct. at 1748. Those objectives, the Court concluded, are to ensure that private arbitration agreements are enforced according to their terms and to allow for efficient, streamlined procedures tailored to the type of dispute. *Id.* at 1748-49. The Court concluded that California's law stood as an obstacle to those objectives because it allows a party to a consumer contract to demand class-wide arbitration that is not consensual, thereby making arbitration slower, more formal and more costly, and greatly increasing risks to defendants. *Id.* at 1750-52. The Court rejected an argument that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system, stating that

> [s]tates cannot require a procedure that is inconsistent with the [Federal Arbitration Act], even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole. . . . Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars."

Id. at 1753 (citations omitted) (emphasis in original). Justice Thomas concurred on the ground that the saving clause in 9 U.S.C. 2 preserves only challenges to the formation of the arbitration agreement. *Id.* at 1753 (Thomas, J., concurring). Four dissenting Justices concluded that the California law was consistent with the Federal Arbitration Act's language and primary objective and did not stand as an obstacle to the Act's

accomplishment and execution. *Id.* at 1756 (Breyer, Ginsburg, Sotomayor, Kagan, JJ, dissenting).

Because the issue in *AT&T Mobility* was preemption of state law by federal law, the Court's decision does not address the federal law principle, recognized in the Court's previous cases, that federal statutory claims are subject to arbitration only so long as a party may effectively vindicate his rights in arbitration. *See Daugherty*, 2011 WL 2791338, at *10-12 (recognizing, after *AT&T Mobility*, that terms in an arbitration agreement that prevent plaintiffs from enforcing their FLSA rights are unenforceable). *AT&T Mobility* therefore does nothing to undercut the argument in this brief against enforcing waivers of collective actions. *See Chen-Oster*, 2011 WL 2671813, at *3-5; *cf. Williams v. Securitas Sec. Servs. USA, Inc.*, No. 10-7181, 2011 WL 2713741, at *3 (E.D. Pa. July 13, 2011) (*AT&T Mobility* does not prevent court from ordering employer to stop sending a confusing and unfair mandatory arbitration agreement with a class waiver to employees who are potential plaintiffs in an FLSA collective action).

AT&T Mobility's reasoning is also inapplicable in this case. The Court reasoned that invalidating a class waiver would allow a party to an arbitration agreement to demand a class-wide arbitration that is not consensual, thereby making arbitration slower, more formal and more costly, and greatly increasing risks to defendants. 131 S. Ct. at 1750-52. Although that would have been the result of invalidating the waiver provision in *AT&T Mobility*, it is not necessarily the result in other cases. Instead, a court could deny class-wide arbitration and allow employees to sue in court under 29 U.S.C. 216(b). *See Sutherland*, 768 F. Supp. 2d at 554.

Moreover, the Court's recognition in *AT&T Mobility* that the individual claim in that case "was most unlikely to go unresolved," 131 S. Ct. at 1753, also distinguishes *AT&T Mobility* from cases where an individual cannot resolve his or her claim on an individual basis. Indeed, as the Court recognized in *AT&T Mobility*, the arbitration agreement in that case was unusually favorable to claimants, providing them a minimum of $7,500 and twice their attorney's fees if they obtained an arbitration award greater than AT&T's last settlement offer, and effectively making the Concepcions better off under the arbitration agreement than they would have been as participants in a class action. The same is not necessarily true in FLSA cases as shown by the facts of *Sutherland*, where the plaintiff presented uncontested estimates that if she had to pursue the claim as an individual rather than on a collective basis, her attorney's fees would exceed $160,000 and costs exceed $6,000 for an overtime loss of approximately $1,867. 768 F. Supp. 2d at 551-52. Nor is it true in *Chen-Oster*, where the employee would lose her Title VII right to prove a pattern or practice of discrimination. It is for these kinds of claims that a waiver of a right to bring a class or collective action is impermissible.

CONCLUSION

In construing Section 8(a)(1) of the NLRA, the Board should consider the critical role of class or collective actions in enforcing employees' statutory rights and the unenforceability of waivers of class or collective actions in mandatory arbitration agreements that prevent an employee from effectively vindicating his or her statutory rights.

Respectfully submitted,

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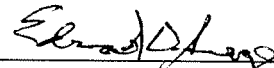

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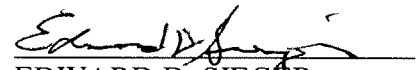

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