

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 10-CA-38804	Date Filed 11-28-2011

INSTRUCTIONS:

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

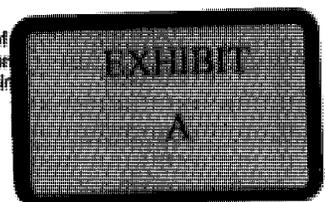
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Murphy Oil USA, Inc. Also serve chg on Agent at 2000 Interstate Park Dr., Suite 204 Montgomery, AL 36109-5420	b. Tel. No. (404)586-1846 c. Cell No. () - f. Fax No. (404)525-1173 g. e-Mail h. Number of workers employed 1000's
d. Address (Street, city, state, and ZIP code) 169 Super Center Drive Calera AL 35040-	e. Employer Representative Stephen Munger Attorney 1155 Peachtree St. NE Suite 1000, Atlanta, GA 30309
i. Type of Establishment (factory, mine, wholesaler, etc.) Retail Sales	j. Identify principal product or service Gasoline
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (1st subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) During the past 6 months, the above-named Employer has maintained a policy that prohibits employees from engaging in concerted employment litigation and arbitration of employment disputes During the past 6 months, the Employer has maintained a policy that prohibits employees from filing charges with the NLRB During the past 6 months, the Employer has required employees and potential employees to execute agreements that purport to waive an employees' access to the NLRB and purport to waive an employee's right to engage in protected concerted activity for mutual aid and protection, including the right to participate in a class action litigation or class action arbitration. On or about September 17, 2010, the Employer discharged Sheila Hobson because of her protected concerted activity engaged in for mutual aid and protection and to discourage other employees from engaging in protected concerted activities. By these and other acts, the Employer has interfered with, restrained and coerced employees in the exercise of their rights as guaranteed in Section 7 of the National Labor Relations Act.	
3. Full name of party filing charge (If labor organization, give full name, including local name and number) Sheila M. Hobson, An Individual	
4c. Address (Street and number, city, state, and ZIP code) 243 County Road 772 Calera AL 35115-	4a. Tel. No. (205)230-2387 4b. Cell No. () - 4d. Fax No. () - 4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. By <u>Richard Rouco</u> Richard R. Rouco, Esquire (signature of representative or person making charge) (Printtype name and title or office, if any) Richard R Rouco 2001 Park Place North Suite 1000 Birmingham AL 35203- Address (date) 1 25 11 2011	
Tel. No. (205)328-9576 Office, if any, Cell No. () - Fax No. (205)328-9669 e-Mail rrouco@wdklaw.com	

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

PRIVACY ACT STATEMENT

10-2011-0124

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are: (1) to process and resolve unfair labor practice charges and related proceedings or litigation; (2) to conduct research and analysis; (3) to disseminate information; (4) to provide information to the public; (5) to provide information to the media; (6) to provide information to the public; (7) to provide information to the public; (8) to provide information to the public; (9) to provide information to the public; (10) to provide information to the public. The NLRB will further explain these uses upon request. Disclosure of this information is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.





United States Government

NATIONAL LABOR RELATIONS BOARD - Region 10, Resident Office
1130 22nd Street, South - Ridge Park Place, Suite 3400
Birmingham, Alabama 35205-2870
Telephone: (205) 933-3018 Fax: (205) 933-3017
Website: www.nlr.gov Email: NLRBRegion10@nlrb.gov

January 31, 2011

Mr. Stephen Munger, Attorney
Jackson Lewis LLP
1155 Peachtree Street NE
Atlanta, GA 30309

Re: Murphy Oil USA, Inc.
Case No. 10-CA-38804

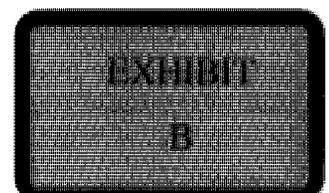
Dear Mr. Munger:

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

Investigator: This charge will be investigated by Field Examiner Patrick L. McCarty whose telephone number is (205)933-3014. Email address is Patrick.McCarty@nlrb.gov. If Field Examiner McCarty is not available, you may contact Resident Officer Marshall whose telephone number is (205)933-3021.

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

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



that must be made available to any member of the public under the Freedom of Information Act.

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

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

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

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

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

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

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

Thank you for your cooperation in this matter.

Very truly yours,



Martin M. Arlook
Regional Director

Enclosures

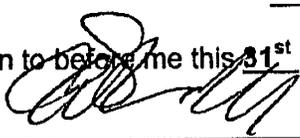
cc Mr. Henry Heithaus, Vice President
Murphy Oil USA, Inc.
169 Super Center Drive
Calera, AL 35040

Murphy Oil USA, Inc.
2000 Interstate Park Drive, Suite 204
Montgomery, AL 36109-5420

-----FOR NLRB USE ONLY-----

I certify that I served the above-referenced charge on the 31st day of January 2011, by postpaid first-class mail on the above addressees together with a transmittal letter of which this is a true copy.

Subscribed and sworn to before me this 31st day of January 2011.

Designated Agent  _____

INTERNET
FORM NLRB-501
(2-08)

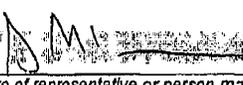
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

First Amended

DO NOT WRITE IN THIS SPACE	
Case 10-CA-38804	Date Filed 4/11/12

INSTRUCTIONS:

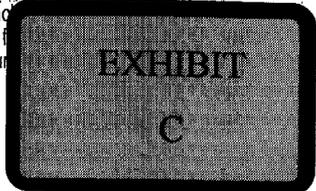
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Murphy Oil USA, Inc. (Copy be served on Agent at 2000 Interstate Park Dr., Suite 204, Montgomery, AL 36109)	b. Tel. No. (404) 586-1846
d. Address (Street, city, state, and ZIP code) 169 Super Center Drive Calera, AL 35040	c. Cell No.
e. Employer Representative Stephen Munger, Esq. 1155 Peachtree St. NE Suite 1000 Atlanta, GA 30309	f. Fax No. (404) 525-1173
i. Type of Establishment (factory, mine, wholesaler, etc.) Retail Sales	g. e-Mail
j. Identify principal product or service Fuel	h. Number of workers employed 1000+
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 8(a)(1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) During the past 6 months, the above-named Employer has maintained a policy that prohibits employees from engaging in concerted employment litigation and arbitration of employment disputes. During the past 6 months, the Employer has maintained a policy that prohibits employees from filing charges with the NLRB. During the past 6 months, the Employer has required employees and potential employees to execute agreements which waive an employees' access to the NLRB and to engage in protected concerted activity, including participation in class or collective actions. During the last 6 months, the Employer has attempted to enforce its agreements requiring the unlawful waiver of employees' Section 7 right to engage in class or collective actions in the United States District Court for the Northern District of Alabama, Civil Action No. CV-10-HGD-1486-S.	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Sheila M. Hobson, In Individual	
4a. Address (Street and number, city, state, and ZIP code) 243 County Road 772 Calera, AL 35115	4b. Tel. No. (205) 230-2387
	4c. Cell No.
	4d. Fax No.
	4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION	
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	
By  Glen M. Connor, Esquire (signature of representative or person making charge) (Print/Type name and title or office, if any)	Tel. No. (205) 328-9576
Quinn Connor Davies Weaver and Rouco 2700 Highway 280 East, Suite 380 Birmingham, AL 35223	Office, if any, Cell No.
Address	Fax No. (205) 328-9669
	e-Mail GConnor@qcwdr.com
	4/11/12 (date)

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

PRIVACY ACT STATEMENT

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





UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 10
233 PEACHTREE ST NE
HARRIS TOWER, SUITE 1000
ATLANTA, GA 30303-1531

Agency Website: www.nlrb.gov
Telephone: (404)331-2896
Fax: (404)331-2858

April 11, 2012

HENRY HEITHAUS, Vice President
MURPHY OIL USA, INC.
169 SUPERCENTER DR
CALERA, AL 35040-5193

Re: Murphy Oil USA, Inc.
Case 10-CA-038804

Dear Mr. HEITHAUS:

Enclosed is a copy of the Amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney KERSTIN MEYERS whose telephone number is (404) 331-4600. If the agent is not available, you may contact Supervisor LISA HENDERSON whose telephone number is (404) 331-2889.

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

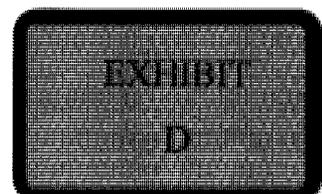
Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

CLAUDE T. HARRELL JR.
Regional Director

Enclosure: Copy of charge

cc: STEPHEN MUNGER, Attorney
JACKSON LEWIS, LLP
1155 PTREE ST NE SUITE 1000
ATLANTA, GA 30309-7629



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MURPHY OIL USA, INC.

Charged Party

and

SHEILA M. HOBSON

Charging Party

Case 10-CA-038804

AFFIDAVIT OF SERVICE OF AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on April 11, 2012, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

STEPHEN MUNGER, Attorney
JACKSON LEWIS, LLP
1155 PTREE ST NE
SUITE 1000
ATLANTA, GA 30309-7629

HENRY HEITHAUS, Vice President
MURPHY OIL USA, INC.
ALSO SERVE CHG ON AGENT AT 2000
INTERSTATE PARK DR., SU
169 SUPERCENTER DR
CALERA, AL 35040-5193

MURPHY OIL USA INC
2000 INTERSTATE PARK DR STE 204
MONTGOMERY, AL 36109-5420

April 11, 2012

Date

Designated Agent of NLRB

Name

/s/ Nellie Lucas

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

COMPLAINT AND NOTICE OF HEARING

It having been charged by Sheila M. Hobson, an Individual, herein called the Charging Party, that Murphy Oil USA, Inc. (herein called Respondent), has engaged in and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Section 151 et seq., (herein called the Act), the Acting General Counsel of the National Labor Relations Board, on behalf of the National Labor Relations Board (herein called the Board), by the undersigned, pursuant to Section 10(b) of the Act, and Section 102.15 of the Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Charging Party on January 28, 2011, and a copy was served by regular mail on Respondent on January 31, 2011.
2. At all material times, Respondent, a Delaware corporation with a place of business in Calera, Alabama, herein called Respondent's facility, has been engaged in the operation of retail gasoline and diesel fueling stations.

EXHIBIT

B

3. During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2, purchased and received at its Calera, Alabama, facility goods valued in excess of \$50,000 directly from points outside the State of Alabama.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. Since on or about July 28, 2010, and at all material times, Respondent has required employment applicants to sign a document titled "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (herein called the Agreement). A copy of the Agreement is attached hereto as Exhibit A.

6. By requiring applicants to sign the Agreement, Respondent has maintained and enforced a mandatory arbitration agreement that unlawfully prohibits employees from engaging in protected concerted activities.

7. By requiring applicants to sign the Agreement, Respondent has maintained and enforced a mandatory arbitration agreement that leads employees reasonably to believe that they are prohibited from filing charges with the Board.

8. By the conduct described above in paragraphs 5 through 7, inclusive, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

10. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before April 14, 2011, or postmarked on or before April 13, 2011.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If an answer being filed electronically is a .pdf document containing the required signature, no paper copy of the answer needs to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a .pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means

allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in this Complaint and Notice of Hearing are true.

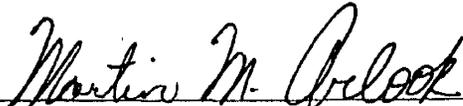
NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 10:00 a.m. (CDT) on May 12, 2011, and on consecutive days thereafter, at the National Labor Relations Board, Birmingham Resident Office, Suite 3400 Ridge Park Place, 1130 22nd Street South, Birmingham, Alabama, a hearing will be conducted before an Administrative Law Judge of the Board on the allegations in this complaint, at which time and place any party within the meaning of Section 102.8 of the Board's Rules and Regulations will have the right to appear and present testimony.

Form NLRB-4338, Notice, and Form 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as Amended, is attached.

Dated at Atlanta, Georgia, this 31st day of March, 2011.




Martin M. Arlook Regional Director
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (APPLICANT)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned applicant (hereinafter "Individual"). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

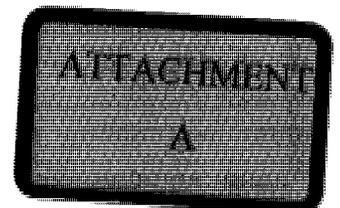
This Agreement mutually binds Individual and Company to arbitrate any and all disputes between them as set forth herein. Individual also is bound to arbitrate any related claims he/she individually may have arising out of or in the context of their employment relationship against any manager of the Company. Conversely, managers have signed similar arbitration agreement and thereby are bound to arbitrate any related claims they individually may have against Individual arising out of or in the context of their employment relationship.

Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement. Individual further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Individual is unable to pay the applicable filing fee for arbitration due to extreme hardship, Individual may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Individual qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Individual or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Individual also must provide written notification that he/she is invoking the arbitration process to the Law Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

Arbitrations pursuant to this Agreement shall be conducted in accordance with the Rules of AAA except where those Rules conflict with the terms of this Agreement, in which event the terms of this Agreement shall control.

Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise, procedural questions which arise out of the dispute and bear on its final disposition are matters for the arbitrator to decide.

Individual's Initials



This Agreement shall be binding upon and inure to the benefit of any successor or assignee of the Company and as to the Individual's heirs, executors and administrators.

This Agreement is an agreement as to choice of forum and is not intended to extend any applicable statute of limitation. Individual and Company understand and agree that any claim for arbitration will be timely only if brought within the time in which an administrative charge or a complaint could have been filed with the administrative agency or the court. If the arbitration claim raises an issue which could not have been timely filed with the appropriate administrative agency or court, then the claim must be treated as the administrative agency or court would have treated it. Claims must be filed within the time set by the appropriate statute of limitation.

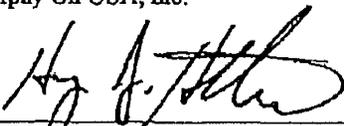
By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

If any claim is found not to be subject to this Agreement and the arbitration procedure, it must be brought in the federal or state court which is closest to the site at which Individual was employed by the Company and which has jurisdiction over the matter. Both Individual and Company expressly agree to waive any right to seek or demand a jury trial and agree to have any dispute decided solely by a judge of the court.

If any provision of this Agreement is determined to be invalid or unenforceable, it is agreed that the remainder of this Agreement shall remain in full force and effect. The parties agree that this Agreement may be interpreted or modified to the extent necessary for it to be enforceable and to give effect to the parties' expressed intent to create a valid and binding arbitration procedure to resolve all disputes not expressly excluded. In the event any provision of this Agreement is found unlawful or unenforceable and an arbitrator (or court) declines to modify this Agreement to give effect to the parties' intent, then the parties agree that this Agreement shall be self-amending, meaning it automatically, immediately and retroactively shall be amended, modified, and/or altered to achieve the intent of this Agreement to the maximum extent allowed by law. If the parties cannot agree upon the appropriate amendment or modification, an arbitrator shall make that determination. Other than as set forth in the above provision, all other modifications of this Agreement must be in writing and signed by a Vice President of the Company and Individual.

INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES BETWEEN THEM RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN INDIVIDUAL AND COMPANY IS TERMINABLE AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

Date
Murphy Oil USA, Inc.


By Henry K. Heithaus, Vice President

Individual's Signature

Individual's Name (Please Print)

Individual's Social Security Number

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

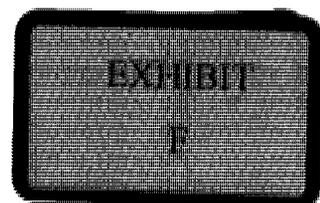
SHEILA M. HOBSON, An Individual

ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, Section 8, as amended, Respondent, Murphy Oil USA, Inc. ("Murphy"), by its attorneys, Jackson Lewis LLP, answers the Complaint and Notice of Hearing as follows:

Answering the first, unnumbered paragraph of the Complaint, Murphy acknowledges that the National Labor Relations Board (the "Board") has issued the Complaint based upon certain allegations of unfair labor practices brought by Sheila Hobson, an individual (hereinafter, "Charging Party") pursuant to the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.

1. Murphy admits the allegations in Paragraph 1 of the Complaint.
2. Murphy admits the allegations in Paragraph 2 of the Complaint.
3. Murphy admits the allegations in Paragraph 3 of the Complaint.
4. Murphy admits the allegations in Paragraph 4 of the Complaint.
5. Murphy admits the allegations in Paragraph 5 of the Complaint.
6. Murphy denies the allegations in Paragraph 6 of the Complaint.
7. Murphy denies the allegations in Paragraph 7 of the Complaint.



8. Murphy denies the allegations in Paragraph 8 of the Complaint.

9. Answering Paragraph 10¹ of the Complaint, Murphy acknowledges that its use of the “Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)” (the “Agreement”) affects commerce, but Murphy denies that its use of the Agreement constitutes an unfair labor practice within the meaning of the Act. Murphy denies any remaining allegations in Paragraph 10.

10. Unless otherwise admitted herein, Murphy denies any remaining allegations in the Complaint.

DEFENSES AND AFFIRMATIVE DEFENSES

For its defenses and affirmative defenses, Murphy avers as follows:

First Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Defense

The conduct in which Charging Party and others are alleged to have been engaged was neither protected nor concerted and thus cannot serve as the basis of unfair labor practice charges within the meaning of Section 8(a) (1) of the Act.

Third Defense

The Complaint is barred, in whole or in part, by the six-month limitations period set forth in Section 10(b) of the Act.

Fourth Defense

The Complaint may be barred, in whole or in part, by the doctrines of estoppel, waiver, laches, or unclean hands.

¹ The Complaint does not contain a Paragraph 9.

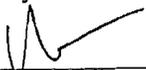
Murphy reserves the right to assert additional affirmative defenses should it become aware of them as this matter proceeds.

PRAYER FOR RELIEF

Having now fully answered, Respondent, Murphy Oil USA, Inc., prays the Complaint be dismissed with prejudice, without further proceedings.

Dated: April ^{13th}, 2011.

Respectfully submitted,

By: 

Stephen X. Munger, Esq.
mungers@jacksonlewis.com
C. Dan Wyatt, III, Esq.
wyattc@jacksonlewis.com
Brandon M. Cordell, Esq.
cordellb@jacksonlewis.com

JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173

ATTORNEYS FOR RESPONDENT
MURPHY OIL USA, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

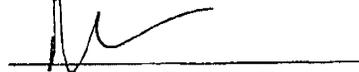
CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2011, I served the foregoing document upon the following by causing a copy to be sent via overnight mail to:

Martin M. Arlook, Regional Director
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

Richard M. Rouco
Quinn Conner Davies Weaver and Rouco
2700 Highway 280 East, Suite 380
Birmingham, Alabama 35223

Respectfully submitted,



Brandon M. Cordell, Esq.
JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

ORDER POSTPONING HEARING
INDEFINITELY

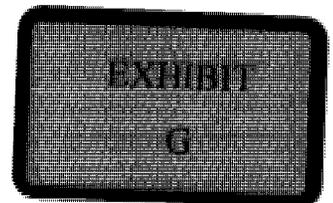
IT IS HEREBY ORDERED that the hearing in the above matter scheduled for May 12, 2011, in the Richard P. Prowell Hearing Room, located at 233 Peachtree Street, Suite 1000, Harris Tower, Atlanta, Georgia 30303, at 10:00 a.m. (EDT), be, and it hereby is, indefinitely postponed.

Dated at Atlanta, Georgia, this 26th day of April, 2011.



A handwritten signature in cursive script that reads "Martin M. Arlook".

Martin M. Arlook
National Labor Relations Board
Region 10
233 Peachtree Street, N.E.
Harris Tower – Suite 1000
Atlanta, GA 30303-1531



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

AMENDED ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, Section 8, as amended, Respondent, Murphy Oil USA, Inc. ("Murphy"), by its attorneys, Jackson Lewis LLP, files this Amended Answer and answers the Complaint and Notice of Hearing as follows:

Answering the first, unnumbered paragraph of the Complaint, Murphy acknowledges that the National Labor Relations Board (the "Board") has issued the Complaint based upon certain allegations of unfair labor practices brought by Sheila Hobson, an individual (hereinafter, "Charging Party") pursuant to the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.

1. Murphy admits the allegations in Paragraph 1 of the Complaint.
2. Murphy admits the allegations in Paragraph 2 of the Complaint.
3. Murphy admits the allegations in Paragraph 3 of the Complaint.
4. Murphy admits the allegations in Paragraph 4 of the Complaint.
5. Murphy admits the allegations in Paragraph 5 of the Complaint.
6. Murphy denies the allegations in Paragraph 6 of the Complaint.

EXHIBIT

H

7. Murphy denies the allegations in Paragraph 7 of the Complaint.
8. Murphy denies the allegations in Paragraph 8 of the Complaint.
9. Answering Paragraph 10¹ of the Complaint, Murphy acknowledges that its use of the "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (the "Agreement") affects commerce, but Murphy denies that its use of the Agreement constitutes an unfair labor practice within the meaning of the Act. Murphy denies any remaining allegations in Paragraph 10.
10. Unless otherwise admitted herein, Murphy denies any remaining allegations in the Complaint.

DEFENSES AND AFFIRMATIVE DEFENSES

For its defenses and affirmative defenses, Murphy avers as follows:

First Defense

The Complaint fails to state a claim upon which relief may be granted.

Second Defense

The conduct in which Charging Party and others are alleged to have been engaged was neither protected nor concerted and thus cannot serve as the basis of unfair labor practice charges within the meaning of Section 8(a) (1) of the Act.

Third Defense

The Complaint is barred, in whole or in part, by the six-month limitations period set forth in Section 10(b) of the Act.

Fourth Defense

The Complaint may be barred, in whole or in part, by the doctrines of estoppel, waiver, laches, or unclean hands.

¹ The Complaint does not contain a Paragraph 9.

Fifth Defense

The Complaint is barred, in whole or in part, because the Board lacks a quorum. Specifically, under the Act, all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Murphy reserves the right to challenge the authority of the Board and its agents or delegates if they continue to act in the absence of a lawfully constituted quorum.

Murphy reserves the right to assert additional affirmative defenses should it become aware of them as this matter proceeds.

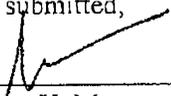
PRAYER FOR RELIEF

Having now fully answered, Respondent, Murphy Oil USA, Inc., prays the Complaint be dismissed with prejudice, without further proceedings.

Dated: January 30, 2012.

Respectfully submitted,

By: _____


Stephen X. Munger, Esq.
mungers@jacksonlewis.com
C. Dan Wyatt, III, Esq.
wyattc@jacksonlewis.com
Brandon M. Cordell, Esq.
cordellb@jacksonlewis.com

JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173
ATTORNEYS FOR RESPONDENT
MURPHY OIL USA, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

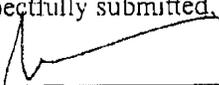
CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012, the foregoing document was filed via the NLRB E-Filing System and served, via overnight mail, upon the following parties of record:

Martin M. Arlook, Regional Director
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

Richard M. Rouco
Quinn Conner Davies Weaver and Rouco
2700 Highway 280 East, Suite 380
Birmingham, Alabama 35223

Respectfully submitted,



Brandon M. Cordell, Esq.
JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

SECOND AMENDED ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, Section 8, as amended, Respondent, Murphy Oil USA, Inc. ("Murphy"), by its attorneys, Jackson Lewis LLP, files this Second Amended Answer and answers the Complaint and Notice of Hearing as follows:

Answering the first, unnumbered paragraph of the Complaint, Murphy acknowledges that the National Labor Relations Board (the "Board") has issued the Complaint based upon certain allegations of unfair labor practices brought by Sheila Hobson, an individual (hereinafter, "Charging Party") pursuant to the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.

1. Murphy admits the allegations in Paragraph 1 of the Complaint.
2. Murphy admits the allegations in Paragraph 2 of the Complaint.
3. Murphy admits the allegations in Paragraph 3 of the Complaint.
4. Murphy admits the allegations in Paragraph 4 of the Complaint.
5. Murphy admits the allegations in Paragraph 5 of the Complaint.

EXHIBIT

1

6. Murphy denies the allegations in Paragraph 6 of the Complaint.
7. Murphy denies the allegations in Paragraph 7 of the Complaint.
8. Murphy denies the allegations in Paragraph 8 of the Complaint.
9. Answering Paragraph 10¹ of the Complaint, Murphy acknowledges that its use of the “Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)” (the “Agreement”) affects commerce, but Murphy denies that its use of the Agreement constitutes an unfair labor practice within the meaning of the Act. Murphy denies any remaining allegations in Paragraph 10.
10. Unless otherwise admitted herein, Murphy denies any remaining allegations in the Complaint.

DEFENSES AND AFFIRMATIVE DEFENSES

For its defenses and affirmative defenses, Murphy avers as follows:

First Defense

The Complaint is barred, in whole or in part, because the Board lacks a quorum. Specifically, under the Act, all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Murphy reserves the right to challenge the authority of the Board and its agents or delegates if they continue to act in the absence of a lawfully constituted quorum.

¹ The Complaint does not contain a Paragraph 9.

Second Defense

The Charging Party is not statutorily protected under Section 7 of the Act since at all relevant times she was a supervisor under Section 2(11) of the Act. *See* 29 U.S.C. § 152(3) and 152(11).

PRAYER FOR RELIEF

Having now fully answered, Respondent, Murphy Oil USA, Inc., prays the Complaint be dismissed with prejudice, without further proceedings.

Dated: February 24, 2012.

Respectfully submitted,

By:



Stephen X. Munger, Esq.
mungers@jacksonlewis.com
Brandon M. Cordell, Esq.
cordellb@jacksonlewis.com

JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173
ATTORNEYS FOR RESPONDENT
MURPHY OIL USA, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, the foregoing document was filed via the NLRB E-Filing System and served, via overnight mail, upon the following parties of record:

Martin M. Arlook, Regional Director
Kerstin Meyers, Esq.
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

Richard P. Rouco, Esq.
Quinn Connor Weaver Davies and Rouco, LLP
2700 Highway 280 East, Suite 380
Birmingham, Alabama 35223

Respectfully submitted,

Stephen X. Munger, Esq.
JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC

Charged Party

and

Case 10-CA-038804

SHEILA M. HOBSON

Charging Party

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from May 12, 2011, at 10:00 a.m. (CDT) on **April 16, 2012**, at the Birmingham Resident Office, 1130 22nd Street. South, Suite. 3400, Ridge Park Place, Birmingham, Alabama. The hearing will continue on consecutive days until concluded.

Dated: February 28, 2012



Mary L. Bulls

Mary L. Bulls, Acting Regional Director
National Labor Relations Board
Region 10
233 PEACHTREE ST NE
HARRIS TOWER, SUITE 1000
ATLANTA, GA 30303-1531

EXHIBIT

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MURPHY OIL USA, INC.

and

CASE 10-CA-38804

SHEILA M. HOBSON, An Individual

ORDER POSTPONING HEARING INDEFINITELY

IT IS HEREBY ORDERED that the hearing in the above-styled matter scheduled for April 16, 2012, in the Hearing Room of the National Labor Relations Board, Region 10, Birmingham Resident Office, 1130 22nd Street South, Suite 3400, Ridge Park Place, Birmingham, Alabama, at 10:00 AM (CDT), be, and it hereby is, indefinitely postponed.

Dated at Atlanta, Georgia, this 11th day of April, 2012.



Claude T. Harrell, Jr.
Regional Director
National Labor Relations Board
Region 10
Harris Tower - Suite 1000
233 Peachtree Street, N.E.
Atlanta, Georgia 30303



EXHIBIT

K

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

Charged Party

and

SHEILA M. HOBSON

Charging Party

Case 10-CA-038804

AFFIDAVIT OF SERVICE OF ORDER POSTPONING HEARING INDEFINITELY

I, the undersigned employee of the National Labor Relations Board, state under oath that on April 11, 2012, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

STEPHEN MUNGER, Attorney
JACKSON LEWIS, LLP
1155 PTREE ST NE
SUITE 1000
ATLANTA, GA 30309-7629

HENRY HEITHAUS, Vice President
MURPHY OIL USA, INC.
ALSO SERVE CHG ON AGENT AT 2000
INTERSTATE PARK DR., SU
169 SUPERCENTER DR
CALERA, AL 35040-5193

SHEILA M. HOBSON, An Individual
243 COUNTY ROAD 772
MONTEVALLO, AL 35115-9326

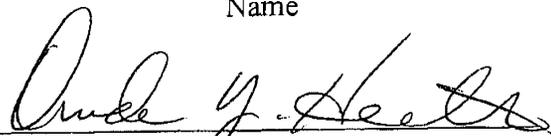
RICHARD P. ROUCO, ESQ.
QUINN CONNOR WEAVER DAVIES &
ROUCO LLP
2700 HIGHWAY 280
SUITE 380
BIRMINGHAM, AL 35223

April 11, 2012

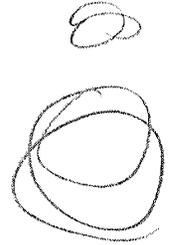
Date

Designated Agent of NLRB

Name


Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**



MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

AMENDED COMPLAINT AND NOTICE OF HEARING

Based upon a charge filed by Shelia M. Hobson, an Individual (Charging Party), a Complaint and Notice of Hearing issued on March 31, 2011, against Murphy Oil U.S.A., Inc. (Respondent), alleging that Respondent violated the National Labor Relations Act, as amended, 29 U.S.C. Section 151 et seq. (Act), by engaging in unfair labor practices.

This Amended Complaint and Notice of Hearing is issued pursuant to Section 10(b) and Section 102.15 of the Board's Rules and Regulations, and alleges that Respondent has violated the Act by engaging in the following unfair labor practices:

1.

(a) The original charge in this proceeding was filed by Charging Party on January 28, 2011, and a copy was served by regular mail on Respondent, on January 31, 2011.

(b) The first amended charge in this proceeding was filed by Charging Party on April 11, 2012, and a copy was served by regular mail on Respondent on April 11, 2012.



2

2.

At all material times, Respondent, a Delaware corporation with a place of business in Calera, Alabama, herein called Respondent's facility, has been engaged in the operation of retail gasoline and diesel fueling stations and related products.

3.

During the 12-month period ending September 30, 2012, Respondent in conducting its operations described above in paragraph 2, purchased and received at its Calera, Alabama facility goods valued in excess of \$50,000 directly from points outside the State of Alabama.

4.

In conducting its operations during the 12-month period ending September 30, 2012, Respondent derived gross revenues in excess of \$500,000.

5.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6.

Since on or about July 28, 2010, and at all material times, Respondent has required employment applicants to sign a document titled "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (Agreement). A copy of the Agreement is attached hereto as Attachment A.

7.

By requiring applicants to sign the Agreement, Respondent has maintained and enforced a mandatory arbitration agreement that unlawfully prohibits employees from engaging in protected concerted activities.

3

8.

By requiring applicants to sign the Agreement, Respondent has maintained and enforced a mandatory arbitration agreement that leads employees reasonably to believe that they are prohibited from filing charges with the Board.

9.

On June 14, 2010, Charging Party engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a collective civil action in the United States District Court, Northern District of Alabama (Civil Action No. 2:10-cv-01486-HGD) alleging a violation of the Fair Labor Standards Act.

10.

On July 26, 2010, Respondent filed a Motion to Compel Arbitration and Dismiss Collective Action ("Motion") in Civil Action No. 2:10-cv-01486-HGD, in the Northern District of Alabama, and at all material times since September 3, 2010, Respondent, by filing pleadings in support of the Motion, has maintained its Motion.

11.

By maintaining the Motion to compel individual arbitration pursuant to the Agreement, Respondent has implemented and enforced a rule or policy unlawful under the Act, as set forth above in paragraphs 6 through 8.

12.

By maintaining the Motion to compel individual arbitration pursuant to the unlawful Agreement, as set forth above in paragraphs 6 through 8, Respondent has unlawfully prohibited employees from engaging in protected concerted activities.

13.

By the conduct described above in paragraphs 6 through 8, and paragraphs 10 through 12, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

14.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

As part of the remedy for the unfair labor practices alleged above in paragraphs 6 through 13, the Acting General Counsel seeks an Order requiring Respondent to: (1) rescind the unlawful provisions of the arbitration agreement, and notify all employees subject to the agreement of the rescission; (2) post at all locations where the arbitration agreement has been in effect any Notice to Employees that may issue in this proceeding; (3) electronically post the Notice to Employees for employees at all its facilities if Respondent customarily uses electronic means such as an electronic bulletin board, e-mail, website, or intranet to communicate with those employees; (4) cease and desist from requiring the unlawful provision of the Agreement prohibiting collective and class actions, and cease and desist from enforcing that portion of the Agreement prohibiting collective and class actions; (5) reimburse employees for all reasonable litigation expenses expended within the 10(b) period directly related to opposing the Employer's unlawful Motion or any other legal action taken to enforce the unlawful agreement; (6) on request, join in a Motion to the United States District Court, Northern District of Alabama to vacate any order compelling individual arbitration pursuant to the unlawful provision of the Agreement. The

Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER

RESPONDENT IS FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent must file an answer to the above amendment to complaint. The answer must be **received by this office on or before** November 8, 2012, **or postmarked on or before November 7, 2012.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that

such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the amendment to complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that commencing at 10:00 a.m. (CST) on December 14, 2012, and on consecutive days thereafter, at the National Labor Relations Board, Birmingham Resident Office, Suite 3400 Ridge Park Place, 1130 22nd Street South, Birmingham, Alabama, a hearing will be conducted before an Administrative Law Judge of the Board on the allegations in this complaint, at which time and place any party within the meaning of Section 102.8 of the Board's Rules and Regulations will have the right to appear and present testimony.

Form NLRB-4338, Notice, and Form 4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as Amended, is attached.

Dated at Atlanta, Georgia, this 25th day of October, 2012.



A handwritten signature in black ink that reads "Claude T. Harrell, Jr." written over a horizontal line.

Claude T. Harrell, Jr.
Regional Director
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (APPLICANT)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned applicant (hereinafter "Individual"). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

This Agreement mutually binds Individual and Company to arbitrate any and all disputes between them as set forth herein. Individual also is bound to arbitrate any related claims he/she individually may have arising out of or in the context of their employment relationship against any manager of the Company. Conversely, managers have signed similar arbitration agreement and thereby are bound to arbitrate any related claims they individually may have against Individual arising out of or in the context of their employment relationship.

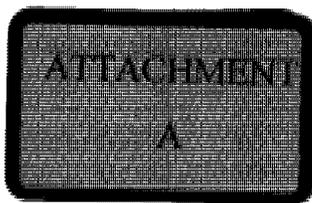
Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement. Individual further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Individual is unable to pay the applicable filing fee for arbitration due to extreme hardship, Individual may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Individual qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Individual or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Individual also must provide written notification that he/she is invoking the arbitration process to the Law Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

Arbitrations pursuant to this Agreement shall be conducted in accordance with the Rules of AAA except where those Rules conflict with the terms of this Agreement, in which event the terms of this Agreement shall control.

Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise, procedural questions which arise out of the dispute and bear on its final disposition are matters for the arbitrator to decide.

Individual's Initials

Page 1 of 2



This Agreement shall be binding upon and inure to the benefit of any successor or assignee of the Company and as to the Individual's heirs, executors and administrators.

This Agreement is an agreement as to choice of forum and is not intended to extend any applicable statute of limitation. Individual and Company understand and agree that any claim for arbitration will be timely only if brought within the time in which an administrative charge or a complaint could have been filed with the administrative agency or the court. If the arbitration claim raises an issue which could not have been timely filed with the appropriate administrative agency or court, then the claim must be treated as the administrative agency or court would have treated it. Claims must be filed within the time set by the appropriate statute of limitation.

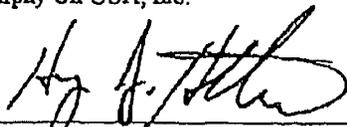
By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

If any claim is found not to be subject to this Agreement and the arbitration procedure, it must be brought in the federal or state court which is closest to the site at which Individual was employed by the Company and which has jurisdiction over the matter. Both Individual and Company expressly agree to waive any right to seek or demand a jury trial and agree to have any dispute decided solely by a judge of the court.

If any provision of this Agreement is determined to be invalid or unenforceable, it is agreed that the remainder of this Agreement shall remain in full force and effect. The parties agree that this Agreement may be interpreted or modified to the extent necessary for it to be enforceable and to give effect to the parties' expressed intent to create a valid and binding arbitration procedure to resolve all disputes not expressly excluded. In the event any provision of this Agreement is found unlawful or unenforceable and an arbitrator (or court) declines to modify this Agreement to give effect to the parties' intent, then the parties agree that this Agreement shall be self-amending, meaning it automatically, immediately and retroactively shall be amended, modified, and/or altered to achieve the intent of this Agreement to the maximum extent allowed by law. If the parties cannot agree upon the appropriate amendment or modification, an arbitrator shall make that determination. Other than as set forth in the above provision, all other modifications of this Agreement must be in writing and signed by a Vice President of the Company and Individual.

INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES BETWEEN THEM RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN INDIVIDUAL AND COMPANY IS TERMINABLE AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

Date
Murphy Oil USA, Inc.



By Henry K. Heithaus, Vice President

Individual's Signature

Individual's Name (Please Print)

Individual's Social Security Number

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

ANSWER TO AMENDED COMPLAINT AND NOTICE OF HEARING

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, Section 8, as amended, Respondent, Murphy Oil USA, Inc. ("Murphy"), by its attorneys, Jackson Lewis LLP, files its Answer to Amended Complaint and Notice of Hearing ("Amended Complaint") as follows:

Answering the first, unnumbered paragraph of the Amended Complaint, Murphy acknowledges that the National Labor Relations Board (the "Board") has issued the Amended Complaint based upon certain allegations of unfair labor practices brought by Sheila Hobson, an individual (hereinafter, "Charging Party") pursuant to the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.

Answering the second, unnumbered paragraph of the Amended Complaint, Murphy acknowledges that the Amended Complaint makes certain allegations of unfair labor practices by Murphy. Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.



1. Murphy admits the allegations in Paragraph 1 of the Amended Complaint, including the allegations in subparagraphs (a) and (b) thereto.

2. Murphy admits the allegations in Paragraph 2 of the Amended Complaint.

3. Murphy admits the allegations in Paragraph 3 of the Amended Complaint.

4. Murphy admits the allegations in Paragraph 4 of the Amended Complaint.

5. Murphy admits the allegations in Paragraph 5 of the Amended Complaint.

6. Answering Paragraph 6 of the Amended Complaint, Murphy admits requiring employment applicants to sign a document entitled "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (the "Agreement"). Murphy denies, however, that the version of the Agreement set forth as "Attachment A" to the Amended Complaint has been used continually since July 28, 2010. Murphy denies any remaining allegations in Paragraph 6 of the Amended Complaint.

7. Murphy denies the allegations in Paragraph 7 of the Amended Complaint.

8. Murphy denies the allegations in Paragraph 8 of the Amended Complaint.

9. Answering Paragraph 9 of the Amended Complaint, Murphy admits that on or about June 14, 2010, Charging Party and three other employees filed a "collective civil action" in the United States District Court for the Northern District of Alabama (Civil Action No. 2:10-cv-01486-HGD) alleging a violation of the Fair Labor Standards Act. The remainder of Paragraph 9 constitutes legal conclusions requiring neither an admission nor a denial by Murphy. To the extent any further response is required, Murphy denies the remaining allegations in Paragraph 9 of the Amended Complaint.

10. Answering Paragraph 10 of the Amended Complaint, Murphy acknowledges that on or about July 26, 2010, Murphy filed a Motion to Compel Arbitration and Dismiss Collective

Action (“Motion”) in Civil Action No. 2:10-cv-1486-HGD in the United States District Court for the Northern District of Alabama. Murphy further admits to filing pleadings in support of the Motion. Murphy denies currently “maintain[ing]” the Motion, insofar as the United States District Judge adopted the Report and Recommendation of the United States Magistrate Judge and compelled arbitration on September 18, 2012. Murphy denies any remaining allegations in Paragraph 10 of the Amended Complaint.

11. Murphy denies the allegations in Paragraph 11 of the Amended Complaint.

12. Murphy denies the allegations in Paragraph 12 of the Amended Complaint.

13. Murphy denies the allegations in Paragraph 13 of the Amended Complaint.

14. Murphy denies the allegations in Paragraph 14 of the Amended Complaint.

15. The final the unnumbered paragraph of the Amended Complaint entitled “Remedy” is a prayer for relief requiring neither an admission nor a denial by Murphy. To the extent a response is required, Murphy denies engaging in any unfair labor practices within the meaning of the Act (or otherwise). Murphy further denies that Charging Party of any other individual is entitled to any remedy or relief in this action.

16. Unless otherwise admitted herein, Murphy denies any remaining allegations in the Amended Complaint.

DEFENSES AND AFFIRMATIVE DEFENSES

For its defenses and affirmative defenses, Murphy avers as follows:

First Defense

The Amended Complaint is barred, in whole or in part, because the Board lacks a quorum. Specifically, under the Act, all authority is vested in the Board, and while others may act on the Board’s behalf by statute or delegation, the Board lacks a quorum because the

President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Murphy reserves the right to challenge the authority of the Board and its agents or delegates if they continue to act in the absence of a lawfully constituted quorum.

Second Defense

The Amended Complaint is barred, in whole or in part, for failure to timely initiate administrative remedies pursuant to Section 10(b) of the Act.

Third Defense

The Amended Complaint is barred, in whole or in part, by the doctrine(s) of res judicata or collateral estoppel.

Fourth Defense

As a result of the resolution of Murphy's Motion to Compel Arbitration in the United States District Court, some or all of the claims in the Amended Complaint are moot.

PRAYER FOR RELIEF

Having now fully answered, Respondent, Murphy Oil USA, Inc., prays the Amended Complaint be dismissed with prejudice, without further proceedings.

Dated: October 31, 2012.

Respectfully submitted,

By:



Stephen X. Munger, Esq.
mungers@jacksonlewis.com
Jeffrey A. Schwartz, Esq.
Schwartzj2@jacksonlewis.com
Brandon M. Cordell, Esq.
cordellb@jacksonlewis.com

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Telephone: (404) 525-8200
Facsimile: (404) 525-1173
ATTORNEYS FOR RESPONDENT
MURPHY OIL USA, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and

Case 10-CA-38804

SHEILA M. HOBSON, An Individual

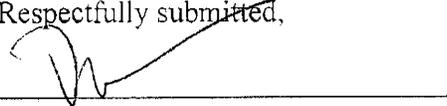
CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, the foregoing document was filed via the NLRB E-Filing System and served, via overnight mail, upon the following parties of record:

Martin M. Arlook, Regional Director
Kerstin Meyers, Esq.
National Labor Relations Board
Harris Tower, Suite 1000
233 Peachtree Street, NE
Atlanta, Georgia 30303

Richard P. Rouco, Esq.
Quinn Connor Weaver Davies and Rouco, LLP
2700 Highway 280 East, Suite 380
Birmingham, Alabama 35223

Respectfully submitted,



Brandon M. Cordell, Esq.
JACKSON LEWIS LLP
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, Georgia 30309

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (APPLICANT)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned applicant (hereinafter "Individual"). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

This Agreement mutually binds Individual and Company to arbitrate any and all disputes between them as set forth herein. Individual also is bound to arbitrate and related claims he/she individually may have arising out of or in the context of his/her employment relationship against any manager of the Company. Conversely, managers have signed similar arbitration agreement and thereby are bound to arbitrate any related claims they individually may have against Individual arising out of or in the context of their employment relationship.

Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement. Individual further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Individual is unable to pay the applicable filing fee for arbitration due to extreme hardship, Individual may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Individual qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Individual or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Individual also must provide written notification that he/she is invoking the arbitration process to the Law Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

Arbitrations pursuant to this Agreement shall be conducted in accordance with the Rules of AAA except where those Rules conflict with the terms of this Agreement, in which the terms of this Agreement control.



Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is whether an issue is subject to arbitration under this Agreement) shall be decided by the arbitrator. Likewise procedural questions which arise out of the dispute and bear on its final disposition are matters for the arbitrator to decide.

This Agreement shall be binding upon and inure to the benefit of any successor or assignee of the Company as to the Individual's heirs, executors and administrators.

This Agreement is an agreement as to choice of forum and is not intended to extend any applicable statute of limitation. Individual and Company understand and agree that any claim for arbitration will be timely only if brought within the time in which an administrative charge or a complaint could have been filed with the administrative agency or the court. If the arbitration claim raises an issue which could not have been timely filed with the appropriate administrative agency or court, then the claim must be treated as the administrative agency or court would have treated it. Claims must be filed within the time set by the appropriate statute of limitation.

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or act as a class member in, any class or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.

Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act ("NLRA") to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes Individual or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board ("NLRB"), including, but not limited to, charges addressing the enforcement of the group, class or collective action waiver set forth in the preceding paragraph.

If any claim is found not to be subject to this Agreement and the arbitration procedure, it must be brought in the federal or state court which is closest to the site at which Individual was employed by the Company and which has jurisdiction over the matter. Both Individual and Company expressly agree to waive any right to seek or demand a jury trial and agree to have any dispute decided solely by a judge of the court.

If any provision of this Agreement is determine to be invalid or unenforceable, it is agreed that the remainder of this Agreement shall remain in full force and effect. The parties agree that this Agreement may be interpreted or modified to the extent necessary for it to be

enforceable and to give effect to the parties' expressed intend to create a valid and binding arbitration procedure to resolve all disputes not expressly excluded. In the event any provision of this Agreement is found unlawful or unenforceable and an arbitrator (or court) declines to modify this Agreement to give effect to the parties' intent, then the parties agree that this Agreement shall be self-amending, meaning it automatically, immediately and retroactively shall be amended, modified, and/or altered to achieve the intent of this Agreement to the maximum extend allowed by law. If the parties cannot agree upon the appropriate amendment or modification, an arbitrator shall make that determination. Other than as set forth in the above provision, all other modifications of this Agreement must be in writing and signed by a Vice President of the Company and Individual.

INDIVIDUAL AND COMPANY UNDERSTAND THAT, ABSENT THIS AGREEMENT, THEY WOULD HAVE THE RIGHT TO SUE EACH OTHER IN COURT, TO INITIATE OR BE A PARTY TO A GROUP OR CLASS ACTION CLAIM, AND THE RIGHT TO A JURY TRIAL, BUT, BY EXECUTING THIS AGREEMENT, BOTH PARTIES GIVE UP THOSE RIGHTS AND AGREE TO HAVE ALL EMPLOYMENT DISPUTES BETWEEN THEM RESOLVED BY MANDATORY, FINAL AND BINDING ARBITRATION. ANY EMPLOYMENT RELATIONSHIP BETWEEN INDIVIDUAL AND COMPANY IS TERMINABLE AT-WILL, AND NO OTHER INFERENCE IS TO BE DRAWN FROM THIS AGREEMENT.

Date

Murphy Oil USA, Inc.

Individual's Signature

Individual's Name (Please Print)

By Henry K. Heithaus, President

Individual's Social Security Number

4829-3685-6334, v 1

Parties

3. Plaintiff, Sheila Hobson, is over the age of nineteen (19) and works as an Assistant Manager for Murphy Oil. She has worked at the Murphy Oil store in Calera, Alabama, as a cashier, and currently works at the Murphy Oil kiosk located in Pelham, Alabama. Ms. Hobson has expressly authorized the filing of this collective action.

4. Plaintiff, Susan Ellington, is over the age of nineteen (19) and works as an Assistant Manager for Murphy Oil. She has worked at the Murphy Oil store in Calera, Alabama, as a cashier, and currently works, as an Assistant Manager, at the Murphy Oil store in Calera, Alabama. Ms. Ellington has expressly authorized the filing of this collective action.

5. Plaintiff, Christine Pinckney, is over the age of nineteen (19) and worked as an Assistant Manager for Murphy Oil. She worked at the Murphy Oil store in Calera, Alabama. Ms. Pinckney has expressly authorized the filing of this collective action.

6. Plaintiff, Santressa Lovelace, is over the age if nineteen (19) and worked as an Assistant Manager for Murphy Oil. She has worked as both a cashier and an Assistant Manager at the Murphy Oil store in Roebuck, Alabama. Ms. Lovelace has expressly authorized the filing of this collective action.

7. Defendant Murphy Oil, is a foreign corporation with its principal place of business in El Dorado, Arkansas, and is incorporated under the laws of Delaware.

Factual Allegations

8. Defendant Murphy Oil, is a retail subsidiary of Murphy Oil Corporation, an international oil and gas company.

9. Defendant Murphy Oil operates approximately 1,000 gas stations in 21 states throughout the Southeast and the Midwest United States.

10. At all material times, Defendant Murphy Oil has been an employer within the meaning of § 3 (d) of the FLSA.

11. At all material times, Plaintiffs have been employed by Defendant Murphy Oil within the meaning of §3 (d) of the FLSA.

12. Murphy Oil has at least two types of hourly employees—Assistant Managers and cashiers.

13. In the Defendant's job description, Defendant provides that the Assistant Manager should "promote a safe work environment and manage the sales, operations and personnel in order to ensure quality customer service and to maximize store sales and profitability" as well as being able to completely perform all duties necessary to run the store without any supervision.

14. In the Defendant's job description on its website, Defendant states that cashiers should "[p]rovide exceptional customer service while tendering transactions for gasoline, snacks, tobacco and other products." Cashiers also "[s]upport [the] store with duties such as stocking, cleaning, safety compliance."

15. For each shift, Defendant has a checklist of tasks to be done by hourly employees on duty, which are so numerous that they must arrive early and stay late to perform their duties.

16. Defendant Murphy Oil requires its employees to perform fuel surveys at certain specified times of the day. These fuel surveys take significant time and are conducted during times when its hourly employees are not compensated.

17. Defendant Murphy Oil describes fuels surveys as one of the most important aspects of their business in their training manuals.

18. Defendant's employees are required to do several fuels surveys a day. These fuel surveys involve driving in a defined geographical area to other fuel stations not owned or

operated by Defendant Murphy Oil and recording information concerning the price of fuel offered by such fuel stations. This includes driving up to the pump of these fuel stations to verify that the information on competitors' signs is correct.

19. After an employee finishes conducting the fuel survey, he or she must travel to the Murphy Oil fuel station where he or she works. Once in the fuel station, the employee enters the information gathered during the fuel survey into a computer owned and operated by Murphy Oil. The information taken from these surveys is then transmitted at certain times daily through the computer to the main office.

20. If a fuel survey is not submitted in a timely manner, the store's commission is docked.

21. District Managers frequently come into the stores to verify fuel surveys are performed during the allotted time provided for by Defendant Murphy Oil. In accordance with Defendant Murphy Oil's policy and practice, if it is suspected that a fuel survey has not been verified, the store will be docked a percentage of its commission.

22. All of Defendant Murphy Oil's hourly employees are instructed to perform these fuel surveys before coming into work and after leaving for the day. The time it takes to perform these surveys is uncompensated.

23. Though hourly employees frequently arrive early and stay late, they are not allowed to clock in until the time listed on their schedule or they are subject to discipline by the Store Manager or the District Manager. This work performed prior to and after their paid shift is not compensated.

24. Hourly employees are required to perform a fuel survey prior to arriving at the store to begin their shift. In addition to fuel surveys, hourly employees are required to perform various

work-related activities off the clock including but not limited to: cleaning the store, stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies. This work is not compensated.

Facts pertaining to Hobson

25. On or about November 5, 2008, Defendant Murphy Oil hired Plaintiff Hobson as a cashier to work in its store located in Calera, Alabama. Plaintiff Hobson was promoted to work as an Assistant Manager in the Calera, Alabama store after about six weeks.

26. Plaintiff Hobson currently works as an Assistant Manager for the Pelham, Alabama store.

27. As an Assistant Manager in both Defendant Murphy Oil's Calera and Pelham, Alabama stores, Plaintiff Hobson has regularly worked over 40 hours in any given work week and not been compensated for all hours worked, including overtime.

28. Plaintiff Hobson has worked overtime hours, and she has recorded those hours. However, in several instances, those overtime hours have been eliminated from her pay check.

29. As an Assistant Manager, Plaintiff Hobson has a list of tasks that must be accomplished in her 8 hour shift that is so numerous that she frequently has to work early or late at the store to get the tasks accomplished. These are hours for which she has never been compensated.

30. Plaintiff Hobson's Store Manager and District Manager have told her to not record the overtime hours she works.

31. Plaintiff Hobson is required to conduct a fuel survey one to two times a day for which she is not compensated. Fuel surveys take a significant amount of time for which she is not compensated.

32. In addition to fuel surveys, Hobson is required to perform various work-related activities for which she is not compensated including but not limited to: cleaning the store, stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies.

Facts pertaining to Ellington

33. On or about March 2008, Defendant Murphy Oil hired Plaintiff Ellington as a cashier in the store located in Calera, Alabama. Plaintiff was promoted about six months later to an Assistant Manager position in the Calera, Alabama store.

34. As an Assistant Manager in the Calera, Alabama store, Ellington has worked over 40 hours in any given work week and not been compensated for all hours worked, including overtime.

35. Plaintiff Ellington has worked overtime hours, and she has recorded those hours. However, in several instances, those overtime hours have been eliminated from her pay check.

36. As an Assistant Manager, Plaintiff Ellington has a list of tasks that must be accomplished in her 8 hour shift that is so numerous that she frequently has to work early or late at the store to get the tasks accomplished. These are hours for which she has never been compensated.

37. Plaintiff Ellington's Store Manager and District Manager have told her to not record the overtime hours she works.

38. Plaintiff Ellington is required to conduct a fuel survey one to two times a day for which she is not compensated. Fuel surveys take a significant amount of time for which she is not compensated.

39. In addition to fuel surveys, Plaintiff Ellington is required to perform various work-related activities for which she is not compensated including but not limited to: cleaning the store, stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies.

Facts pertaining to Pinckney

40. On or about March 2007, Defendant Murphy Oil hired Plaintiff Pinckney as an Assistant Manager in the store located in Calera, Alabama.

41. As an Assistant Manager in the Calera, Alabama store, Pinckney has worked over 40 hours in any given work week and not been compensated for all hours worked, including overtime.

42. Plaintiff Pinckney has worked overtime hours, and she has recorded those hours. However, in several instances, those overtime hours have been eliminated from her pay check.

43. As an Assistant Manager, Plaintiff Pinckney has a list of tasks that must be accomplished in her 8 hour shift that is so numerous that she frequently has to work early or late at the store to get the tasks accomplished. These are hours for which she has never been compensated.

44. Plaintiff Pinckney's Store Manager and District Manager have told her to not record the overtime hours she works.

45. Plaintiff Pinckney is required to conduct a fuel survey one to two times a day for which she is not compensated. Fuel surveys take a significant amount of time for which she is not compensated.

46. In addition to fuel surveys, Pinckney is required to perform various work-related activities for which she is not compensated including but not limited to: cleaning the store,

stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies.

Facts pertaining to Lovelace

47. On or about September 2008, Defendant Murphy Oil hired Plaintiff Lovelace as a cashier in the store located in Roebuck, Alabama. She was promoted to Assistant Manager about two weeks later.

48. As an Assistant Manager in the Roebuck, Alabama store, Lovelace has regularly worked over 40 hours in any given work week and not been compensated for all hours worked, including overtime.

49. Plaintiff Lovelace has worked overtime hours, and she has recorded those hours. However, in several instances, those overtime hours have been eliminated from her pay check.

50. As an Assistant Manager, Plaintiff Lovelace has a list of tasks that must be accomplished in her 8 hour shift that is so numerous that she frequently has to work early or late at the store to get the tasks accomplished. These are hours for which she has never been compensated.

51. Plaintiff Lovelace's Store Manager and District Manager have told her to not record the overtime hours she works.

52. Plaintiff Lovelace is required to conduct a fuel survey one to two times a day for which she is not compensated. Fuel surveys take a significant amount of time for which she is not compensated.

53. In addition to fuel surveys, Plaintiff Lovelace is required to perform various work-related activities for which she is not compensated including but not limited to: cleaning the

store, stocking the shelves, unloading merchandise from trucks, making bank deposits, running errands, and getting supplies.

Class Allegations

54. Plaintiffs bring their claims pursuant to 29 U.S.C. §216(b) as a representative action on behalf of the following similarly situated individuals:

- (a) All current and former hourly employees, including but not limited to assistant managers and cashiers, who worked for Defendant Murphy Oil since June 11, 2007.

55. Plaintiffs are similarly situated, in accordance with 29 U.S.C. §216(b), since they are all paid in accordance with a uniform and company-wide compensation policy that they allege violates the provisions of the FLSA. This uniform policy, in violation of the FLSA, has been applied to all hourly employees in Murphy Oil stores.

56. Plaintiffs have no interests that are antagonistic to or in conflict with those interests that they have undertaken to represent as Class Representatives.

57. Plaintiffs have retained competent and experienced counsel who are experienced in collective action cases brought under the FLSA and are able to effectively represent the interests of the entire Class.

VIOLATION OF THE FAIR LABOR STANDARDS

ACT 29 U.S.C. § 201 et seq.

58. Plaintiffs re-allege and incorporate the preceding paragraphs as if fully set forth herein.

59. The FLSA requires that covered employees be compensated for every hour worked in a workweek. *See* 29 U.S.C. §206(b).

60. Section 13 of the FLSA, codified at 29 U.S.C. § 213, exempts certain categories of employees from overtime pay obligations. None of the FLSA exemptions apply to Plaintiffs or potential opt-in Plaintiffs.

61. Murphy Oil does not pay the plaintiffs and similarly situated employees at their regular rate of pay for every hour they work in a workweek, including overtime, which violated 29 U.S.C. § 206 and § 207.

62. Defendant Murphy Oil willfully and/or knowingly failed to pay plaintiffs and similarly situated employees for all time worked as defined by 29 U.S.C. §206, including overtime. 29 U.S.C. §255(a). The plaintiffs and similarly situated employees were damaged as a result of Murphy Oil's willful and/or knowing violation of the FLSA, 29 U.S.C. §§ 201 *et seq.*

63. Defendant's failure to pay wages and overtime pay to Plaintiffs in accordance with FLSA regulations was neither reasonable, nor in good faith. 29 U.S.C. § 259.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief against Defendant:

A. An order permitting this litigation to proceed as a collective action pursuant to 29 U.S.C. § 216(b);

B. Prompt notice, pursuant to 29 U.S.C. § 216(b), of this litigation to all potential members of the collective action;

C. Enter judgment against Defendant and in favor of Plaintiffs and others similarly situated, for the amount of unpaid overtime that the Defendant has failed and refused to pay in violation of the Fair Labor Standards Act;

D. Find that Defendant's violations of the Fair Labor Standards Act were willful;

E. An injunction prohibiting Defendant from engaging in future violations of the Fair Labor Standards Act;

F. Liquidated damages to the fullest extent permitted under the Fair Labor Standards Act;

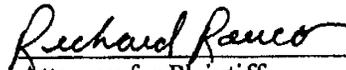
G. Litigation costs, expenses, and attorneys' fees to the fullest extent permitted under the Fair Labor Standards Act; and,

H. Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to the Seventh Amendment of the United States Constitution, the plaintiffs respectfully request a trial by jury.

Respectfully submitted,



Attorney for Plaintiffs

OF COUNSEL:

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Birmingham, Alabama 35242

Telephone: (205) 980-6065

Kevin L. Weaver (ASB-8452-158W)

kweaver@weavertidmorelaw.com

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee <i>Karna Payne</i></p> <p>B. Restricted by (Printed Name) <input type="checkbox"/> C. Date of Delivery <i>Karna Payne</i> 6/24/10</p>
<p>1. Article Addressed to:</p> <p>Murphy Oil USA, Inc. c/o The Corporation Company 2000 Interstate Park Drive, Suite 204 Montgomery, AL 36109</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
<p>2. Article Number (Transfer from service label)</p>	<p>7008 0150 0003 5987 9161</p>

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

UNITED STATES POSTAL SERVICE

• Sender: Please print your name, address, and ZIP+4 in this box •

USDC Northern District of AL
Hugo L. Black U.S. Courthouse
1729 Fifth Avenue North
Birmingham, AL 35203

CV-10-HGD-1486-S

500

BINDING ARBITRATION AGREEMENT
AND
WAIVER OF JURY TRIAL (APPLICANT)

This Agreement is entered into between Murphy Oil USA, Inc. ("Company") and the undersigned applicant (hereinafter "Individual"). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

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Individual understands that he/she will not be considered for employment by the Company unless he/she signs this Agreement. Individual further understands that, as additional consideration for signing this Agreement, the Company agrees to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the arbitration procedure set forth in this Agreement. In the event Individual is unable to pay the applicable filing fee for arbitration due to extreme hardship, Individual may apply to AAA for deferral or reduction of the fees. AAA shall determine whether the Individual qualifies for a waiver, deferral or reduction of its filing fee. To invoke the arbitration process, Individual or Company must contact the American Arbitration Association at 2200 Century Parkway, Suite 300, Atlanta, Georgia 30345-3202, 404-325-0101, direct toll free: 1-800-925-0155, facsimile 404-325-8034, or the nearest regional office of AAA. Individual also must provide written notification that he/she is invoking the arbitration process to the Law Department, Murphy Oil USA, Inc., 200 Peach Street, El Dorado, Arkansas 71730, facsimile: 870-864-6489.

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S. M. H.

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11/5/2008

Date

Murphy Oil USA, Inc.



By Henry K. Heithaus, President



Digitally Signed By: SHEILA M HOBSON

Individual's Signature

SHEILA M HOBSON

Individual's Name (Please Print)

422864447

Individual's Social Security Number

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9/7/2008

Date
Murphy Oil USA, Inc.



By Henry K. Heithaus, President



Digitally Signed By: SANTRESSA LANISE

Individual's Signature

SANTRESSA LANISE LOVELACE

Individual's Name (Please Print)

422138272

Individual's Social Security Number

Jun 13 08 04:04p

P. 2

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AND
WAIVER OF JURY TRIAL (APPLICANT)

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Individual's Initials

Jun 13 08 04:04P

p. 3

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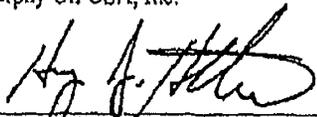
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3-25-08
Date
Murphy Oil USA, Inc.


By Henry K. Heithaus, Vice President


Individual's Signature

Susan Dawn Ellington
Individual's Name (Please Print)

255 33 6129
Individual's Social Security Number

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AND
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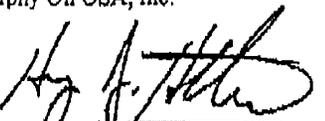
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3-11-05
Date
Murphy Oil USA, Inc.


By Henry K. Heidhaus, Vice President


Individual's Signature

Christine S. Pinckney
Individual's Name (Please Print)

366-4928
Individual's Social Security Number

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

AFFIDAVIT OF ANDREW QUALLS

Affiant, Andrew Qualls, hereby deposes, affirms, and attests as follows:

1.

I, Andrew Qualls, am over the age of twenty-one (21) years and competent to testify to the matters contained herein. The statements contained in this affidavit are based upon my own personal knowledge.

2.

I am employed as a Senior Human Resources Analyst for Murphy Oil USA, Inc. ("Murphy") in El Dorado, Arkansas. In that capacity, I am familiar with Murphy's human resources processes, procedures, records, and record-keeping functions.

3.

Since early 2008, all newly-hired employees at Murphy have been asked to execute a document entitled "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant) (the "Agreement"). Attached to this affidavit as collective Exhibit "A" are true and correct copies of four such Agreements executed by Murphy employees Sheila Hobson, Christine Pinckney,

Susan Ellington, and Santressa Lovelace. Each of the Plaintiffs joined Murphy during 2008 and executed their respective Agreement as part of the hiring process.

4.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and based upon my own personal knowledge.

FURTHER AFFIANT SAYETH NOUGHT.

This ___ day of July, 2010.


Andrew Qualls

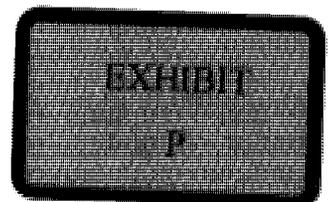
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

**DEFENDANT’S MOTION AND MEMORANDUM TO COMPEL
ARBITRATION AND DISMISS COLLECTIVE ACTION**

COMES NOW Defendant Murphy Oil USA, Inc. (“Murphy”) and files its motion and memorandum seeking that the Court (1) compel arbitration of Plaintiffs’ individual claims pursuant to the “Binding Arbitration Agreement And Waiver Of Jury Trial (Applicant)” (“Arbitration Agreement”)¹ each Plaintiff executed at the inception of their employment with Murphy; and (2) to dismiss this action. Plaintiffs and Murphy have agreed to arbitrate the Fair Labor Standards Act (“FLSA”) claims asserted in the Complaint. Moreover, through that

¹ Plaintiffs’ respective Agreements are attached to the Affidavit of Andrew Qualls (“Qualls Aff.”), submitted herewith as Exhibit “A.”



Agreement, Plaintiffs affirmatively agreed not to bring any claims against Murphy in a collective manner pursuant to 29 U.S.C. § 216(b) or through any other class action mechanism. Accordingly, the Court should compel the Plaintiffs to arbitrate their claims on an individual basis and dismiss the collective action in its entirety.

I. FACTUAL BACKGROUND

A. Plaintiffs' Agreement to Arbitrate Their Individual and Collective Claims Against Murphy.

Plaintiffs Sheila Hobson, Christine Pinckney, Susan Ellington and Santressa Lovelace each began employment with Murphy during 2008. (Qualls Aff., ¶ 3.) At the inception of employment, each Plaintiff executed the Arbitration Agreement. *See* Ex. A. The Arbitration Agreement broadly requires arbitration of all claims brought by either the signing employee or Murphy arising out of the employment relationship, stating the parties agree to “resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual’s employment,” and further, “[t]his Agreement mutually binds Individual and Company to arbitrate *any and all disputes between them* as set forth herein.” (Arbitration Agreement, p. 1 (emphasis added).) All claims brought under the FLSA are subject to binding arbitration pursuant to the express terms of the Arbitration Agreement:

Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans with Disabilities Act, the Family and Medical Leave Act, *the Fair Labor Standards Act or other wage statutes*, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever.

(Arbitration Agreement, p. 1 (*emphasis added*.)

As additional consideration for each Plaintiff's execution of the Arbitration Agreement, Murphy "agree[d] to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the Arbitration procedure set forth in this Agreement." (*Id.*)

In addition, each of the Plaintiffs and Murphy agreed to a provision both waiving and prohibiting class or collective actions such as this action:

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member in any court or collective action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class, or collective action claim in arbitration or any other forum. The parties agree that any claim by, against, or among Manager, Individual and/or Company shall be heard without consolidation of such claim with other person or entity's claim.

(Arbitration Agreement, p. 2.)

The Arbitration Agreement further provides:

Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration

provisions of this Agreement, and judgment upon the award rendered bit the Arbitrator may be entered by any court having jurisdiction thereof. Questions or arbitrability (that is, whether an issue may be subject to arbitration under this Agreement) shall be decided by the Arbitrator. . . .

(Arbitration Agreement, p. 1.)

B. Plaintiffs' Individual FLSA Claims Are Subject to Arbitration and They Have Waived The Right To Pursue Collective Action Claims.

On June 14, 2010, Plaintiffs filed this civil action styled as a “Collective Action Complaint” naming Murphy as Defendant and asserting claims pursuant to the FLSA. Plaintiffs allege that they have not be properly compensated for all hours work in violation of the FLSA. (Complaint, ¶¶ 27, 34, 41, 48.) Specifically, Plaintiffs allege they were required to work late, conduct fuel surveys, and perform “various work-related activities” for which they are not compensated. (Complaint, ¶¶ 22-24, 29-32, 36-39, 48-53.)

In addition, Plaintiffs' Complaint includes a section titled “Class Allegations,” in which they purport to “bring their claims pursuant to 29 U.S.C. § 216(b) as a representative action[.]” (Complaint, ¶ 54.)

As shown below, Plaintiffs have entered into a binding agreement to arbitrate their individual claims and have validly waived their right to pursue collective action claims. Accordingly, the Court should compel Plaintiffs to arbitrate their FLSA claims and dismiss their collective action claims.

II. ARGUMENT AND CITATION OF AUTHORITY

A. **The Federal Arbitration Act Governs the Arbitration Agreement.**

The Arbitration Agreement is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.* Section 2 of the FAA provides:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out [*8] of such contract . . . 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.

Thus, the FAA “makes enforceable a written arbitration provision ‘in a contract evidencing a transaction involving commerce.’” *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 874 (11th Cir. 2005). The FAA’s reach is extremely broad. The Supreme Court of the United States has “interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’ – words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). So long as the underlying agreement containing the arbitration provision “involves” or “affects” interstate commerce, the FAA will govern whether that provision is enforceable. *Id.* Significantly, both the United States Supreme Court and the Eleventh Circuit Court of Appeals have held that federal employment claims involve and affect interstate

commerce and are therefore subject to mandatory arbitration. See *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing arbitration of ADEA claims); see also *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1258 (11th Cir. 2003) (The "FAA applies to all arbitration agreements involving interstate commerce, including employment contracts, such as the one at issue here"); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1457 (11th Cir. 1997) (finding the district court's referral of FLSA claims to arbitration proper).

B. Federal Law Favors Arbitration.

"Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Company*, 460 U.S. 1, 24 (1983). Thus, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" *Id.* at 24-25.

The FAA ensures that an arbitration agreement "will be enforced according

to its terms even if a rule of state law would otherwise exclude such claims from arbitration.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995). A court may not rewrite or void an arbitration provision based upon the court's view of proper public policy, efficiency or equity. *See, e.g., Waffle House, Inc.*, 534 U.S. at 294 (“we do not . . . reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated”) “Even claims arising under a statute designed to further important social policies maybe arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.” *Green Tree Financial Corp. of Alabama v. Randolph*, 531 U.S. 79, 89-90 (2000) (*internal citations omitted*).

C. The Court Should Compel All Plaintiffs To Arbitration Their Claims.

In light of the strong federal policy favoring arbitration, the Court should compel Plaintiffs to arbitrate their FLSA claims in this case. Section 4 of the FAA grants federal district courts the power to compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. “In determining whether to compel arbitration, the Court must undertake a two step inquiry.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). First, the Court must

determine whether the parties agreed to arbitrate the dispute. *Id.* Second, the Court must decide whether “any legal constraints external to the parties’ agreement foreclose arbitration.” *Id.* In making these determinations, the Court must keep in mind the strong presumption in favor of arbitration. *See Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1011 (11th Cir. 1998); *see also Collins v. Int’l Dairy Queen, Inc.*, 2 F. Supp. 2d 1473, 1478 (M.D. Ga. 1998) (explaining that the “general principle relating to contracts [that ambiguities should be interpreted against the drafter] is superseded by the federal policy which requires that construction of the contract language is to be resolved in favor of arbitration where there are doubts as to the parties’ intentions”).

i. The Parties Agreed to Arbitrate.

Here, the parties agreed in writing to arbitrate the claims Plaintiffs have asserted in this action and therefore the Court should compel Plaintiffs to arbitrate their claims. *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369-1370 (11th Cir. 2005).

The Arbitration Agreements clearly constitutes a written arbitration agreement for purposes of the FAA. Indeed, the Eleventh Circuit has enforced far less formal written provisions, such as employer policies, that nonetheless evidence an agreement to arbitrate. *See Caley*, 428 F.3d at 1369 ((holding a “dispute resolution policy” constituted an enforceable agreement to arbitrate under

the FAA, despite the plaintiff's protestations they were not required to sign the policy upon its implementation).

ii. The Class Action Waiver Provision Is Enforceable Under Binding Precedent.

The Supreme Court has expressly held that courts must enforce arbitration agreements, even if doing so precludes the claimant from pursuing a class action. *Gilmer*, 500 U.S. at 32. The Eleventh Circuit relying on *Gilmer*, has held that a provision in an arbitration agreement expressly prohibiting an employee from bringing a class action under the FLSA is fully enforceable. *See Caley*, 428 F.3d at 1378 (affirming district court's granting motion to compel and to dismiss FLSA collective action with an estimated class of two hundred employees). In doing so, the Eleventh Circuit rejected the plaintiffs' argument that the class/collective action waiver provision rendered the arbitration agreement unconscionable, reasoning that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.'" *Id.* (quoting *Gilmer*, 500 U.S. at 31-32); *see also Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 816 (11th Cir. 2001) (enforcing arbitration of claims brought under the Truth in Lending Act ("TILA") despite that the arbitration agreement precluded class actions under TILA); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 174-175 (5th Cir. 2004) (enforcing

arbitration agreement with class-action prohibition and rejecting position that it was unconscionable because it immunized the company from low-value claims).

Both before and after the Eleventh Circuit's holding in *Caley*, courts have routinely enforced arbitration provisions prohibiting class or collective actions brought under 29 U.S.C. § 216(b). In doing so, those courts have soundly rejected a variety of attacks on the enforcement of class or collective action waiver provisions under the FLSA. *See, e.g. Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiff's argument such a clause deprived them of a substantial right under the FLSA, noting the Supreme Court's decision in *Gilmer* "applies with equal force to FLSA claims"); *Brown v. Sears Holdings Mgmt., Corp.*, 2009 U.S. Dist. LEXIS 72502 (N.D. Ill. Aug. 17, 2009)² (rejecting the plaintiff's argument that the general prohibition against waiver of FLSA claims absent court oversight prevented enforcement of arbitration agreement with collective action waiver provision, noting "[i]t is the underlying availability of remedies provided in the FLSA, such as back wages, liquidated damages, etc., that constitute rights that cannot be abridged by private agreement, rather than the dispute resolution mechanisms that can be employed to determine legal entitlement to those remedies"); *La Torre v. BFS Retail & Commer.*

² Copies of all unpublished cited herein are attached as Exhibit "B."

Operations, LLC, 2008 U.S. Dist. LEXIS 99002, * 15-16 (S.D. Fla. Dec. 8, 2008) (enforcing the class action waiver in the employer's dispute resolution agreement and compelling arbitration of the plaintiff's individual FLSA claims). Accordingly, the Court should follow the Eleventh Circuit's binding decision in *Caley* and the well-reasoned rationale of the persuasive authorities and compel Plaintiffs to arbitrate their claims.

Though *Caley* involved an arbitration agreement under Georgia law, Alabama law compels the same result. In *Caley*, the Eleventh Circuit explained that "state law generally governs whether an enforceable agreement to arbitrate exists." *Caley*, 428 F.3d at 1368. Alabama state law does not prohibit enforcement of the class and collective action waiver provision in the Arbitration Agreement. Indeed, the middle district of Alabama, applying Alabama law has held class actions waivers enforceable in circumstances indistinguishable from those presented here. *See Gipson v. Cross Country Bank*, 294 F. Supp.2d 1251 (M.D. Ala. 2003). In *Gipson*, the district court enforced a class action waiver in a credit card agreement to preclude class litigation of claims brought pursuant to the Fair Credit Billing Act ("FCBA"). Opposing the defendant's efforts to compel arbitration, the plaintiff argued the class action waiver provision was unconscionable under Alabama law, because the value of her individual claim was too small for her to pursue (and to warrant an attorney's time and effort) in the

absence of a class procedure. The district court rejected this argument, noting that the controlling statute allowed for a recovery of attorney's fees. Thus, the absence of a class procedure did not impede the plaintiff's right to pursue her claims:

The Supreme Court has explained that the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. . . . *This concern, however, is not present in an individual suit seeking damages under statutory provisions that provide prevailing plaintiffs with multiple damages, costs and attorneys' fees, because the existence of these remedies provides parties and lawyers with incentives to pursue their cases.* Indeed, the central purpose behind statutory attorney's fees is to encourage lawyers to accept cases in which damages may be small or nominal. *Although Plaintiff and her lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or her attorneys are so lacking in economic incentive to warrant a finding that [the defendant's] class action prohibition is unconscionable.*

Id. at 1264 (citation omitted, emphasis added).

As in *Gipson*, The FLSA provides Plaintiffs with an avenue to recover their costs and attorney's fees, as well as liquidated damages if they establish liability. *See* 29 U.S.C. § 260. Indeed, Plaintiffs are in an even better position than *Gipson* plaintiffs because Murphy has agreed to pay for the entire cost of the arbitration except filing fees. Therefore, unlike *Gipson*, there is even less of an impediment created by enforcing the terms of the Arbitration Agreements and requiring the

Plaintiffs to pursue their claims individually in arbitration. Accordingly, the collective action waiver provision is certainly enforceable under Alabama law.

D. The Court Should Dismiss Plaintiffs' Collective Action Claims.

Assuming the Court enforces the Arbitration Agreements and requires the Plaintiffs to submit their individual claims to arbitration, the Court should dismiss this action. First, because the named-Plaintiffs are obligated to arbitrate their individual claims and agreed not participate in a collective action (and waived their right to do so), there are no claims remaining for the Court to resolve. Under those circumstances, dismissal is proper. *See Caley*, 428 F.3d 1359, 1366, 1378-1379 (11th Cir. 2005) (affirming district court's order compelling arbitration and dismissing action involving an intended class of two hundred workers); *Gipson*, 294 F. Supp.2d at 1264 (dismissing the action when enforcing arbitration agreement's class action waiver, "since the court is now required to make an order directing the parties to proceed to arbitration . . . [and] the agreement specifically provides that 'neither [the Plaintiff] nor anyone else on [her] behalf can pursue [her] claim . . . in an arbitration proceeding on a class-wide basis[.]'"); *Chapman v. Lehman Bros.*, 279 F. Supp.2d 1286, 1290 (S.D. Fla. 2003) (granting motion to compel arbitration of the individual plaintiffs' FLSA claims and dismissing class allegations); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (compelling arbitration of the named-plaintiffs' claims and dismissing

action); *see also Pomposi v. Gamestop, Inc.*, 2010 U.S. Dist. LEXIS 1819 (D. Conn. Jan. 11, 2010) (granting motion to compel arbitration of FLSA claims and dismissing putative collective action under Section 16(b)).

Furthermore, because the named-Plaintiffs' individual claims must be dismissed, the remaining collective action claims no longer present a justiciable controversy for the Court to oversee, and thus dismissal of the action is proper. *See Tucker v. Phyfer*, 891 F.2d 1030, 1033 (11th Cir. 1987) (stating class action is moot if no named-plaintiff has a live claim before class certification); *Bowens v. Atlantic Maintenance Corp.*, 546 F. Supp.2d 55, 77 (E.D.N.Y. 2008) (explaining “[t]he unnamed class members are not technically part of the action until the court has certified the class; therefore, once the named plaintiffs' claims are dismissed, there is no one who has a justiciable claim that may be asserted”). Accordingly, those allegations are subject to dismissal.

III. CONCLUSION

Plaintiffs agreed in writing to arbitrate their FLSA claims and have waived their right to pursue collective claims under the FLSA. Accordingly, the Court should compel arbitration of Plaintiffs' individual FLSA claims and dismiss their action with prejudice.

Respectfully submitted this 26th day of July, 2010.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

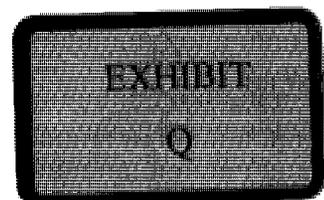
SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

**DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF MOTION TO
COMPEL ARBITRATION AND DISMISS ACTION**

COMES NOW Defendant Murphy Oil USA, Inc. (“Murphy”) and files its Reply Memorandum in Support of Motion to Compel Arbitration and Dismiss Action (“Motion”) and shows as follows:

I. INTRODUCTION

Plaintiffs do not contest Murphy’s Motion to Compel Arbitration of their FLSA claims. Instead, they merely seek clarification of the enforceability of the collective action waiver in the Arbitration Agreement. Therefore, the Court should compel Plaintiffs to arbitrate their individual Fair Labor Standards Act (“FLSA”) claims. Murphy also asked the Court to dismiss the lawsuit after compelling arbitration because there would be no plaintiffs or class representatives. Plaintiffs



do not address or even oppose the motion to dismiss on this basis. Instead, they ask the Court to compel arbitration of the collective claims and clarify the enforceability of the collective action waiver. There is no motion pending asking the Court to compel arbitration of the collective action claims. Moreover, the Supreme Court has recently held parties cannot be compelled to arbitrate class claims unless the arbitration agreement shows an intent to allow such a procedure. Here, the Arbitration Agreement specifically forbids the parties from arbitrating on a class or collective basis. Accordingly, the Court should enforce the Arbitration Agreement, refer the Plaintiffs' individual FLSA claims to arbitration, and dismiss this action.

Nonetheless, even if the Court considers whether the collective action waiver provision is enforceable, Plaintiffs have failed to carry their burden. Plaintiffs' argument that a collective action waiver is unenforceable because the FLSA provides a substantive right to proceed collectively has been soundly rejected. Moreover, Plaintiffs have failed to demonstrate the collective action waiver is unconscionable under Alabama law. Indeed, they fail to cite any Alabama authority or tender any evidence to support their argument. Finally, the principal cases cited by Plaintiffs involve arbitration agreements that prohibit attorney fee awards and/or mandate cost sharing by the plaintiffs, provisions not contained in Murphy's Arbitration Agreement. As shown below, the Court should

compel the Plaintiffs to arbitrate their claims and dismiss their collective action claims entirely.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiffs Concede Their Individual Claims Are Subject to Mandatory Arbitration.

Plaintiffs concede that they entered into binding Arbitration Agreements with Murphy, which encompass their individual FLSA claims. Consequently, they should be compelled to arbitrate their FLSA claims on an individual basis.¹

B. Plaintiffs Do Not Contest Murphy's Motion To Dismiss Their Collective Claims.

Plaintiffs also do not contest Murphy's motion to dismiss their collective action claims. They do not even address the issue in their Response. Even if they had, dismissal of the collective action claims is proper. First, because the named-Plaintiffs' individual claims must be referred to arbitration pursuant to the Arbitration Agreement, the remaining collective action claims no longer present a justiciable controversy for the Court to oversee, and therefore dismissal of the action is proper. *See East Texas Motor Freight Syst. v. Rodriguez*, 431 U.S. 395, 405-406 (1977) (stating class action is properly dismissed if no named-plaintiff has

¹ The Arbitration Agreement states "[t]he parties agree that any claim by or against Individual or the Company shall be heard without consideration of such claim with any other person or entity's claim." Arbitration Agreement, p. 1. Therefore, Plaintiffs should be compelled to arbitrate their FLSA claims in four separate proceedings.

a live claim before class certification); *Tucker v. Phyfer*, 819 F.2d 1030, 1033 (11th Cir. 1987) (same).

Second, as a practical matter, referring the Plaintiffs' individual claims to arbitration leaves no extant class representative to prosecute the collective action claims. Accordingly, irrespective of the waiver provision, the collective action claims are subject to dismissal because they cannot be adjudicated without a class representative. *See, e.g., Harris v. Peabody*, 611 F.2d 543, 545 (5th Cir. 1980) (affirming dismissal of action where no viable class representative remained in the case); *Kifer v. Ellsworth*, 346 F.3d 1155, 1156 (7th Cir. 2003) (stating "a class action suit cannot proceed in the absence of a class representative").

Accordingly, no viable class representative remains in the litigation and there is nothing more that the Court must resolve. As a result, the Court may properly compel the Plaintiffs to arbitrate and dismiss this action without deciding if the collective action waiver is enforceable.

C. Plaintiffs Collective Action Claims Are Not Subject To Arbitration.

Plaintiffs ask the Court to strike the collective action waiver and refer their collective action claims to arbitration. Neither party, however, has moved to compel arbitration of the collective action claims in this case. In any event, the Arbitration Agreement does not provide for arbitration of collective claims.

Indeed, the Agreement expressly excludes arbitration of collective actions, stating the Plaintiffs “waive their right to commence or be a party to any group, class or collective action claim *in arbitration or any other forum.*” Arbitration Agreement, p. 2 (emphasis added).

Plaintiffs do not challenge this specific provision of the Arbitration Agreement in their Response. Indeed, there is no right to arbitrate collective claims under the FLSA. Even if they had, however, their affirmative agreement not to proceed collectively in arbitration must be enforced. In considering arbitration agreements, the Court must give effect to the contractual rights and expectations of the parties. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). As with any other contract, the parties' intentions control. *Id.* As the Supreme Court has recently explained, where the parties have not manifested an intent to arbitrate on a class basis, the Court cannot interpret an arbitration agreement to include such terms:

[W]e have held that parties are generally free to structure their arbitration agreements as they see fit. For example, we have held that parties may agree to limit the issues they choose to arbitrate, and may agree on rules under which any arbitration will proceed. They may choose who will resolve specific disputes. We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. ***From these principles, it follows 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.***

Stolt-Nielsen v. AnimalFeed International Corp., ___ U.S. ___, 130 S.Ct. 1758, 1774-1775 (2010) (emphasis in original) (internal citations omitted); *see also*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (stating “nothing in the FAA authorizes a court to compel arbitration of any issues or by any parties that are not already covered in the agreement”);

Here, not only is there no contractual basis for concluding Murphy and Plaintiffs agreed to class or collective action in arbitration, the plain language of the Arbitration Agreement demonstrates just the opposite. Plaintiffs and Murphy clearly and unequivocally agreed *not* to arbitrate any claims on a collective basis. Accordingly, Plaintiffs’ argument that the Court may refer their collective action claims to arbitration should be rejected.

D. The Collective Action Waiver Is Enforceable.

The Court may compel the Plaintiffs to arbitrate their FLSA claims and dismiss their lawsuit without ever addressing the enforceability of the collective action waiver. If the Court decides to address that issue, Plaintiffs have failed to demonstrate the waiver provision is unenforceable.

1. Plaintiffs Do Not Have a Substantive Right to Proceed Collectively.

Plaintiffs’ assertion that the FLSA guarantees them a substantive right to proceed collectively is erroneous. Under federal law, “[e]ven claims arising under

a statute a statute designed to further important social policies may be arbitrated, because so long as the prospective litigant effective may vindicate [his or her] statutory cause of action in a arbitral forum, the statute serves its function.” *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000). Thus, agreements to arbitrate federal statutory claims are enforceable unless “Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Id.*

The FLSA provides no indication that Congress intended to preclude arbitration agreements that include a collective action waiver. Indeed, the Supreme Court itself has strongly suggested otherwise. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court upheld the arbitration of claims under the Age Discrimination in Employment Act (“ADEA”), which uses the same remedial provisions and collective action mechanism as the FLSA. *See* 29 U.S.C. § 626(b). In doing so, the Supreme Court rejected the plaintiff’s argument that, by agreeing to arbitrate, he had necessarily waived a substantive right under the ADEA. “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer*, 500 U.S. at 26. Moreover, the Court explicitly rejected the plaintiff’s argument that he was deprived of a substantive right because the arbitration agreement

effectively prevented a class or collective action procedure, stating, “[t]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* at 32.

In the wake of *Gilmer*, numerous courts have rejected Plaintiffs’ argument that the FLSA precludes a collective action waiver. The Eleventh Circuit definitively ruled a collective action waiver is enforceable in *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1376-1378 (11th Cir. 2005), in which the court enforced a collective action waiver in a dispute resolution policy covering FLSA claims. Other courts also have firmly rejected Plaintiffs’ position. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (finding “no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. [Plaintiff’s] inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum”); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiff’s argument such a clause deprived them of a substantial right under the FLSA, noting the Supreme Court’s decision in *Gilmer* “applies with equal force to FLSA claims”); *Pomposi v. Gamestop, Inc.*, 2010 U.S. Dist. LEXIS 1819 (D. Conn. Jan. 11, 2010) (holding

“the right to bring a collective action under the FLSA is a right that can be waived”); *Brown v. Sears Holdings Mgmt., Corp.*, 2009 U.S. Dist. LEXIS 72502 (N.D. Ill. Aug. 17, 2009) (rejecting the plaintiff’s argument that the general prohibition against waiver of FLSA claims absent court oversight prevented enforcement of arbitration agreement with collective action waiver provision, noting “[i]t is the underlying availability of remedies provided in the FLSA, such as back wages, liquidated damages, etc., that constitute rights that cannot be abridged by private agreement, rather than the dispute resolution mechanisms that can be employed to determine legal entitlement to those remedies”); *La Torre v. BFS Retail & Commer. Operations, LLC*, 2008 U.S. Dist. LEXIS 99002, * 15-16 (S.D. Fla. Dec. 8, 2008) (enforcing the class action waiver in the employer’s dispute resolution agreement and compelling arbitration of the plaintiff’s individual FLSA claims).

In their Response, Plaintiffs do not address the Eleventh Circuit’s binding ruling in *Caley*. Instead, they cite generally to cases discussing the remedial purposes underlying the FLSA. They do not, however, cite to *any* binding authority holding the FLSA creates a substantive right to litigate on a collective basis in derogation of an arbitration agreement’s express collective action waiver. Indeed, the *only* decision cited by Plaintiffs that directly addresses that issue -- *Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100391 (D. Minn. Jan. 23, 2002) --

was reversed. In *Bailey*, a federal district court in an unpublished opinion declined to enforce a collective action waiver on the grounds it deprived the plaintiffs of “procedural rights guaranteed by Congress.” *Id.* at * 6. The district court was later overruled by the Eighth Circuit, which found FLSA claims waivable pursuant to the Supreme Court’s holding in *Gilmer*. See *Bailey v. Ameriquest Mortgage Co.*, 236 F.3d 821, 822-823 (8th Cir. 2003).

2. The Class Action Waiver Is Not Unconscionable Under Alabama Law.

Plaintiffs also argue the collective action waiver is unconscionable under Alabama law. The Court should reject Plaintiffs’ argument on multiple grounds. Plaintiffs have cited no Alabama authority to support their position. Instead, they have relied on inapposite decisions involving consumer claims. Unlike here, those cases did not involve a statutory right to recover costs and attorney’s fees. In addition, unlike here, those cases involved arbitration agreements requiring the plaintiffs to share the costs of arbitration. Moreover, the factors considered in analyzing unconscionability do not support Plaintiffs’ position. Finally, Plaintiffs have presented no admissible evidence demonstrating the Arbitration Agreement is unconscionable under Alabama law. Instead, they rely entirely on argument of counsel.

a. Plaintiffs Have Failed to Identify Any Alabama Law Suggesting the Arbitration Agreement Is Unconscionable.

Plaintiffs have failed cite any case law demonstrating the class action waiver is unconscionable under Alabama law.² Indeed, in making their argument, Plaintiffs fail to cite *any* Alabama authority. In contrast, as Murphy demonstrated in its Motion, Alabama federal courts applying Alabama law have compelled arbitration and enforced a class action waiver where the plaintiffs were entitled to similar remedies as Plaintiffs in the instant case. *Gipson v. Cross Country Bank*, 294 F. Supp.2d at 1251, 1265 (M.D. Ala 2003) (enforcing arbitration agreement's class action waiver under Alabama law where the plaintiffs could recover attorney's fees and costs, noting "the existence of these remedies provides parties and lawyers with incentives to pursue their cases"); *Pitchford v. AmSouth Bank*, 285 F.Supp.2d 1286 (M.D. Ala. 2003) (same). Here, the Arbitration Agreement provides for the same remedies. Thus, the Court should follow the reasoning of the *Gipson* decision and hold the collective action waiver provision enforceable.

b. Plaintiffs Authorities Are Not Controlling.

The authorities relied upon by Plaintiffs do not support their position. In arguing that the collective action waiver is unconscionable, Plaintiffs rely

² It is undisputed that Plaintiffs work (or worked) for Murphy in Alabama and executed their Arbitration Agreements there.

principally on *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2006).

In *Dale*, the limited claims and remedies available to the plaintiffs in *Dale*, none of which present themselves here, proved decisive to the Eleventh Circuit's finding of unconscionability. The plaintiffs, all Comcast subscribers, filed a class action lawsuit alleging Comcast overcharged them for cable services in violation of Georgia state law and the Cable Communications Policy Act, 47 U.S.C. § 521 *et seq.* Comcast removed the case to federal court and filed a motion to compel arbitration and dismiss. In so moving, Comcast relied upon a "policies and procedures" notice received annually by each subscriber. In response, the plaintiffs argued the notice was unconscionable on multiple grounds. First, they pointed out the alleged overcharge amounted to only \$0.66 per subscriber per quarter, or approximately \$10.00 per subscriber during the relevant period at issue. *Id.* at 1220. In addition, the plaintiffs noted that the policy held them responsible for costs and fees, including fees for attorneys and expert witnesses. *Id.* The policy also required the plaintiffs to reimburse Comcast in advance of the arbitration for fees equal to the amount the plaintiffs would have spent to file the claim in state court. *Id.* The plaintiffs thus argued that "given the potential recovery when compared to the cost of arbitration," no plaintiff could proceed to arbitration on an individual basis. *Id.* at 1221. The Eleventh Circuit agreed. In doing so, the Eleventh Circuit distinguished its prior decision in *Caley*, stating:

[In *Caley*] [w]e did not consider as factual scenario in which a remedy was effectively foreclosed because of the negligent amount of recovery when compared to the cost of bringing an arbitration action. More importantly, a review of the claims in *Caley* shows that each provided for the recovery of attorney's fees and/or expert witness costs should the plaintiff prevail.

Id. at 1221 (citing *Caley*, 428 F.3d at 1368).

As in *Caley*, nothing in the Arbitration Agreement prevents Plaintiffs from recovering their attorney's fees, costs, and expert's fees. The Arbitration Agreement states that "the arbitrator shall have the power to allocate costs and/or attorney's fees pursuant to the applicable statute." Arbitration Agreement, p. 1. Therefore, Plaintiffs presumptively would recover their fees and costs if they prevailed. Moreover, under the terms of the Arbitration Agreement, Murphy pays the costs of the arbitration other than filing fees, which can be waived, deferred, or reduced in the event of hardship. *Id.* Indeed, under the Arbitration Agreement, Plaintiffs incur no other costs at all to litigate their individual claims.

Thus, in contrast to *Dale*, Plaintiffs received valuable consideration for their waiver – the ability to speedily seek complete statutory relief in an arbitral forum at Murphy's expense. Accordingly, the concerns raised by the Eleventh Circuit in *Dale* simply are not present in the instant case. *See also Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (enforcing class action waiver because the plaintiffs could recover attorney's fees and costs); *Gipson*, 294 F.

Supp.2d at 1285-1286 (same).

c. The Factors Relied Upon By Plaintiffs Do Not Demonstrate the Collective Action Waiver Is Unconscionable.

Relying on *Dale*, Plaintiffs further argue that the collective action waiver is unconscionable based on four separate factors. Specifically, Plaintiffs argue that the collective action waiver (1) benefits only Murphy; (2) prevents them from obtaining legal representation; (3) gives Murphy an “unfair advantage in the market;” and (4) violates public policy. The Court should reject Plaintiffs’ arguments on each issue.

First, it cannot be said that the collective action waiver benefits only Murphy. The collective action waiver is encompassed within a larger agreement providing Plaintiffs with a speedy and efficient method for resolving their claims before a neutral arbitrator without the cost or time of litigation. Plaintiffs received these benefits as valuable consideration in exchange for waiving their right to proceed collectively. Therefore, Plaintiffs argument they receive no benefit from the collective action waiver is incorrect.

Second, the collective action waiver does not prevent Plaintiffs from obtaining legal representation. As shown above, Plaintiffs’ ability to recover their attorney’s fees, costs, and related expenses demonstrates they will be able to attract counsel to represent them. *See Jenkins v. American Cash Advance, LLC*, 400 F.3d

868, 877-878 (11th Cir. 2005) (reversing district court's finding that an arbitration agreement in a consumer loan contract was unconscionable where the plaintiffs could recover attorney's fees under the state statute at issue, noting "when the opportunity to recover attorney's fees is available, lawyers will be willing to represent [plaintiffs]"); *see also*, *Gipson*, 294 F. Supp.2d at 1261 (rejecting argument a class action waiver is unconscionable, noting the ability to recover attorney's fees attracts competent representation).³ Moreover, Plaintiffs have not demonstrated their individual recoveries will somehow be diminished by pursuing their claims individually in arbitration rather than through a collective action in court.

Third, the collective action waiver does not give Murphy an "unfair advantage in the market." Though Plaintiffs discussion of this issue is not entirely clear, Plaintiffs appear to suggest that, in the absence of a collective action

³ Plaintiffs rely on *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) for the proposition that a class action waiver may be found unconscionable even if the plaintiff can recover attorney's fees. *Kristian*, however, involved antitrust claims under state and federal law. In ruling the class action waiver was unconscionable under Massachusetts law, despite the ability to recover attorney's fees, the First Circuit pointed out other financial difficulties the plaintiffs would face litigating an antitrust claim in an arbitral setting. These concerns included the necessity of spending an estimated \$300,000 to hire economists to testify as expert witnesses. *Id.* at 58. Further, the First Circuit noted antitrust litigation requires the plaintiffs' counsel to "invest a large initial outlay in time and money," making a class procedure necessary to make it worth counsel's time. *Id.* Plaintiffs have not raised any such concerns here, much less tendered any evidence to support such concerns in this case.

mechanism, Murphy will have no incentive to end its allegedly improper wage practices. If anything, the opposite is true. Murphy has created a mechanism for its employees to efficiently bring claims on an individual basis. Having created an avenue for employees to quickly bring and resolve their claims, Murphy has an even greater incentive to fully comply with all applicable employment laws.

Finally, Plaintiffs argue the collective action waiver violates public policy. In doing so, Plaintiffs simply restate their assertion that the FLSA grants them a nonwaivable, statutory right to proceed collectively. As shown in Section II.D.1, *supra*, Plaintiffs are incorrect. Accordingly, the Court should reject Plaintiffs' argument that the collective action waiver is unconscionable on public policy grounds for the reasons stated above.

d. Plaintiffs Failed to Tender Admissible Evidence Demonstrating Unconscionability.

The Court should also reject Plaintiffs' unconscionability argument because Plaintiffs failed to come forth with any supporting evidence. Under Alabama law, a party seeking to compel arbitration must prove "(1) the existence of a contract containing an arbitration agreement and (2) that the underlying contract evidences a transaction affecting interstate commerce." *Allied Williams Companies, Inc. v. Davis*, 901 So.2d 696, 698 (Ala. 2004) (citation omitted). As Plaintiffs concede, Murphy has clearly satisfied its burden in that regard. Once the moving party

demonstrates the existence of a contract with an arbitration provision, "the burden shifts to the opposing party to *present evidence* that the arbitration agreement is not valid or that it does not apply to the dispute in question." *Id.* (citation omitted) (emphasis added); *see also Blue Cross Blue Shield of Alabama v. Rigas*, 923 So.2d 1077, 1086 (Ala. 2005) (same).

Plaintiffs' Response sets forth no evidence whatsoever, only argument of counsel. Their legal arguments alone do not satisfy their burden. *Scurtu v. Int'l. Student Exchange, et al.*, 523 F. Supp.2d 1313, 1319 (S.D. Ala. 2007). In *Scurtu*, a decision cited by Plaintiffs, the district court rejected the plaintiffs' argument that an arbitration agreement was unconscionable in part due to the plaintiffs' failure to tender any admissible evidence supporting their position:

Plaintiffs place themselves at a distinct disadvantage by failing to offer evidence of any kind in support of their position. Plaintiffs do not submit affidavits. They do not submit exhibits[. . .]. Instead, plaintiffs rely almost exclusively on the unadorned, unsupported representations of counsel, which are not in the form of evidence that can be considered on a motion to compel arbitration, which is a proceeding akin to summary judgment.

Scurtu, 523 F. Supp.2d at 1319, n. 4. As in *Scurtu*, Plaintiffs have presented nothing more than the "unadorned, unsupported representations of counsel." Accordingly, if for no other reason, they have failed to meet their burden of demonstrating the Arbitration Agreement is unconscionable.

III. CONCLUSION

Plaintiffs agreed in writing to arbitrate all claims arising out of or relating to their employment and, in conjunction therewith, forego the opportunity to pursue their FLSA claims on a class or collective basis. Accordingly, pursuant to the FAA, the Court should compel arbitration of Plaintiffs' individual FLSA claims and dismiss Plaintiffs' class and collective claims with prejudice.

Respectfully submitted this 3rd day of September, 2010.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)
PICKNEY, SUSAN ELLINGTON,)
and SANTRESSA LOVELACE,)
Individually and On Behalf of)
Similarly situated employees,)

Plaintiffs,)

v.)

MURPHY OIL USA, INC.,)

Defendant.)

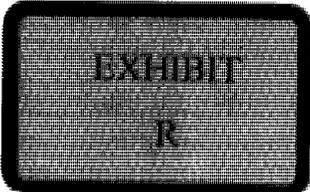
CIVIL ACTION

NO. 2:10-cv-01486-HGD

**DEFENDANT’S MOTION TO ALLOW SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS MOTION TO COMPEL ARBITRATION
AND DISMISS ACTION**

Defendant Murphy Oil USA, Inc. (“Murphy”), by and through its undersigned counsel, files this Motion to Allow Supplemental Brief in Support of its Motion to Compel Arbitration and Dismiss Collective Action.

On July 26, 2010, Murphy filed its Motion and asked the Court to (1) compel Plaintiffs to arbitrate their individual claims under the Fair Labor Standards Act (“FLSA”) and (2) dismiss their collective action claims. *See* Doc. No. 14 (“Motion”). As shown in Murphy’s Motion, each of the Plaintiffs executed a document at the inception of their employment entitled “Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)” (the “Arbitration Agreements”).



Pursuant to their Arbitration Agreements, Plaintiffs agreed to arbitrate their FLSA claims. Plaintiffs also affirmatively agreed not to bring any claims against Murphy through a collective or class action mechanism. Accordingly, Murphy sought a court order compelling the Plaintiffs to proceed to arbitration on an individual basis and dismissing the collective action in its entirety.

Since Murphy filed its Motion, the Supreme Court has issued its decision in *AT&T Mobility, LLC v. Concepcion*, 2011 U.S. LEXIS 3367, 131 S. Ct. 1740, ___ U.S. ___ (Sup. Ct. Apr. 27, 2011). Murphy requests leave to file its Supplemental Brief in Support of Motion to Compel Arbitration, which addresses the impact of *Concepcion* on the issue of the relief sought in Murphy's Motion. A copy of the proposed Supplemental Brief is attached hereto as Exhibit "1."

WHEREFORE, Murphy respectfully moves for this Court to grant this motion, allowing filing of the Supplemental Brief, and deem said brief filed as of the date of the Court's order.

Respectfully submitted this 17th day of June, 2011.

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Plaintiffs,)	NO. 2:10-cv-01486-HGD
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v.)	
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MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

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NORTHERN DISTRICT OF ALABAMA

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PICKNEY, SUSAN ELLINGTON,)
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Individually and On Behalf of)
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Plaintiffs,)

v.)

MURPHY OIL USA, INC.,)

Defendant.)

CIVIL ACTION

NO. 2:10-cv-01486-HGD

**DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS
MOTION TO COMPEL ARBITRATION AND DISMISS ACTION**

Defendant Murphy Oil USA, Inc. ("Murphy"), by and through its undersigned counsel, files this Supplemental Brief in Support of its Motion to Compel Arbitration and Dismiss Collective Action [Doc. No. 14] ("Motion").

I. INTRODUCTION

On July 26, 2010, Murphy filed its Motion and asked the Court to (1) compel Plaintiffs to arbitrate their individual claims under the Fair Labor Standards Act ("FLSA") and (2) dismiss their collective action claims. As shown in Murphy's Motion, each of the Plaintiffs executed a document at the inception of their employment entitled "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (the "Arbitration Agreements"). Pursuant to their Arbitration.

EXHIBIT

8

Agreements, Plaintiffs agreed to arbitrate their FLSA claims. Plaintiffs also affirmatively agreed not to bring any claims against Murphy through a collective or class action mechanism. Accordingly, Murphy sought a court order compelling the Plaintiffs to proceed to arbitration on an individual basis and dismissing the collective action in its entirety.

On August 25, 2010, Plaintiffs filed their “Response in Opposition to Defendant’s Motion to Compel Arbitration and Dismiss Collective Action” [Doc. No. 18] (“Response”). Therein, Plaintiffs did not contest Murphy’s right to enforce arbitration of their individual claims pursuant to their Arbitration Agreements; instead, Plaintiffs sought “clarification of the enforceability of the collective action waiver provision.” (Response, p. 1.) In essence, Plaintiffs conceded their Arbitration Agreements were enforceable, but sought to avoid the class and collective action waiver provision and, instead, to proceed on a collective basis in arbitration.

Since Murphy filed its Motion, the Supreme Court has issued its decision in *AT&T Mobility, LLC v. Concepcion*, 2011 U.S. LEXIS 3367, 131 S. Ct. 1740, ___ U.S. ___ (Sup. Ct. Apr. 27, 2011) (attached as Exhibit A). *Concepcion* reinforces that the Federal Arbitration Act (“FAA”) requires courts to enforce arbitration agreements according to their terms. Moreover, *Concepcion* further holds that state laws deeming class or collective action waiver provisions in arbitration

agreements unenforceable “interfere with fundamental attributes of arbitration.” *Id.* at ** 18. Therefore, such state-law rules are preempted by the FAA. *Id.* Accordingly, as more fully addressed below, *Concepcion* squarely forecloses Plaintiffs’ argument that the Court may excise the class and collective action waiver from Murphy’s Arbitration Agreement and, instead, mandates enforcement of that clause according to its plain terms.

II. ARGUMENT AND AUTHORITIES

A. The FAA Preempts State Law Requiring Class Arbitration

Under the Supreme Court’s holding in *Concepcion*, any state law that purports to invalidate class action waiver provisions in arbitration agreements and allow class arbitration is now preempted by the FAA. In *Concepcion*, the Supreme Court addressed the enforceability of a class action waiver in an arbitration provision in a telecommunications contract between AT&T and two California consumers. As in the instant case, the class action waiver prohibited class arbitration, requiring instead that an aggrieved customer bring a claim “in an individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *Concepcion*, 2011 U.S. LEXIS 3367, at ** 5. At issue was whether Section 2 of the FAA, 9 U.S.C. § 2, preempted California law that nullifies class action waivers in arbitration agreements and requires the parties to arbitrate on a class-wide basis.

Before the district court, AT&T moved to compel arbitration. The district court refused to grant AT&T's motion, finding the class action waiver unconscionable. Specifically, the district court determined that California law deemed arbitration contracts containing class action waivers unconscionable under 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) (the "*Discover Bank* rule"). Under the *Discover Bank* rule, California courts routinely found provisions in arbitration agreements waiving a party's right to participate in a class, collective, or representative action unconscionable and unenforceable and, as a result, allowed class-wide arbitration at the insistence of that party.

The Supreme Court began by reinforcing the "liberal federal policy favoring arbitration," and reiterated that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Concepcion*, 2011 U.S. LEXIS 3367, at * 10. The Court acknowledged, however, that the final clause of Section 2 of the FAA contains a "savings clause" which permits arbitration agreements to "be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at * 11. The Court then rejected the consumers' argument that the California Supreme Court's *Discover Bank* rule fell within the ambit of the savings clause:

Although Section 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 As we have said, a federal statute's saving clause "cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." The overarching purpose of the FAA, evident in the text of Sections 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at * 17-18. The Court further explained why requiring arbitration on a class or collective basis in the absence of the parties' agreement to do so is entirely inconsistent with the FAA:

Class-wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

Id. at ** 25. As a result of the inconsistency between the FAA and requiring class arbitration, the Court held the FAA preempted the *Discover Bank* rule and similar state laws invalidating class action waivers and forcing class-wide arbitrations in contravention of the arbitration agreement's terms:

States cannot require a procedure that is inconsistent with the FAA, even if desirable for unrelated reasons. . . . [b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [under the FAA] . . . California's *Discover Bank* rule is preempted by the FAA.

Id. at ** 32-33 (internal citation omitted). Thus, under *Concepcion*, state laws prohibiting class or collective action waivers on unconscionability grounds are preempted.

B. Pursuant to *Concepcion*, the Court Should Enforce the Class and Collective Action Waiver Provision.

For at least two reasons, *Concepcion* forecloses Plaintiffs' argument, as set forth in their Response, that the Court may compel arbitration but refuse to enforce the class and collective action waiver in Murphy's Arbitration Agreement. First, as *Concepcion* reiterates, courts must enforce arbitration agreements according to their terms. Where the parties do not manifest intent to arbitrate on a class or collective basis, courts cannot interpret an arbitration agreement to include such terms. *Concepcion*, 2011 U.S. LEXIS 3367, at ** 10; *accord*, *Stolt-Nielsen v. AnimalFeed International Corp.*, 130 S. Ct. 1758, 1774-1775 (2010) (holding "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"). Here, not only is there no basis for concluding Plaintiffs and Murphy agreed to class or collective action basis, the plain terms of the Arbitration Agreement demonstrates

just the opposite. Plaintiffs and Murphy clearly did not agree to arbitrate any claim on a class or collective action basis as directly evidenced by the class and collective action waiver. Accordingly, requiring Murphy to arbitrate Plaintiffs' claims on a class or collective basis is not permissible.

Second, *Concepcion* holds the FAA preempts state laws that require parties to arbitrate through class or collective action proceedings (in the absence of express agreement to do so). In their Response, Plaintiffs suggest the class and collective action waiver in the Arbitration Agreement is unconscionable under Alabama law, though they fail to identify any specific Alabama statute or decisional authority suggesting so.¹ Nonetheless, any Alabama law that requires Murphy to arbitrate Plaintiffs' claims on a class or collective action basis is inconsistent with (and preempted by) the FAA. *Concepcion*, 2011 U.S. LEXIS 3367, at ** 18 (“[r]equiring the availability of class-wide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”); *see also*, *Day v. Persels & Assocs.*, 2011 U.S. Dist. LEXIS 49231, * 17 (S.D. Fla. May 9, 2011) (enforcing class action waiver provision and rejecting

¹ Plaintiffs have also failed to meet their evidentiary burden. As shown in Murphy's Reply Memorandum in Support of Motion to Compel Arbitration and Dismiss Action (“Reply”), Plaintiffs have also failed to tender any evidence demonstrating the Arbitration Agreement is unconscionable or otherwise invalid, as required to meet their burden of proof. *See* Doc. No. 19 at 17(citing *Scurtu v. Int'l. Student Exchange, et al.*, 523 F. Supp.2d 1313, 1319 (S.D. Ala. 2007)).

the plaintiff's argument that such a clause is unconscionable under Florida law, noting Florida law is preempted by the FAA under *Concepcion's* holding) (attached as Exhibit B). Accordingly, under *Concepcion*, the Court must reject Plaintiffs' argument for excising the class and collective waiver provision, and, instead, enforce that provision according to its terms. *Id.*

III. CONCLUSION

Plaintiffs agreed in writing to arbitrate all claims arising out of or relating to their employment and, in conjunction therewith, forego the opportunity to pursue their FLSA claims on a class or collective basis. Accordingly, pursuant to the FAA, the Court should compel arbitration of Plaintiffs' individual FLSA claims and dismiss Plaintiffs' class and collective claims with prejudice.

Respectfully submitted this ___ day of June, 2011.

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EXHIBIT A



AT&T MOBILITY LLC, PETITIONER v. VINCENT CONCEPCION ET UX.

No. 09-893

SUPREME COURT OF THE UNITED STATES

131 S. Ct. 1740; 179 L. Ed. 2d 742; 2011 U.S. LEXIS 3367; 161 Lab. Cas. (CCH) P10,368; 22 Fla. L. Weekly Fed. S 957; 52 Comm. Reg. (P & F) 1179

November 9, 2010, Argued
April 27, 2011, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Laster v. AT&T Mobility LLC, 584 F.3d 849, 2009 U.S. App. LEXIS 23599 (9th Cir. Cal., 2009)

DISPOSITION: Reversed and remanded.

SYLLABUS

[*1742] [**747] The cellular telephone contract between respondents (Concepcions) and petitioner (AT&T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in a California Federal District Court. Their suit was consolidated with a class action alleging, *inter alia*, that AT&T had engaged in false advertising and fraud by charging sales tax on "free" phones. The District Court denied AT&T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's *Discover Bank* decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements "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, did not [***2] preempt its ruling.

Held: Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581, California's *Discover Bank* rule is pre-empted by the FAA. Pp. 4-18.

(a) *Section 2* reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ____, ____, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410. Thus, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488. [**748] *Section 2*'s saving clause permits agreements to be invalidated by "generally applicable contract defenses," but not by defenses that apply [*1743] only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902. Pp. 4-5.

(b) In *Discover Bank*, the California Supreme Court held that class [***3] waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. Pp. 5-6.

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(c) The Concepcions claim that the *Discover Bank* rule is a ground that "exist[s] at law or in equity for the revocation of any contract" under *FAA* § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the inquiry is more complex when a generally applicable doctrine is alleged to have been applied in a fashion that disfavors or interferes with arbitration. Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S. Ct. 1913, 146 L. Ed. 2d 914. The FAA's overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings. Parties may agree to limit the issues subject to arbitration, [***4] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444, to arbitrate according to specific rules, *Volt, supra*, at 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488, and to limit with whom they will arbitrate, *Stolt-Nielsen, supra*, at ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605. Pp. 6-12.

(d) Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, interferes with fundamental attributes of arbitration. The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes. In litigation, a defendant may appeal a certification decision and a final judgment, but 9 U.S.C. § 10 limits the grounds on which courts can vacate arbitral awards. Pp. 12-18.

584 F.3d 849, reversed and remanded.

COUNSEL: Andrew J. Pincus argued the cause for petitioner.

Deepak Gupta argued the cause for respondents.

JUDGES: SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, [***5] THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

OPINION BY: SCALIA

OPINION

[*1744] [**749] JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "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. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T).¹ The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." App. to Pet. for Cert. 61a.² The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions. The version at issue in this case reflects [***6] revisions made in December 2006, which the parties agree are controlling.

1 The Concepcions' original contract was with Cingular Wireless. AT&T acquired Cingular in 2005 and renamed the company AT&T Mobility in 2007. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852, n. 1 (CA9 2009).

2 That provision further states that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." App. to Pet. for Cert. 61a.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$ 10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, [***7] or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitra-

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tion; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a \$ 7,500 minimum recovery and twice the amount of the claimant's attorney's fees.³

3 The guaranteed minimum recovery was increased in 2009 to \$ 10,000. Brief for Petitioner 7.

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged \$ 30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the [**750] Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In [***8] March 2008, AT&T moved to compel arbitration under the terms of its contract [*1745] with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promptly full or . . . even excess payment to the customer *without* the need to arbitrate or litigate"; that the \$ 7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *Laster v. T-Mobile USA, Inc.*, 2008 U.S. Dist. LEXIS 103712, *34, 2008 WL 5216255, *11-12 (SD Cal., Aug. 11, 2008). Nevertheless, relying on 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), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent [***9] effects of class actions. *Laster*, 2008 U.S. Dist. LEXIS 103712, 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank. Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (2009). It also held that the *Discover Bank* rule was not preempted by the FAA because that rule

was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." 584 F.3d at 857. In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "class proceedings will reduce the efficiency and expeditiousness of arbitration" and noted that "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Id.*, at 858 (quoting *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 990 (CA9 2007)).

We granted certiorari, 560 U.S. ___, 130 S. Ct. 3322, 176 L. Ed. 2d 1218 (2010).

II

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. See *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). [***10] Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), provides, in relevant part, as follows:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds [**751] as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

We have described this provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra*, at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. [**1746] Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

The final phrase of § 2, however, permits arbitration [***11] agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agree-

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ments to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); see also *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987). The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." *Cal. Civ. Code Ann. § 1670.5(a)* (West 1985). A finding of unconscionability requires "a [***12] 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669, 690 (2000); accord, *Discover Bank*, 36 Cal. 4th, at 159-161, 113 P. 3d, at 1108.

In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

"[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, 113 P. 3d, at 1110 (quoting *Cal. Civ. Code Ann. § 1668*).

California [***13] courts have frequently applied this rule to find arbitration agreements unconscionable. See, e.g., *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451-1453, [**752] 48 Cal.Rptr. 3d 813, 819-821 (2006); *Klussman v. Cross Country Bank*, 134 Cal. App.

4th 1283, 1297, 36 Cal.Rptr. 3d 728, 738-739 (2005); *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 556-557, 36 Cal.Rptr. 3d 229, 237-239 (2005).

III

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under *FAA § 2*. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well. See *America Online, Inc. v. Superior* [*1747] *Ct.*, 90 Cal. App. 4th 1, 17-18, 108 Cal.Rptr.2d 699, 711-713 (2001).

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced [***14] by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "at law or in equity for the revocation of any contract." *Id.*, at 492, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Id.*, at 493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive [***15] his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory -- restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See *Discover Bank, supra*, at 161, 113 P. 3d, at 1109 (arguing that class waivers are similarly one-sided).

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And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable [**753] arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). Such examples are not fanciful, since the judicial hostility [***16] towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (CA2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 *Hastings Bus. L. J.* 39, 54, 66 (2006); Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 *Buffalo L. Rev.* 185, 186-187 (2004).

The Concepcions suggest that all this is just a parade of horrors, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, [*1748] "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are [***17] incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id.*, at 33 (quoting *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 50, 927 N.E.2d 1207, 1220, 340 Ill. Dec. 196 (2010)).⁴

4 The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge "we have not . . . applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings," *post*, at 10 (opinion of BREYER, J.), and that "we should think more than twice before invalidating a state law that . . . puts agreements to arbitrate and agreements to litigate upon the same footing" *post*, at 4-5.

We largely agree. Although § 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. Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000). As we have said, a federal statute's saving clause "cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely [***18] inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S. Ct. 350, 51 L. Ed. 553 (1907)).

We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement [**754] of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt*, 489 U.S., at 478; see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). This purpose is readily apparent [***19] from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure . . . to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), [*1749] to arbitrate according to specific rules, *Volt*, *supra*, at 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488, and to limit with whom a party

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will arbitrate its disputes, *Stolt-Nielsen, supra*, at ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept [***20] confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. 14 *Penn Plaza LLC v. Pyett*, 556 U.S. ___, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009); *Mitsubishi Motors Corp., supra*, at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444.

The dissent quotes *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985), as "reject[ing] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." *Post*, at 4 (opinion of BREYER, J.). That is greatly misleading. After saying (accurately enough) that "the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims," but to "ensure judicial enforcement of privately made agreements to arbitrate," 470 U.S., at 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158, *Dean Witter* went on to explain: "This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it . . ." *Id.*, at 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158. It then quotes a House Report saying that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration." *Ibid.* (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). [***21] The concluding paragraph of this part of its discussion begins as follows:

"We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration [**755] Act -- enforcement of private agreements and encouragement of efficient and speedy dispute resolution -- must be resolved in favor of the latter in order to realize the intent of the drafters." 470 U.S., at 221, 105 S. Ct. 1238, 84 L. Ed. 2d 158.

In the present case, of course, those "two goals" do not conflict -- and it is the dissent's view that would frustrate both of them.

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as "embod[ing] [a] national policy favoring arbitration," *Buckeye Check Cashing*, 546 U.S., at 443, 126 S. Ct.

1204, 163 L. Ed. 2d 1038, and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone*, 460 U.S., at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765; see also *Hall Street Assocs.*, 552 U.S., at 581, 128 S. Ct. 1396, 170 L. Ed. 2d 254. Thus, in *Preston v. Ferrer*, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined [***22] proceedings and expeditious results,'" which objective would be "frustrated" by requiring a dispute to be heard by an agency first. 552 U.S., at 357-358, 128 S. Ct. 1396, 170 L. Ed. 2d 254. That rule, we said, would "at the least, hinder speedy resolution of the controversy." *Id.*, at 358, 128 S. Ct. 1396, 170 L. Ed. 2d 254.⁵

5 Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress "thought that arbitration would be used primarily where merchants sought to resolve disputes of fact . . . [and] possessed roughly equivalent bargaining power." *Post*, at 6. Such a limitation appears nowhere in the text of the FAA and has been explicitly rejected by our cases. "Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); see also *id.*, at 32-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (allowing arbitration of claims arising under the Age Discrimination in Employment Act of 1967 despite allegations of unequal bargaining power between employers [***23] and employees). Of course the dissent's disquisition on legislative history fails to note that it contains nothing -- not even the testimony of a stray witness in committee hearings -- that contemplates the existence of class arbitration.

[*1750] California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts, *Discover Bank*, 36 Cal. 4th, at 162-163, 113 P. 3d, at 1110, but the times in which consumer contracts were anything other than adhesive are long past. ⁶ *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (CA7 2004); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (CA7 1997). The rule also requires that damages be predictably small, and that

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the consumer allege a scheme to cheat consumers. *Discover Bank, supra*, at 162-163, 113 P. 3d, at 1110. The former requirement, however, is toothless and malleable (the [*756] Ninth Circuit has held that damages of \$ 4,000 are sufficiently small, see *Oestreicher v. Alienware Corp.*, 322 Fed. Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all [***24] that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

6 Of course States remain free to take steps addressing the concerns that attend contracts of adhesion -- for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt-Nielsen* is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that [***25] would affect its interpretation. 559 U.S., at ___, 130 S.Ct. 1758, 176 L. Ed. 2d 605. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." *Id.*, at ___, 130 S. Ct. 1758, 1776, 176 L. Ed. 2d 605, 625. This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that [*1751] class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration -- its informality -- and makes the process slower, more costly,

and more likely to generate procedural morass [***26] than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 559 U.S., at ___, 130 S. Ct. 1758, 1776, 176 L. Ed. 2d 605, 625. But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA's Consumer Arbitration Caseload, online at <http://www.adr.org/si.asp?id=5027> (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court's case file). As of September 2009, the [**757] AAA had opened 283 class [***27] arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits. Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen*, O. T. 2009, No. 08-1198, pp. 22-24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal -- not judgment on the merits -- was 583 days, and the mean was 630 days. *Id.*, at 24. 7

7 The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. *Post*, at 6-7. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration-by-jury by saying that parties will still prefer it to trial-by-jury.

Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at <http://www.adr.org/sp.asp?id=21936>, with *Fed. Rule Civ. Proc.* 23. And while parties can alter those procedures by contract, an alternative is not obvious. [***28] If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472

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U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a "relatively recent development." *36 Cal. 4th, at 163, 113 P. 3d, at 1110*. And it [*1752] is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered [***29] review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, see, e.g., *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, *571 F.3d 672, 677-678 (CA7 2009)*, and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as [**758] well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, *9 U.S.C. § 10* allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue [***30] means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under *§ 10* focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.*, *552 U.S., at 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254*. We find it hard to

believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision. *

8 The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post*, at 7-8. Those examples [***31] might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards -- which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

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. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *Rent-A-Center*, [*1753] *West, 561 U.S., at ___, 130 S. Ct. 2772, 177 L. Ed. 2d 403*. But what the parties in the aforementioned examples would [***32] have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post*, at 9. But States cannot require a procedure that is inconsistent with the FAA, 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 [**759] would be "essentially guarantee[d]" to be made whole, *584 F.3d at 856, n. 9*. Indeed, the District Court concluded that the Concepcions were

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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, [***33] and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." *Laster*, 2008 U.S. Dist. LEXIS 103712, [WL] at *12.

* * *

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941), California's *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: THOMAS

CONCUR

JUSTICE THOMAS, concurring.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision "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. The question here is whether California's *Discover Bank* rule, see *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 (2005), is a "groun[d] . . . for the revocation of any contract."

It would be absurd to suggest that § 2 requires only that a defense apply to "any contract." If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against [***34] arbitration, even if the policy nominally applies to "any contract." There must be some additional limit on the contract defenses permitted by § 2. Cf. *ante*, at 17 (opinion of the Court) (state law may not require procedures that are "not arbitration as envisioned by the FAA" and "lac[k] its benefits"); *post*, at 5 (BREYER, J., dissenting) (state law may require only procedures that are "consistent with the use of arbitration").

I write separately to explain how I would find that limit in the FAA's text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

[*1754] This reading of the text, however, has not been fully developed by any party, cf. Brief for Petitioner 41, n. 12, and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation [***35] and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 411, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) [**760]. (O'Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, see *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

I

The FAA generally requires courts to enforce arbitration agreements as written. Section 2 provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Significantly, the statute does not parallel the words "valid, irrevocable, and enforceable" by referencing the grounds as exist for the "invalidation, revocation, or nonenforcement" of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use of only "revocation" and the conspicuous omission of "invalidation" and [***36] "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses. See *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute" (internal quotation marks omitted)).

Concededly, the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious. The statute does not define the terms, and their ordinary meanings arguably overlap. Indeed, this Court and others have referred to the concepts of revocability, validity, and enforceability interchangeably. But this ambiguity alone cannot justify ignoring Congress' clear decision in § 2 to repeat only one of the three concepts.

To clarify the meaning of § 2, it would be natural to look to other portions of the FAA. Statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997). "A provision that may seem ambiguous in isolation is

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often clarified by the remainder of the statutory scheme . . . because only [***37] one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Asso. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2's exception to the enforcement of arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," the court must order arbitration "in accordance with the terms of the agreement."

Reading §§ 2 and 4 harmoniously, the "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the [*1755] making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of [**761] the agreement to arbitrate, such as fraud, duress, or mutual mistake. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of "fraud in the inducement of the arbitration clause itself" [***38] because such claims "g[o] to the 'making' of the agreement to arbitrate"). Contract defenses unrelated to the making of the agreement -- such as public policy -- could not be the basis for declining to enforce an arbitration clause.

* The interpretation I suggest would be consistent with our precedent. Contract formation is based on the consent of the parties, and we have emphasized that "[a]rbitration under the Act is a matter of consent." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

The statement in *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), suggesting that § 2 preserves all state-law defenses that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *id.*, at 493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426, is dicta. This statement is found in a footnote concerning a claim that the Court "decline[d] to address." *Id.*, at 492, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426. Similarly, to the extent that statements in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___ n. 1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010), can be read to suggest anything about the scope of state-law defenses under § 2, those statements are dicta, as

well. This Court has never addressed [***39] the question whether the state-law "grounds" referred to in § 2 are narrower than those applicable to any contract.

Moreover, every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996), this Court said that fraud, duress, and unconscionability "may be applied to invalidate arbitration agreements without contravening § 2." All three defenses historically concern the making of an agreement. See *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547, 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008) (describing fraud and duress as "traditional grounds for the abrogation of [a] contract" that speak to "unfair dealing at the contract formation stage"); *Hume v. United States*, 132 U.S. 406, 411, 414, 10 S. Ct. 134, 33 L. Ed. 393 (1889) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make" and suggesting that there may be "contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception" (internal quotation marks omitted)).

II

Under this reading, the question here would be whether California's [***40] *Discover Bank* rule relates to the making of an agreement. I think it does not.

In *Discover Bank*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100, the California Supreme Court held that "class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory." *Id.*, at 165, 113 P. 3d, at 1112; see also *id.*, at 161, 113 P. 3d, at 1108 ("[C]lass action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy"). The court concluded that where a class-action waiver is found in an arbitration agreement in certain consumer contracts of adhesion, such waivers "should not be enforced." *Id.*, at 163, 113 P. 3d, at 1110. In practice, the court explained, such agreements "operate to insulate a party from liability that otherwise would be imposed under California law." *Id.*, at 161, 113 P. 3d, at 1108, 1109. The court did not conclude that a customer would sign such an agreement only if under [*1756] the influence of fraud, duress, or delusion.

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover* [***762] *Bank* rule does not concern the making of the arbitration [***41] agreement. Exculpatory contracts

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are a paradigmatic example of contracts that will not be enforced because of public policy. 15 G. Giesel, Corbin on Contracts §§ 85.1, 85.17, 85.18 (rev. ed. 2003). Indeed, the court explained that it would not enforce the agreements because they are "against the policy of the law." 36 Cal. 4th, at 161, 113 P. 3d, at 1108 (quoting Cal. Civ. Code Ann. § 1668); see also 36 Cal. 4th, at 166, 113 P. 3d, at 1112 ("Agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy" (internal quotation marks omitted)). Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a "ground . . . for the revocation of any contract" as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

DISSENT BY: BREYER

DISSENT

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Federal Arbitration Act says that an arbitration agreement "shall be valid, irrevocable, and enforceable, save [***42] upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which "class action waivers" in any contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not "stan[d] as an obstacle" to the Act's "accomplishment and execution." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). And the Court is wrong to hold that the federal Act pre-empt's the rule of state law.

I

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law." Cal. Civ. Code Ann. § 1668 (West 1985). The second provision authorizes courts to "limit the application of any unconscionable clause" in a contract so "as to avoid any unconscionable result." § 1670.5(a).

The specific rule of state law in question consists of the California Supreme Court's application of these prin-

ciples to hold that "some" [***43] (but not "all") "class action waivers" in consumer contracts are exculpatory and unconscionable under California "law." *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148, 160, 162, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100, 1108, 1110 (2005). In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action 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 [**763] fraud, or willful injury [*1757] to the person or property of another.'" *Id.*, at 162-163, 113 P. 3d, at 1110.

In such a circumstance, the "waivers are unconscionable under California law and should not be enforced." *Id.*, at 163, 113 P. 3d, at 1110.

The *Discover Bank* rule does not create a "blanket policy in California against class action waivers in the consumer context." *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (CD Cal. 2006). Instead, [***44] it represents the "application of a more general [unconscionability] principle." *Gentry v. Superior Ct.*, 42 Cal. 4th 443, 457, 64 Cal. Rptr. 3d 773, 165 P. 3d 556, 564 (2007). Courts applying California law have enforced class-action waivers where they satisfy general unconscionability standards. See, e.g., *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647-650, 114 Cal. Rptr. 3d 449, 459-462 (2010); *Arguelles-Romero v. Superior Ct.*, 184 Cal. App. 4th 825, 843-845, 109 Cal. Rptr. 3d 289, 305-307 (2010); *Smith v. Americredit Fin. Servs., No. 09cv1076*, 2009 U.S. Dist. LEXIS 115767, 2009 WL 4895280 (SD Cal., Dec. 11, 2009); cf. *Provencher, supra*, at 1201 (considering *Discover Bank* in choice-of-law inquiry). And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable. See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

II

A

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The *Discover Bank* rule is consistent with the federal Act's language. It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts [***45] with such agreements." 36 Cal. 4th, at 165-166, 113 P. 3d, at 1112. Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The majority agrees. *Ante*, at 9.

B

The *Discover Bank* rule is also consistent with the basic "purpose behind" the Act. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). We have described that purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. *Ibid.*; see also *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274, n. 2, 52 S. Ct. 166, 76 L. Ed. 282 (1932) ("The purpose of this bill is to make *valid and enforceable* agreements for arbitration" (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924); emphasis added)); 65 Cong. Rec. 1931 (1924) ("It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts"). As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. See S. Rep. No. 536, [***46] 68th Cong., 1st Sess., 2 (1924). The Act sought to eliminate that hostility by placing agreements to arbitrate "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974) (quoting H. R. Rep. No. 96, at 2; emphasis added).

Congress was fully aware that arbitration [**764] could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration [*1758] agreements enforceable "at this time when there is so much agitation against the costliness and delays of litigation." *Id.*, at 2. And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes. See *Preston v. Ferrer*, 552 U.S. 346, 357, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008) (discussing "prime objective of an agreement to arbitrate"). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. *Dean Witter*, 470 U.S., at 221, 105 S. Ct. 1238,

84 L. Ed. 2d 158. See also *id.*, at 219, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (we "reject the suggestion that the [***47] overriding goal of the Arbitration Act was to promote the expeditious resolution of claims"); *id.*, at 219, 217-218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 ("[T]he intent of Congress" requires us to apply the terms of the Act without regard to whether the result would be "possibly inefficient"); cf. *id.*, at 220, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (acknowledging that "expedited resolution of disputes" might lead parties to prefer arbitration). The relevant Senate Report points to the Act's basic purpose when it says that "[t]he purpose of the [Act] is *clearly set forth in section 2*," S. Rep. No. 536, at 2 (emphasis added), namely, the section that says that an arbitration agreement "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.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate "upon the same footing."

III

The majority's contrary view (that *Discover Bank* stands as an "obstacle" to the accomplishment of the federal law's objective, *ante*, at 9-18) rests primarily upon its claims that the *Discover Bank* [***48] rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require "ultimate disposition by a jury" or "judicially monitored discovery" or use of "the Federal Rules of Evidence." *Ante*, at 8, 9. Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. See, e.g., *Keating v. Superior Ct.*, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481, 492 (App. 1980) (officially depublished); American Arbitration Association (AAA), *Supplementary Rules for Class Arbitrations* (2003), <http://www.adr.org/sp.asp?id=21936> (as visited Apr. 25, 2011, and available in [**765] Clerk of Court's case file); JAMS, *The Resolution Experts, Class Action Procedures* (2009). Indeed, the AAA has told us that it has found class arbitration to be "a fair, balanced, and efficient means of [***49] resolving class disputes." Brief for AAA as *Amicus Curiae* in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, O. T. 2009, No. 08-1198, p. 25 (hereinafter AAA *Amicus* Brief). And unlike the majori-

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ty's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot [*1759] fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea -- that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? *Ante*, at 9. The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. See *Mitsubishi Motors, supra*, at 646, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (Stevens, J., dissenting); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th [***50] Cong., 1st Sess., 15 (1924); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9-10 (1923); Dept. of Commerce, Secretary Hoover Favors Arbitration -- Press Release (Dec. 28, 1925), Herbert Hoover Papers -- Articles, Addresses, and Public Statements File -- No. 536, p. 2 (Herbert Hoover Presidential Library); Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926); AAA, *Year Book on Commercial Arbitration in the United States* (1927). This last mentioned feature of the history -- roughly equivalent bargaining power -- suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

For another thing, the majority's argument that the *Discover Bank* rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. [***51] See *ante*, at 14. And it finds the former more complex. See *ibid*. But, if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures -- whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take

more time than the average commercial arbitration, but [**766] may take *less time* than the average class action in court." AAA *Amicus* Brief 24 (emphasis added). Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. Compare *ante*, at 14 (providing statistics for class arbitration), with Judicial Council of California, Administrative Office of the Courts, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 18 (2010) (providing [***52] statistics for class-action litigation in California courts). And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, [*1760] not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because "[a]rbitration is poorly suited to . . . higher stakes" lacks empirical support. *Ante*, at 16. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit high-stake disputes to arbitration. And there are numerous counterexamples. Loftus, *Rivals Resolve Dispute Over Drug*, *Wall Street Journal*, Apr. 16, 2011, p. B2 (discussing \$ 500 million settlement in dispute submitted to arbitration); Ziobro, *Kraft Seeks Arbitration In Fight With Starbucks Over Distribution*, *Wall Street Journal*, Nov. 30, 2010, p. B10 (describing initiation of an arbitration in which the payout "could be higher" than \$ 1.5 billion); Markoff, *Software Arbitration Ruling Gives I.B.M. \$ 833 Million From Fujitsu*, *N. Y. Times*, Nov. 30, 1988, p. A1 (describing [***53] both companies as "pleased with the ruling" resolving a licensing dispute).

Further, even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___, ___, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'" (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996))). A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. See, *e.g.*, *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 67, 2009-Ohio-2054, P19, 908 N.E.2d 408, 412 ("Unconscionability is a ground for revocation of an arbitration agreement"); *In re Poly-America, L. P.*, 262 S. W. 3d 337, 348 (Tex. 2008) ("Unconscionable contracts, however -- whether relating to arbitration or not -- are unen-

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forceable under Texas law"). The *Discover Bank* rule amounts to a variation on this theme. California is free to define unconscionability as it sees [***54] fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration. Cf. *Doctor's Associates, supra*, at 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902. See also *ante*, at 4, n. (THOMAS, J., concurring) (suggesting that, under certain circumstances, California might remain free to apply its unconscionability doctrine).

Because California applies the same legal principles to address the [**767] unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *ante*, at 15-16 (referring to the "greatly increase[d] risks to defendants"; the "chance of a devastating loss" pressuring defendants "into settling questionable claims"). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than [***55] to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT&T can avoid the \$ 7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a \$ 30.22 dispute is still just \$ 30.22." *Laster v. AT&T Mobility* [*1761] LLC, 584 F.3d 849, 855, 856 (CA9 2009).

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$ 30.22 claim? See, e.g., *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (CA7 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$ 30"). In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$ 30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe [***56] that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." 36 Cal. 4th, at 162-163,

113 P. 3d, at 1110. Why is this kind of decision -- weighing the pros and cons of all class proceedings alike -- not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex arbitration procedures. E.g., *Mitsubishi Motors*, 473 U.S., at 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (antitrust claims arising in international transaction are arbitrable). We have upheld non-discriminatory state laws that slow down arbitration proceedings. E.g., *Volt Information Sciences*, 489 U.S., at 477-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (California law staying arbitration proceedings until completion of related litigation is not pre-empted). But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings. Cf. *Preston*, 552 U.S., at 355-356, 128 S. Ct. 978, 169 L. Ed. 2d 917 [***57] (Act pre-empting state law that vests primary jurisdiction in state administrative board).

[**768] At the same time, we have repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements "like all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). See also, e.g., *Vaden v. Discover Bank*, 556 U.S. ___, ___, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009); *Doctor's Associates, supra*, at 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987); *Mitsubishi Motors, supra*, at 627, 105 S. Ct. 3346, 87 L. Ed. 2d 444. And we have recognized that "[t]o immunize an arbitration agreement from judicial challenge" on grounds applicable to all other contracts "would be to elevate it over other forms of contract." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); see also *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391 (1929) (Cardozo, C. J.) ("Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficent any more than [***58] they may shirk it if their belief happens to be the contrary"); *Cohen & Dayton*, 12 Va. L. Rev., at 276 (the Act "is no infringement upon the right of each State to decide for itself what [*1762] contracts shall or shall not exist under its laws").

These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitra-

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tion contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.

IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. See, e.g., *Medtronic, Inc. v. Lohr*, 518

U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action"). But federalism is as much a question [***59] of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)
PICKNEY, SUSAN ELLINGTON,)
and SANTRESSA LOVELACE,)
Individually and On Behalf of)
Similarly situated employees,)
)
Plaintiffs,)
)
v.)
)
MURPHY OIL USA, INC.,)
)
Defendant.)

CIVIL ACTION

NO. 2:10-cv-01486-HGD

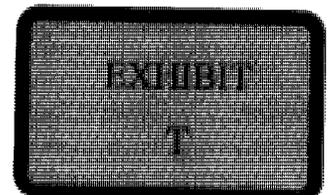
**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION TO DEFER
RULING AND REPLY TO PLAINTIFFS’ RESPONSE TO DEFENDANT’S
SUPPLEMENTAL BRIEF**

Defendant Murphy Oil USA, Inc. (“Murphy”), by and through its undersigned counsel, files this Response in Opposition to Plaintiff’s Motion to Defer Ruling and Reply to Plaintiffs’ Response to Defendant’s Supplemental Brief,¹ and shows as follows:

I. INTRODUCTION

Plaintiffs respond to Murphy’s Supplement Brief in Support of Motion to Compel Arbitration (“Supplemental Brief”) by (1) largely reasserting the same arguments Plaintiffs raised in their original Response, and (2) asking the Court to defer its ruling on the Motion to Compel Arbitration (“Motion to Compel”). The parties’ briefing, however, has narrowed the issue now confronting the Court. Plaintiffs now concede their FLSA claims are subject to arbitration. Plaintiffs’ Motion to Defer, p. 2. However, they ask the Court to also compel arbitration of their collective claims. The resolution of that issue does not require the Court to

¹ The Court has not issued a scheduling order in this matter and did not issue any order or docket annotation addressing Murphy’s ability to respond/reply to Plaintiffs’ filing. Out of abundance of caution, undersigned counsel contacted the Court’s chambers and was instructed to respond by July 25, 2011.



even address the collective action waiver in the Arbitration Agreement. It does, however, require compelling arbitration of Plaintiffs' individual FLSA claims and dismissing Plaintiffs' action entirely.

This Court cannot compel arbitration of collective claims absent an agreement between the parties to do so. Plaintiffs cannot and do not cite to any such agreement, as none exists. Instead, the parties expressly agreed that they "waive their right to commence or be a party to any . . . collective action in arbitration or any other forum." Exhibit 1, Arbitration Agreement, p. 2. Therefore, because (1) Plaintiffs conceded they must arbitrate their individual claims; (2) class arbitration is unavailable; and (3) no class representative will remain in the case,² the Court should compel the Plaintiffs to arbitrate their individual FLSA claims and dismiss their collective action claims with prejudice.

In any event, the Court should find the waiver enforceable based on the Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 2011 U.S. LEXIS 3367, 131 S. Ct. 1740 (Sup. Ct. April 27, 2011). Plaintiffs argue *Concepcion* does not require the Court to enforce the waiver because they have a "substantive right" to proceed collectively under the FLSA. As shown below, the Eleventh Circuit and other courts have squarely rejected Plaintiffs' exact argument. Plaintiffs also attempt to distinguish *Concepcion* by arguing they oppose enforcing the collective action waiver on unconscionability grounds which, according to Plaintiffs, is a generally available contract defense. Plaintiffs fail to recognize, however, that *Concepcion* expressly dealt with a state law that had the effect of preventing enforcement of class action waivers on unconscionability grounds. Thus, their argument is indistinguishable

² Significantly, there is absolutely no way the case can continue once the individual named Plaintiffs are compelled to arbitrate, because no one else remains a party plaintiff in the case and no class has been conditionally certified. Indeed, no other current or former Murphy employee has even filed to consent to join the lawsuit. Accordingly, dismissal of the lawsuit in its entirety is proper.

from the argument rejected in *Concepcion*. In any event, Plaintiffs have failed to point to any Alabama law rendering the collective action waiver unconscionable. Moreover, the authorities they continue to rely upon are clearly distinguishable.

Plaintiffs also ask the Court to defer ruling on the Motion to Compel based on an unfair labor practices charge (“ULP Charge”) filed by Plaintiff Sheila Hobson with the National Labor Relations Board (the “Board”). According to Plaintiffs, the Board has “primary jurisdiction” to determine whether Murphy’s use of the collective action waiver violates the National Labor Relations Act (“NLRA”). That is not the issue before the Court. The issue before the Court is whether the Plaintiffs’ collective claims are subject to arbitration under the terms of the Arbitration Agreement.

Moreover, as Murphy has already demonstrated, the Federal Arbitration Act (FAA”) and controlling Eleventh Circuit authority require enforcement of the collective action waiver.

Finally, Murphy and the Board have now resolved Ms. Hobson’s ULP Charge. In doing so, the Board has recognized the collective action waiver remains fully enforceable. According, Plaintiffs’ “primary jurisdiction” argument is now moot.

For the reasons that follow, the Court should deny Plaintiffs’ Motion to Defer Ruling, compel the Plaintiffs to arbitrate their individual FLSA claims, and dismiss their collective action claims with prejudice.

II. ARGUMENT AND AUTHORITIES

A. The Court Cannot Compel Arbitration of the Collective Claims.

Plaintiffs now only seek arbitration of the collective claims. There is no legal authority for such relief. The FLSA does not afford employees with the right to arbitrate collective actions. Rather, the parties determine what claims are subject to arbitration as a matter of

contract. Here, Plaintiffs admit they and Murphy agreed such claims are not subject to arbitration.

The Arbitration Agreement demonstrates the parties did not intend to arbitrate on a class or collective basis. Indeed, the Agreement expressly excludes arbitration of collective actions, stating the Plaintiffs “waive their right to commence or be a party to any group, class or collective action claim *in arbitration or any other forum.*” Arbitration Agreement, p. 2 (emphasis added). Where the terms of an arbitration agreement demonstrate the parties did not intend to arbitrate on a class basis, the Court cannot interpret the agreement to include such terms:

[W]e have held that parties are generally free to structure their arbitration agreements as they see fit. For example, we have held that parties may agree to limit the issues they choose to arbitrate, and may agree on rules under which any arbitration will proceed. They may choose who will resolve specific disputes. We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. ***From these principles, it follows 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.***

Stolt-Nielsen v. AnimalFeed International Corp., ___ U.S. ___, 130 S. Ct. 1758, 1774-1775 (2010) (emphasis in original) (internal citations omitted); *see also*, *Concepcion*, 2011 U.S. LEXIS 3367, at *** 10, 131 S. Ct. at 1745-1746 (same); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (stating “nothing in the FAA authorizes a court to compel arbitration of any issues or by any parties that are not already covered in the agreement”).

Here, not only is there no contractual basis for concluding Murphy and Plaintiffs agreed to class or collective action in arbitration, the plain language of the Arbitration Agreement demonstrates *just the opposite*. Even if the waiver itself is not enforceable, Plaintiffs and Murphy clearly and unequivocally agreed *not* to arbitrate any claims on a collective basis.

Plaintiffs' affirmative agreement *not* to proceed collectively in arbitration must be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Accordingly, Plaintiffs' argument that the Court may refer their collective action claims to arbitration should be rejected.

B. The Collective Action Waiver Is Enforceable.

While it is no longer necessary to address the class action waiver, the Court should nonetheless find the waiver enforceable if it considers the issue. As shown in Murphy's Supplemental Brief, the Supreme Court's opinion in *Concepcion, supra*, mandates enforcement of the waiver. As discussed below, Plaintiffs' attempts to distinguish the *Concepcion* are unavailing.

1. Plaintiffs Do Not Have a Substantive Right to Proceed Collectively Under 29 U.S.C. § 216(b).

Plaintiffs first attempt to distinguish *Concepcion* on the grounds they have a "substantive right" to proceed collectively under 29 U.S.C. § 216(b). The Court should reject this argument categorically. As explained in Murphy's Reply, the Supreme Court itself has held to the contrary. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court rejected the plaintiff's argument that, by agreeing to arbitrate, he had necessarily waived a substantive right to proceed collectively under the ADEA,³ noting "a party does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26. Moreover, "[t]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* at 32.

³ The ADEA employs the collective action mechanism found in 29 U.S.C. 216(b). See 29 U.S.C. § 626.

Following *Gilmer*, numerous federal courts, including the Eleventh Circuit, have determined the right to proceed collectively under 29 U.S.C. 216(b) is a procedural right – not a substantive one – that is fully waivable. *Caley v. Gulfstream Aerospace Corp.*, 438 F.3d 1359, 1364 (11th Cir 2005) (enforcing collective action waiver in FLSA case and rejecting argument Section 216(b) provides a substantive right); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiff's argument such a clause deprived them of a substantive right under the FLSA); *Hawkins v. Hooters of Amer., Inc.*, 2011 U.S. Dist. LEXIS 72024, * 4 (D.D.C. July 4, 2011) (noting “the ability to proceed as a class is not a substantive right guaranteed by the FLSA”); *Lu v. At&T Servs.*, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011) (stating “[t]he right to bring a collective action under the FLSA is a procedural—not a substantive one”); *Delano v. MasTec, Inc.*, 2010 U.S. Dist. LEXIS 126793, * 9 (M.D. Fla. Nov. 15, 2010) (enforcing collective action waiver and compelling arbitration, noting “Plaintiffs' inability to proceed on a class or collective basis in arbitration does not prevent them from vindicating their substantive rights under the FLSA”).⁴ Therefore, Plaintiffs' argument that *Concepcion* does not apply because they have a substantive right to proceed collectively should be rejected.

2. The Class Action Waiver Is Enforceable under *Concepcion*.

The Court should also reject Plaintiffs' argument that *Concepcion* does not apply because their theory for not enforcing the collective action waiver is somehow different from the theory

⁴ In their Motion to Defer, Plaintiffs cite to the Supreme Court's decision in *Hoffman-Laroche, Inc. v. Sperling*, 110 S. Ct. 482, 486 (1989) for the proposition that Section 216(b) provides a substantive right to proceed collectively. *Hoffman-Laroche* held the district court has the discretion, under principles of effective case management, to send notice to potential opt-in plaintiffs in appropriate circumstances. It says nothing about Section 216(b) conferring a substantive right to proceed collectively.

advanced by the plaintiffs in that case. In essence, Plaintiffs assert *Concepcion* prohibits “some blanket state law or rule that prohibits class or collective action waivers,” whereas in contrast they argue an enforceable waiver is unconscionable and thus “never formed.” See Motion to Defer, pp. 3, 9. Therefore, according to Plaintiffs, the rule they rely upon is a generally applicable contract defense that remains available even after *Concepcion* to prohibit enforcement of the collective action waiver. The Court should reject this misleading argument entirely.

Contrary to Plaintiffs’ position, the California rule of law at issue in *Concepcion* that prevented class action waivers was based precisely on principles of unconscionability. See *Concepcion*, 2011 U.S. LEXIS 3367, at *** 12-13, 131 S. Ct. at 1747. Specifically, the California rule held that class action waivers in contracts of adhesion, which involved predictably small amounts of damages, were against public policy and effectively exempted the offending party from responsibility, and were thus unconscionable under California law. *Id.* at ***11, 131 S. Ct. at 1746. The Supreme Court noted such a defense is “normally thought to be generally applicable” to avoid enforcement of a contracted obligation. *Id.* at *** 12-13, 131 S. Ct. at 1747. Nonetheless, the Supreme Court held such a rule “interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at *** 18, 131 S. Ct. at 1748.

Plaintiffs purport to rely on just such a rule of unconscionability under “basic Alabama contract law” to defeat the collective action waiver in their Arbitration Agreements. In fact, their entire argument is that the collective action waiver is unconscionable. See Motion to Defer at 2-3, 7. Accordingly, Plaintiffs’ attempt to distinguish *Concepcion* on the ground that they are raising a different issue is completely fallacious.

3. Plaintiffs Have Failed to Identify Any Alabama Law Suggesting the Arbitration Agreement Is Unconscionable.

Even if Plaintiffs' unconscionability argument raises a different issue than addressed in *Concepcion*, Plaintiffs have nonetheless failed to cite any "basic Alabama contract law" demonstrating the class action waiver is unconscionable under that state's jurisprudence. Indeed, in making their argument, Plaintiffs fail to cite *any* Alabama authority whatsoever. In contrast, as Murphy demonstrated in its Motion to Compel and Reply, Alabama federal courts applying Alabama law have compelled arbitration and enforced a class action waiver where the plaintiffs were entitled to similar remedies as Plaintiffs in the instant case, such as recovery of attorney's fees and costs. *Gipson v. Cross Country Bank*, 294 F. Supp.2d at 1251, 1265 (M.D. Ala 2003) (enforcing arbitration agreement's class action waiver under Alabama law where the remedies provided "parties and lawyers with incentives to pursue their cases"); *Pitchford v. AmSouth Bank*, 285 F.supp.2d 1286 (M.D. Ala. 2003) (same). Thus, to show the collective action waiver is unenforceable under Alabama law.

4. Plaintiffs Have Otherwise Failed to Show the Collective Action Waiver Is Unconscionable.

Instead of citing Alabama authority, Plaintiffs rely principally on *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2006), an appeal from a Georgia federal court, for the proposition that the collective action waiver is unconscionable. Relying on *Dale*, Plaintiffs argue that the collective action waiver is unconscionable based on four separate factors. (1) it benefits only Murphy; (2) prevents them from obtaining legal representation; (3) it gives Murphy an "unfair advantage in the market;" and (4) it violates public policy. The Court should reject Plaintiffs' arguments on each issue.

First, it cannot be said that the collective action waiver benefits only Murphy. The collective action waiver is encompassed within a larger agreement providing Plaintiffs with a speedy and efficient method for resolving their claims before a neutral arbitrator without the cost or time of litigation. Plaintiffs received these benefits as valuable consideration in exchange for waiving their right to proceed collectively. Therefore, Plaintiffs argument they receive no benefit from the collective action waiver is incorrect.

Second, the collective action waiver does not prevent Plaintiffs from obtaining legal representation. In *Dale*, the Plaintiffs were limited in their ability to arbitrate on an individual basis due to the diminutive size of their individual claims and provisions in the arbitration agreement that prevented them from recovering attorney's fees and expenses and held them responsible for filing costs. *Dale*, 498 F.3d at 1220–1221. The Eleventh Circuit agreed that these circumstances rendered the agreement unconscionable. In doing so, the Eleventh Circuit distinguished its prior decision in *Caley v. Gulfstream Aerospace Corp.*, *supra*, stating:

[In *Caley*] [w]e did not consider as factual scenario in which a remedy was effectively foreclosed because of the negligent amount of recovery when compared to the cost of bringing an arbitration action. More importantly, a review of the claims in *Caley* shows that each provided for the recovery of attorney's fees and/or expert witness costs should the plaintiff prevail.

Id. at 1221 (citing *Caley*, 428 F.3d at 1368).

The circumstances at bar are analogous to the circumstances in *Caley*, not the circumstances in *Dale*. Nothing in the Arbitration Agreement prevents Plaintiffs from recovering their attorney's fees, costs, and expert's fees. The Arbitration Agreement states that "the arbitrator shall have the power to allocate costs and/or attorney's fees pursuant to the applicable statute." Arbitration Agreement, p. 1. Therefore, Plaintiffs presumptively would recover their fees and costs if they prevailed. Moreover, under the terms of the Arbitration

Agreement, Murphy pays the costs of the arbitration other than filing fees, which can be waived, deferred, or reduced in the event of hardship. *Id.* Indeed, under the Arbitration Agreement, Plaintiffs incur no other costs at all to litigate their individual claims. Thus, in contrast to *Dale*, Plaintiffs received valuable consideration for their waiver – the ability to speedily seek complete statutory relief in an arbitral forum at Murphy’s expense.⁵

Third, the collective action waiver does not give Murphy an “unfair advantage in the market.” If anything, the opposite is true. Murphy has created a mechanism for its employees to efficiently bring claims on an individual basis. Having created an avenue for employees to quickly bring and resolve their claims, Murphy has an even greater incentive to fully comply with all applicable employment laws.

Finally, Plaintiffs suggest the collective action waiver violates Alabama public policy. Plaintiffs do not identify any such public policy under Alabama law, however. Even if Alabama has a public policy that invalidates collective action waivers and requires class-wide arbitration, such a policy runs counter to (and is preempted by) the FAA. *Concepcion*, 2011 U.S. LEXIS 3367, at *** 18, 131 S. Ct. at 1748 (“[r]equiring the availability of class-wide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”). Therefore, Plaintiffs’ implicit argument that Alabama public policy prevents enforcement of the collective action waiver is meritless.

⁵ See also *Randolph v. Green Tree Financial Corp.*, 244 F.3d 814, 819 (11th Cir. 2001); *Jenkins v. American Cash Advance, LLC*, 400 F.3d 868, 877-878 (11th Cir. 2005) (reversing district court’s finding that an arbitration agreement in a consumer loan contract was unconscionable where the plaintiffs ⁵could recover attorney’s fees under the state statute at issue, noting “when the opportunity to recover attorney’s fees is available, lawyers will be willing to represent [plaintiffs]”); *Gipson*, 294 F. Supp.2d at 1261 (rejecting argument a class action waiver is unconscionable, noting the ability to recover attorney’s fees attracts competent representation).

C. The Court Should Not Defer Ruling on Murphy's Motion to Compel Arbitration.

In addition, the Court should reject Plaintiffs' argument that Plaintiff Hobson's filing of a ULP Charge before the Board should delay the ruling on the Motion to Compel Arbitration. As shown below, the outcome of the ULP Charge is not relevant to the issue of compelling arbitration. Moreover, the ULP Charge has now been effectively resolved through settlement between Murphy and the Board. That settlement has not resulted in invalidation of the collective action waiver at issue; instead, it reaffirmed Murphy is entirely within its right to enforce it. Accordingly, Plaintiff's argument for deferral is now moot.

1. Because the Court Need Not Address the Collective Action Waiver in Granting the Motion to Compel, the ULP Charge Is Irrelevant.

First, because as shown above the Court does not need to address the collective action waiver to compel Plaintiffs to arbitrate their individual claims and dismiss their collective action claims, the ULP Charge is simply irrelevant. As Plaintiffs concede, the ULP Charge concerns whether Murphy's use of the collective action waiver is an unfair labor practice under the NLRA. Nothing about the ULP Charge, however, calls into question the enforceability of the Arbitration Agreement itself. Moreover, nothing about the ULP Charge diminishes the fact that Murphy and Plaintiffs affirmatively agreed not to arbitrate class or collective claims. Indeed, if anything, Hobson's decision to file the ULP Charge demonstrates the existence of that agreement. Accordingly, the Court should simply disregard Plaintiff's "primary jurisdiction" argument as irrelevant to the issue before the Court.

2. The Board Does Not Have "Primary Jurisdiction" to Address Enforcement of the Collective Action Waiver.

Second, Plaintiffs are incorrect in asserting the Board has "primary jurisdiction" over whether the Court should enforce the collective action waiver. Plaintiffs essentially assert that

their participation in a collective action amounts to protected concerted activity under Section 7 of the NLRA, 29 U.S.C. § 157, and that the collective action waiver constitutes an “unfair labor practice.” While the Board may have jurisdiction to consider whether Murphy’s use of the collective action waiver constitutes an unfair labor practice, the Board has no jurisdiction to determine if that waiver is enforceable as a contractual matter. The Board’s jurisdiction is limited to enforcement of statutory rights under the NLRA. *United Steelworkers of Amer. v. Amer. Int’l. Alum. Corp.*, 334 F.2d 147 (5th Cir. 1964). In contrast, the Board “has no power to adjudicate contractual disputes,” *see id.*, or disputes arising under other federal statutes. *Cardenas v. United Parcel Service*, 2010 U.S. Dist. LEXIS 134269, * 11-14 (C.D. Cal. Dec. 9, 2010) (finding NLRB’s jurisdiction does not extend to wage claims under the FLSA). Whether the collective action waiver is enforceable in this proceeding involves adjudicating a contractual right. *United Steelworkers of Amer.*, 334 F.2d at 151 (finding issues related to enforcement of an arbitration agreement were contractual and outside the Board’s purview), *see also, International Brotherhood of Painters & Allied Trades v. Williams Contracting, Inc.*, 479 F. Supp. 479, 481 (N.D. Ga. 1979) (noting “[f]or some time it has been recognized that proceedings in the courts to enforce arbitration awards involves determination of contractual rights, while proceedings before the NLRB involve determination of statutory rights”). Simply put, the Board has no authority to prevent contractual enforcement of a binding and executed collective action waiver.⁶ Plaintiffs

⁶ In making their argument, Plaintiffs rely on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* does not address the Board’s jurisdictional power, however. Instead, it addresses the obligation of courts to defer to the Board in matters that are within its “exclusive competence.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). “Like many general rules, however, this one contains exceptions.” *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 609 (6th Cir. 2004). Specifically, “federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies.” *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975). As one court has explained:

This exception to the *Garmon* doctrine for independent federal remedies takes its instruction from a cardinal principle of statutory construction: “When there are two [federal] acts upon the same subject, the rule is to give effect to both.” *United States v. Borden Co.*, 308 U.S. 188, 198, 84 L.

are bound by that waiver as a matter of contract, and under the FAA, it is due to be enforced a written. 9 U.S.C. § 3 (stating federal courts "shall enforce" arbitration agreements); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (same).

The Board's General Counsel ("GC") has recently recognized this distinction between an unfair labor practice and a contractual, collective action waiver and, in doing so, rejected the exact position espoused by Plaintiffs. In a recent Memorandum, the GC acknowledged that Supreme Court precedent permits an employee to waive collective action rights without consideration of the NLRA. See Exhibit 2, Memorandum GC 10-6 (the "GC Memorandum"). Addressing the impact of the NLRA on class and collective action waivers in employment arbitration agreements, the GC stated that "the validity of such individual forum waivers is normally determined under non-NLRA law, such as the Federal Arbitration Act and the employment statutes at issue." *Id.* at 2. The GC further recognized the "well-developed body of case law" finding class action waivers enforceable, noting that "these cases should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum is also in effect waiving his or her right to pursue a class action." *Id.* at 6. Accordingly, the GC opined that an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by a class action waiver. *Id.* The GC further clarified that the Board's primary concern is retaliation against the

Ed. 181, 60 S. Ct. 182 (1939). "Absent an intolerable conflict between the two statutes," the Supreme Court has long been "unwilling to read the [later Act] as repealing any part of the [former Act]." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 566-67, 94 L. Ed. 2d 563, 107 S. Ct. 1410 (1987).

Trollinger, 370 F.3d at 609-610. Here, the issue of enforcing the collective action waiver is governed by the FAA. The possibility that the collective action waiver violates the NLRA is, at most, a collateral issue that does not require deference to the Board under *Garmon* or any other theory. *Id.*

employee for participating in the collective action, not preventing enforcement of the collective action waiver itself:

Even if Section 7 cannot insulate individual employees from the consequences of lawful agreements respecting arbitration of non-NLRA rights, Section 7 does protect the right of those employees to band together to test the validity of their individual agreements and to make their case to a court that class or collective action if their statutory employment rights are to be vindicated. He or she cannot be disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim. Rather, the employer's recourse in such situations is to present the Court the individual Gilmer waivers as a defense to the class action claim.

Id. at 6.

That is exactly what Murphy has done in this case – seeking enforcement the arbitration agreement and collective action waiver applicable to each of the Plaintiffs through a motion filed with this Court. Thus, Ms. Hobson's ULP Charge has no bearing on enforcement of the collective action waiver.

3. Murphy and the Board Have Settled the Pending ULP Charge, and Plaintiffs Motion to Defer Is Therefore Moot.

Even if the Board had primary jurisdiction to address the enforceability of the class and collective action waiver (which it does not), the Court should still decline to defer ruling on the Motion to Compel. Murphy and the Board have settled the ULP Charge. That settlement reaffirms Murphy's right to enforce the collective action waiver in the Arbitration Agreement.⁷ Accordingly, the Board proceeding has been resolved, and Plaintiffs' argument that the Court should defer its ruling is now moot.

III. CONCLUSION

Plaintiffs cannot obtain compulsory arbitration of their collective action claims. Moreover, Plaintiffs have failed to show *Concepcion* does not apply. In addition, the Board

⁷ The Settlement Agreement between Murphy and the Board is confidential. Murphy will, however, provide it to the Court for in-camera inspection if necessary to resolve the Motion to Compel.

lacks jurisdiction to prevent enforcement of the collective action waiver, and, in settling with Murphy, the Board has not sought to prevent such enforcement. Accordingly, no basis exists for the Court to defer ruling on Murphy's Motion to Compel. Accordingly, pursuant to the FAA, the Court should compel arbitration of Plaintiffs' individual FLSA claims and dismiss Plaintiffs' collective action claims with prejudice.

Respectfully submitted this 25th day of July, 2011.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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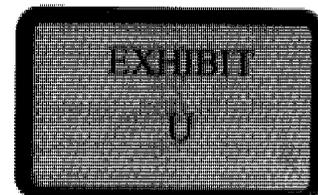
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

**DEFENDANT'S NOTICE OF CLARIFICATION REGARDING ITS RESPONSE IN
OPPOSITION TO MOTION TO DEFER RULING AND REPLY TO PLAINTIFF'S
RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF**

Defendant Murphy Oil USA, Inc. ("Murphy"), by and through its undersigned counsel, submits this Notice of Clarification Regarding its Response in Opposition to Plaintiff's Motion to Defer Ruling and Reply to Plaintiffs' Response to Defendant's Supplemental Brief, and states as follows:

On July 25, 2011, Murphy filed its "Response in Opposition to Plaintiff's Motion to Defer Ruling and Reply to Plaintiffs' Response to Defendant's Supplemental Brief" ("Response") [Doc No. 25]. Therein, Murphy opposed Plaintiffs' request that the Court defer ruling on Murphy's Motion to Compel Arbitration pending resolution of a Charge filed by Plaintiff Sheila Hobson with the National Labor Relations Board (the "Board"). Among other grounds for its opposition to such relief, Murphy pointed out that Murphy and the Board had settled Ms. Hobson's Charge, thus rendering Plaintiffs' argument for deferral moot. Following settlement negotiations, Murphy and the General Counsel's office reached an agreement to settle



Ms. Hobson's Charge. The Counsel for the General Counsel agreed with all material terms of the agreement and had also informed Murphy's counsel the Board proceeding was resolved from the Board's perspective. At the time of filing the Response, Murphy had signed a settlement agreement with the Board (which the Board drafted).

After filing its Response, Murphy's counsel was informed that the Board's Regional Director had delayed executing the agreement in order to submit the agreement to the Board's Division of Advice. According to information relayed by Counsel for the General Counsel, the Division of Advice will consider the settlement and decide whether or not to approve it pending issuance of a decision by the Board in another Board matter, *D.R. Horton*, 12-CA-25764 (NLRB 2011). Given undersigned counsel's communications with Counsel for the General Counsel, Murphy anticipates the Division of Advice will ultimately approve the settlement agreement (which will render Plaintiff's argument moot). In any event, the Court should still deny the Motion to Defer in its entirety. As demonstrated in Murphy's Response, the Board proceedings are entirely irrelevant to the issue before the Court and, in any event, Plaintiffs' argument that the Board has primary jurisdiction to resolve the Motion to Compel Arbitration is meritless. [See Doc. 25, pp. 11-13.]

Respectfully submitted this 4th day of August, 2011.

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ATTORNEYS FOR DEFENDANT
MURPHY OIL USA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Respectfully submitted,

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4816-6708-1738, v. 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
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Plaintiffs,)	NO. 2:10-cv-01486-HGD
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Defendant.)	

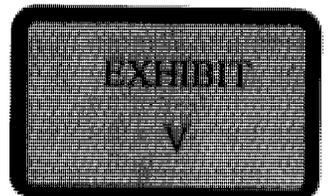
**DEFENDANT’S RESPONSE TO PLAINTIFFS’ NOTICE OF FILING IN SUPPORT OF
THEIR RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO COMPEL
ARBITRATION AND DISMISS COLLECTIVE ACTION**

Defendant Murphy Oil USA, Inc. (“Murphy”), by and through its undersigned counsel, files this Response to Plaintiffs’ Notice of Filing in Support of Their Response in Opposition to Defendant’s Motion to Compel Arbitration and Dismiss Collective Action (“Notice of Filing”),¹ and shows as follows:

I. INTRODUCTION

Plaintiffs’ Notice of Filing asks the Court to disregard controlling Supreme Court and Eleventh Circuit authority and, instead, follow a recent decision by the National Labor Relations Board (the “Board”), *D.R. Horton*, 2012 NLRB LEXIS 11 (NLRB Jan. 3, 2012) (“*D.R. Horton*”), and compel Murphy to arbitrate Plaintiffs’ collective action claims. The Court should reject this argument for multiple reasons.

¹ The Court has not issued a scheduling order in this matter and did not issue any order or docket annotation addressing Murphy’s ability to respond/reply to Plaintiffs’ filing. Out of abundance of caution, undersigned counsel contacted the Court’s chambers and was instructed to respond by February 3, 2012.



First, Plaintiffs are not entitled to the relief they seek. Plaintiffs concede their individual Fair Labor Standards Act (“FLSA”) claims are subject to arbitration, and they do not oppose dismissal of this action so that arbitration may proceed – instead, Plaintiffs only ask the Court to also compel arbitration of their collective claims. Plaintiffs, however, have never filed a motion to compel arbitration of their collective action claims. Accordingly, that issue has never been properly placed before the Court. Even if Plaintiffs had so moved, nothing in *D.R. Horton* gives Plaintiffs the right to arbitrate their collective claims. Indeed, the Board expressly stated in that decision that an employer may lawfully enter into an agreement prohibiting arbitration on a class or collective basis. Finally, under controlling Supreme Court authority, this Court cannot compel arbitration of collective claims absent an agreement between the parties to do so. Plaintiffs cannot and do not cite to any such agreement, as none exists.

Second, even if the Plaintiffs were entitled to the remedy they seek pursuant to *D.R. Horton*, Plaintiffs have not explained why the Court should follow *D.R. Horton* and defer to the Board. The Eleventh Circuit and numerous other courts have held the right to participate in a collective action under 29 U.S.C. § 216(b) is purely procedural and subject to waiver. Thus, Plaintiffs do not possess a non-waivable, substantive right to participate in a collective action (and much less a collective arbitration). Plaintiffs have not, and cannot, reconcile this binding authority with the Board’s recognition in *D.R. Horton* of a substantive right to participate in a collective action pursuant to the NLRA. Moreover, as the Board itself concedes, its rationale in *D.R. Horton* necessarily conflicts with the Supreme Court’s holding in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held the Federal Arbitration Act (“FAA”) requires a court to enforce a private arbitration agreement containing a class action waiver according to its terms. Plaintiffs (and the Board’s) efforts to distinguish *Concepcion* on the grounds it did not

involve employment claims overlooks Supreme Court authority mandating enforcement of arbitration agreements **irrespective of the context in which the agreement arose**. As further discussed below, the Court should reject the application of *D.R. Horton*, enforce Murphy's Arbitration Agreement as written, and dismiss this action.

II. ARGUMENT AND AUTHORITIES

A. This Court Cannot Compel Arbitration of Plaintiffs' FLSA Collective Claims.

1. Plaintiffs Have Never Moved to Compel Collective Arbitration.

The only remedy sought by Plaintiffs is for the Court to compel arbitration of their collective action claims. Plaintiffs, however, never filed a motion requesting that the Court compel arbitration on a collective basis. The FAA specifically requires a party seeking to force arbitration to file an application with the Court in "the manner provided by law for the making and hearing of motions." *See* 9 U.S.C. § 6; *see also*, *Kruse v. Sands Bros. & Co.*, 222 F. Supp.2d 484 (S.D.N.Y. 2002). Plaintiffs have failed to do so. For that reason alone, the Court may reject their request to compel collective arbitration.

2. *D.R. Horton* Does Not Mandate Collective Arbitration.

Plaintiffs also point to *D.R. Horton* as grounds for the Court to compel arbitration on a collective basis. *D.R. Horton*, however, provides no authority for such relief. In *D.R. Horton*, two members of the Board² held that an arbitration agreement entered into by employees as a

² The fact that the Board's decision was handed down by only two members (Pearce and Becker) should not be overlooked. Decisions of the Board, which normally has five seats, are only valid when issued by a quorum of at least three members. As alleged in recent litigation in the D.C. Circuit, at the time *D.R. Horton* was issued, the Board arguably lacked a quorum due to the invalidity of the President's recess appointments without Senate approval. *See Nat'l. Assn. of Manuf. v. NLRB*, 1:11-CV-01629 (D.D.C. 2011). While Murphy has not argued herein that *D.R. Horton* is procedurally invalid for lack of a quorum, the potential invalidity of the decision is another reason for the Court to approach it with circumspection.

condition of employment that contained a class and collective action waiver infringed on employees' rights to engage in protected concerted activity under Section 7 of the NLRA, in violation of Section 8(a)(1) of that act. *See* 29 U.S.C. § 158(a)(1). Accordingly, the Board found the waiver operated as an unfair labor practice and ordered the employer to rescind or revise the arbitration agreement. In fashioning that relief, however, the Board was careful to explain that nothing about its decision required the employer to acquiesce to class or collective arbitration:

[N]othing in our holding here requires the Respondent or any other employer to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. . . . We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

D. R. Horton, 2012 NLRB LEXIS 11, * 54-55 (N.L.R.B. Jan. 3, 2012).

Here, Plaintiffs admit they and Murphy agreed their individual FLSA claims are subject to arbitration. Indeed, the Agreement clearly contemplates arbitration on an individual, not collective, basis, stating Plaintiffs “waive [their] right to commence or be a party to any group, class or collective action claim **in arbitration or any other forum.**” Arbitration Agreement, p. 2.³ Accordingly, even if the Court were inclined to strictly follow *D.R. Horton*, nothing in its holding suggests the Court should force Murphy to arbitrate on a collective basis. Simply put, *D.R. Horton* does not afford Plaintiffs the relief they seek.

³ Copies of the Arbitration Agreements executed by Plaintiffs are attached as part of Doc. No. 14-1.

3. Supreme Court Authority Precludes the Collective Arbitration of Plaintiffs' FLSA Claims.

Even if *D.R. Horton* may be read to require class or collective arbitration, it nonetheless runs afoul of controlling Supreme Court precedent that holds a party **may not** be compelled to arbitrate on a class-wide basis without its express consent to do so. Thus, where the terms of an arbitration agreement demonstrate the parties did not intend to arbitrate on a class basis, the Court cannot interpret the agreement to include such terms:

[W]e have held that parties are generally free to structure their arbitration agreements as they see fit. For example, we have held that parties may agree to limit the issues they choose to arbitrate, and may agree on rules under which any arbitration will proceed. They may choose who will resolve specific disputes. We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. **From these principles, it follows 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.**

Stolt-Nielsen v. AnimalFeed International Corp., ___ U.S. ___, 130 S. Ct. 1758, 1774-1775 (2010) (emphasis in original) (internal citations omitted); *see also*, *Concepcion*, 131 S. Ct. at 1748 (same); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (stating “nothing in the FAA authorizes a court to compel arbitration of any issues or by any parties that are not already covered in the agreement”).

Here, there is no contractual basis for concluding Murphy and Plaintiffs agreed to class or collective action in arbitration. The plain language of the Arbitration Agreement demonstrates **just the opposite**. The parties expressly agreed to exclude class or collective claims from arbitration. Arbitration Agreements at 2. Plaintiffs' affirmative agreement **not** to proceed collectively in arbitration must be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Accordingly, Plaintiffs' argument that the Court may refer their collective action claims to arbitration should be rejected.

B. Murphy's Motion to Compel Arbitration Must Be Granted as Unopposed.

Plaintiffs do not argue *D.R. Horton* precludes arbitration of their individual FLSA claims. Consequently, as Plaintiffs have conceded this issue, Murphy's Motion to Compel Arbitration of Plaintiffs' individual FLSA claims must be granted.

C. Murphy's Motion to Dismiss Is Unopposed.

In addition, Plaintiffs do not oppose Murphy's Motion to Dismiss this entire action. Rather, they only seek to compel arbitration of their collective claims. Since that relief is not available, and since Plaintiffs do not oppose dismissal, the Motion to Dismiss should be granted.⁴

D. Deference to the Board Is Unwarranted.

Even if the Plaintiffs are now opposing dismissal based on *D.R. Horton*, the Court should grant the Motion to Dismiss and decline to follow that decision. At the outset, this Court has no obligation to defer to the Board when it ignores other Congressional acts or federal policies. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (stating "the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives"); *Hoffman Plastics Compound v. NLRB*, 535 U.S. 137, 144 (2002) (explaining "we have accordingly never

⁴ Dismissal of the collective action claims is proper for two other reasons as well. First, because the named-Plaintiffs' individual claims must be referred to arbitration pursuant to the Arbitration Agreement, the remaining collective action claims no longer present a justiciable controversy for the Court to oversee, and therefore dismissal of the action is proper. *See East Texas Motor Freight Syst. v. Rodriguez*, 431 U.S. 395, 405-406 (1977) (stating class action is properly dismissed if no named-plaintiff has a live claim before class certification). Second, as a practical matter, referring the Named-Plaintiffs' individual claims to arbitration leaves no extant class representative to prosecute the collective action claims before this Court. Accordingly, irrespective of the waiver provision, the collective action claims are subject to dismissal because they cannot be adjudicated without a class representative. *See, e.g., Kifer v. Ellsworth*, 346 F.3d 1155, 1156 (7th Cir. 2003) (stating "a class action suit cannot proceed in the absence of a class representative"); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (dismissing collective action where the named-plaintiff's claims were subject to arbitration).

deferred to the Board's remedial preferences when such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). Here, the two-member decision in *D.R. Horton* trenches upon multiple countervailing federal statutes and policies. Specifically, *D.R. Horton* contradicts controlling authority holding employees do not have a substantive right to proceed collectively under the FLSA – and consequently can waive that right in an arbitration agreement.

Moreover, *D.R. Horton* ignores the overriding mandate of the FAA to enforce arbitration agreements according to their terms. Therefore, as discussed below, the Board decision in *D.R. Horton* is not entitled to any deference.

1. Plaintiffs Can Waive Right to Proceed Collectively Under 29 U.S.C. § 216(b).

As an initial matter, *D.R. Horton* fails to acknowledge the significant, contradictory case authority holding that because no substantive right exists to participate in a collective action, those rights can be waived. Numerous federal courts, including the Eleventh Circuit, have determined the right to proceed collectively under 29 U.S.C. 216(b) is a procedural right – not a substantive one – that is fully waivable. *Caley v. Gulfstream Aerospace Corp.*, 438 F.3d 1359, 1364 (11th Cir 2005) (enforcing collective action waiver in FLSA case and rejecting argument Section 216(b) provides a substantive right); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiffs' argument such a clause deprived them of a substantive right under the FLSA); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (stating “while [the] FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action”) (emphasis in original); *Hawkins v. Hooters of*

Amer., Inc., 2011 U.S. Dist. LEXIS 72024, * 4 (D.D.C. July 4, 2011) (noting “the ability to proceed as a class is not a substantive right guaranteed by the FLSA”); *Lu v. AT&T Servs.*, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011) (stating “[t]he right to bring a collective action under the FLSA is a procedural [right] -- not a substantive one”).

Hence, the courts and Congress – not the Board – determine whether an employee can waive his or her rights to participate in a collective action under the FLSA. *D.R. Horton’s* recognition of a non-waivable, substantive right to proceed collectively under the NLRA cannot be reconciled with these decisions. Because the Board’s decision in *D.R. Horton* clearly conflicts with the authority cited above, it is entitled to no deference.

2. Deference to *D.R. Horton* Contradicts the FAA’s Requirement that Courts Enforce Arbitration Agreements According to Their Terms.

The two-member decision in *D.R. Horton* also pays short shrift to the overriding mandate of the FAA to enforce arbitration agreements, including those containing class action waivers, according to their terms. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In fact, the Supreme Court’s decision in *Concepcion* precludes any finding that a collective action requirement can be consistent with the FAA. In *Concepcion*, the Supreme Court addressed an arbitration agreement that precluded class proceedings **in both court and arbitration**. *Id.* at 1744.⁵ In finding such an agreement fully enforceable, the Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748. Accordingly, *Concepcion* eviscerates Plaintiffs’ argument that an absolute right exists to participate in a collective action. Indeed, any such requirement would run afoul of the FAA’s “overarching purpose” of “ensur[ing] the

⁵ AT&T subsequently amended the agreement to allow a claimant to bring an individual action in small claims court in lieu of arbitration. Nonetheless, the agreement was not amended to provide a class action remedy in a judicial forum. *Id.*

enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.*; see also, *Lavoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277, * 19-20 (S.D.N.Y. Jan. 13, 2012) (enforcing employment arbitration agreement that prohibited class and collective proceedings in a judicial or arbitral forum, and declining to rely on *D.R. Horton* as inconsistent with the holding in *Concepcion*); *Grabowski v. C.H. Robinson Co.*, 2011 U.S. Dist. LEXIS 105680, * 17-20 (S.D. Cal. Sept. 19, 2011) (enforcing employment arbitration agreement that precluded class or collective arbitration or litigation, and finding that "the NLRA does not operate to invalidate or otherwise render unenforceable" a class and collective action waiver in such an agreement).

Plaintiffs, relying on *D.R. Horton*, attempt to distinguish *Concepcion* on the grounds that it involved a consumer class action, not the employment relationship. The Court should reject this artificial distinction. The attempt to carve out employment disputes from the ambit of the FAA runs counter to well-established federal law applying the FAA to **all** arbitration agreements, including arbitration agreements in the employment context. See, e.g., *Circuit City Stores v. Adams*, 532 U.S. 105, 111 (U.S. 2001) (declining to exclude employment agreements from the ambit of the FAA); *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) (stating "compulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes"); accord *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-576 (10th Cir. 1998); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470-1472 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-748 (5th Cir. 1996); *Asplundh Tree*

Co. v. Bates, 71 F.3d 592, 596-601 (6th Cir. 1995). Indeed, following the Board's holding would affirmatively carve out an exception against the validity of class action waivers in the context of employment arbitration agreements, a result that simply cannot be reconciled with Supreme Court's holding in both *AT&T Mobility* and *Circuit City Stores*, or the Eleventh Circuit express statement in *Caley*, *supra*, that such waivers are **not** an unlawful employment practice.

Plaintiffs also state that “[i]n no way does [*Concepcion*] address Section 7 NLRA rights or FLSA rights.” Notice of Filing at 6. While it is true *Concepcion* does not directly address the FLSA or NLRA, *Concepcion* still mandates enforcement of the Arbitration Agreement's collective action waiver because neither the NLRA nor the FLSA expressly prohibit arbitration of Plaintiffs' collective action claims. As the Supreme Court explained less than three weeks ago, where an act is silent as to whether claims can proceed in an arbitral forum, “the FAA requires the arbitration agreement to be enforced according to its terms.” *Compucredit Corp. v. Greenwood*, 2012 U.S. LEXIS 575, * 17 (Sup. Ct. Jan. 10, 2012). In *Compucredit*, the Supreme Court reiterated that the FAA “requires courts to enforce arbitration agreements according to their terms . . . even when the claims at issue are statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command.” *Id.* at * 10. In so holding, the Supreme Court rejected the argument that the Credit Repair Organization Act's (CROA) non-waiver provision was sufficient “congressional command” to invalidate an arbitration agreement, noting “when Congress has restricted the use of arbitration agreements in other contexts, it has done so with a clarity that far exceeds the claimed indications of the CROA” by explicitly prohibiting

arbitration. *Id.* at * 15 (citing statutes where Congress expressly included text stating that arbitration would not be allowed).⁶

There is no explicit command in the NLRA that exempts claims arguably falling within its ambit from arbitration. Moreover, there is nothing in the text of Section 16(b) of the FLSA (or anywhere else in that act) suggesting that collective action claims are not subject to an otherwise valid arbitration agreement. Accordingly, neither statute renders the class and collective action waiver in Murphy's Arbitration Agreement unenforceable, and the Court should enforce it according to its terms.

III. CONCLUSION

Plaintiffs' request for compulsory arbitration of their collective action claims must be denied because no motion to compel such relief is pending and such relief is not mandated by *D.R. Horton*. Moreover, compulsory arbitration of Plaintiffs' collective claims would run afoul of Supreme Court precedent. Murphy's Motion to Compel Plaintiffs' individual FLSA claims is unopposed and must be granted. Further, Murphy's Motion to Dismiss should be granted as unopposed. Even if opposed based on *D.R. Horton*, the Motion to Dismiss should be granted because *D.R. Horton* directly conflicts with Supreme Court and Eleventh Circuit authority under the FLSA and FAA. For all of these reasons, the Court should reject *D.R. Horton*, compel Plaintiffs to arbitrate on an individual basis, and dismiss this action.

⁶ Though not addressed in the Supreme Court's opinion, it is significant that the arbitration agreement in *Compucredit* also contained a class action waiver provision that stated "neither you or we will have the right to litigate in court the claim being arbitrated . . . [and] you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration." *Greenwood v. Compucredit Corp.*, 615 F.3d 1204, 1206 (9th Cir. 2010). Therefore, the Court should reject any effort to distinguish *Compucredit* on the grounds it did not involve a class action waiver provision.

Respectfully submitted this 3rd day of February, 2012.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Respectfully submitted,

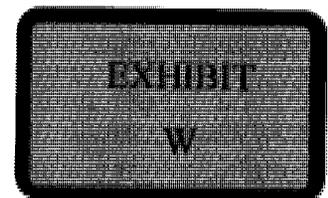
/s/Brandon M. Cordell
Brandon M. Cordell, Esq.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
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)	
Plaintiffs,)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

DEFENDANT’S SECOND NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Murphy Oil USA, Inc. (“Murphy”), by and through its undersigned counsel, files this Notice of Supplemental Authority in support of its Motion to Compel Arbitration and Dismiss Collective Action (“Motion to Compel”). (Docket Entry No. 14.) Since Murphy filed the Motion to Compel, the United States District Court of the Middle District of Georgia (Lawson, D.J.) has issued an opinion in *Palmer v., Convergys Corporation and Convergys Customer Management Group, Inc.*, 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012) (Copy attached hereto as Exhibit A). In *Palmer*, the district court enforced a class action waiver in an employment application and struck the plaintiffs’ FLSA collective action claims. In doing so, the district court rejected the National Labor Relations Board’s decision in *D.R. Horton*, Case 12-CA-25764 (NLRB Jan. 3, 2012), as inapplicable. *Palmer*, 2012 U.S. Dist. LEXIS 16200, at * 8, n. 2. Murphy respectfully requests that the Court consider *Palmer* in determining the merits of the Motion to Compel.



Respectfully submitted this 10th day of February, 2012.

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ATTORNEYS FOR DEFENDANT
MURPHY OIL USA, INC.

UNITED STATES DISTRICT COURT
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SHEILA HOBSON, CHRISTINE)	
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)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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4835-3881-7550, v. 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)
PICKNEY, SUSAN ELLINGTON,)
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Similarly situated employees,)
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Plaintiffs,)
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v.)
)
MURPHY OIL USA, INC.,)
)
Defendant.)

CIVIL ACTION

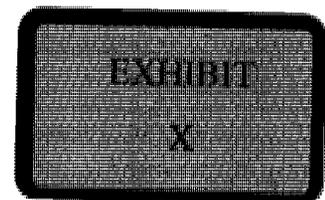
NO. 2:10-cv-01486-HGD

**DEFENDANT’S OPPOSITION TO PLAINTIFFS’ SUPPLEMENTAL BRIEF IN
RESPONSE TO DEFENDANT’S SECOND NOTICE OF SUPPLEMENTAL
AUTHORITY AND IN REPLY TO DEFENDANT’S RESPONSE IN OPPOSITION**

Defendant Murphy Oil USA, Inc. (“Murphy”), by and through its undersigned counsel, files this Opposition to “Plaintiffs’ Supplemental Brief In Response to Defendant’s Second Notice of Supplemental Authority and in Reply to Defendant’s Response in Opposition” (“Plaintiff’s Supplemental Brief”) (Doc No. 31-1) and shows as follows:

I. INTRODUCTION

In their Supplemental Brief, Plaintiffs now concede, for the first time, that the Court cannot compel Murphy to arbitrate Plaintiffs’ collective action claims. Therefore, they have expressly abandoned the only relief they previously sought in opposing Murphy’s Motion to Compel Arbitration and Dismiss Collective Action. Throughout the eighteen months that motion has been pending, Plaintiff have been unequivocal about the relief they seek – **an order compelling Murphy to arbitrate Plaintiffs’ claims on a collective and class wide basis.** Indeed, less than a month ago, Plaintiff asserted “this Court should strike the collective action waiver provision of the arbitration agreements at issue here, **and order Defendant to proceed to**



arbitration as a collective action in accordance with 29 U.S.C. § 216(b) of the Fair Labor Standards Act.” Doc. No. 28, at 2 (emphasis added).

Now, in a stunning reversal of position, Plaintiffs not only repudiate that relief, they affirmatively represent to the Court that they never asked for an order compelling a collective arbitration. See Doc. No. 31-1, Plaintiff’s Supplemental Brief, at 9 (stating “Plaintiffs have never asked this Court to compel collective arbitration”) (emphasis in original).¹

The Court should reject this untimely effort to change position by asserting new (and fundamentally unsupported) arguments for the first time in a reply brief. But even if the Plaintiffs’ latest arguments are not untimely, they have no bearing on the issue before the Court and, indeed, largely fail to respond to Murphy’s arguments in the first instance. First, Murphy has never argued that the National Labor Relations Board (“Board’s) decision in *D.R. Horton*, 2012 NLRB LEXIS 11 (NLRB Jan. 3, 2012) (“*D.R. Horton*”) did not involve an agreement similar to Murphy’s Arbitration Agreement. To the contrary, Murphy simply argued – in response to Plaintiffs’ request for an order compelling collective arbitration as set out above – that Plaintiffs are not entitled to such relief, because (1) nothing in *D.R. Horton* gives Plaintiffs the right to arbitrate their collective claims, and (2) under controlling Supreme Court authority, this Court cannot compel arbitration of collective claims absent an agreement between the parties to do so.²

Second, even if the Plaintiffs were entitled to the remedy they seek pursuant to *D.R. Horton*, Plaintiffs have not explained why the Court should follow *D.R. Horton* and defer to the Board. In *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), the Eleventh

¹ Plaintiffs have also reversed themselves for a third time, representing in their Motion for Status Conference and Hearing that they now want an arbitrator to decide whether the collective action waiver is enforceable. See Doc. No. 32 at 2.

² See Doc. No. 30 at 2-5.

Circuit ruled 29 U.S.C. § 216(b) of the Fair Labor Standards Act (“FLSA”) does not confer a nonwaivable, substantive right to participate in a collective action, and requiring employees to arbitrate federal statutory claims on an individual basis is not an unlawful employment action. That holding is not optional and subject to reconsideration based on a single decision from the Board. Indeed, any reliance on *D.R. Horton* has the practical effect of overruling *Caley*.

Third, Plaintiffs’ argument that the class and collective action waiver is unenforceable under Alabama law should be rejected, as it is predicted on the unwarranted assumption *D.R. Horton* was correctly decided and is controlling. For the reasons stated in Murphy’s Response to Plaintiffs’ Notice of Filing, the Court should reject the application of *D.R. Horton*.³

Finally, even assuming *D.R. Horton* is controlling, the Court should still dismiss this case. Plaintiffs concede their individual FLSA claims are subject to arbitration. Accordingly, even if the class and collective action waiver is not enforceable, no class representative remains to pursue the case. As shown below, the Court should enforce Murphy’s Arbitration Agreement as written. Further, irrespective of the Arbitration Agreement’s enforceability, the Court should dismiss this action.

II. ARGUMENT AND AUTHORITIES

A. Plaintiffs Cannot Raise New Arguments for the First Time in a Reply Brief.

Plaintiffs have asked the Court to compel arbitration of their collective action claims. Faced with the overwhelming weight of authority opposing that position, Plaintiffs now change their argument to request that the Court simply “strike” the collective action waiver. In conjunction with this request Plaintiffs argue, for the first time, that the Court must invalidate the Arbitration Agreements as a whole. The Court should reject this untimely new argument. It is axiomatic a party may not raise new arguments in a reply brief. *See, e.g., In Re Ingridi*, 571 F.3d

³ See Doc. No. 30 at 6-11.

1156, 1163 (11th Cir. 2009) (arguments raised for the first time in reply briefs are deemed waived); *Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D. 273, 317, n. 89 (S.D. Ala. 2006) (finding the plaintiffs' new argument was "not properly raised as a procedural matter" when brought for the first time in a reply brief). For that reason alone, the Court should disregard Plaintiff's Supplemental Brief in its entirety.

B. Plaintiffs' Mischaracterization of Murphy's Position Should Be Rejected.

The Court should also reject Plaintiffs' efforts to mischaracterize Murphy's position on *D.R. Horton*. In the first argument of their Supplemental Brief, Plaintiffs accuses Murphy of misstating the Board's decision by representing that *D.R. Horton* allows employers to prohibit class or collective arbitration. (Doc. 31-1 at 2-4.) There was no misstatement. Murphy has never argued that its Arbitration Agreement is dissimilar to the agreement at issue in *D.R. Horton*. Instead, Murphy simply pointed out that nothing in *D.R. Horton* allows Plaintiffs to force Murphy to arbitrate on a class or collective basis, which is an entirely accurate representation:

[N]othing in our holding here requires the Respondent or any other employer to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. . . . We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

D.R. Horton, 2012 NLRB LEXIS 11, * 54-55 (N.L.R.B. Jan. 3, 2012) (emphasis added). As shown, Murphy's reading is entirely consistent with the relief purportedly sought by the Plaintiffs and the text of *D.R. Horton* itself. Therefore, as an initial matter, the Court should reject Plaintiffs' arguments that Murphy has misconstrued or misrepresented *D.R. Horton*.

C. *D.R. Horton* Does Not Render the Arbitration Agreement Illegal Under Alabama Law.

The Court should also reject Plaintiffs' argument that *D.R. Horton* renders the class and collective action waiver illegal under Alabama law. **That argument rests upon the unwarranted assumption that *D.R. Horton* was correctly decided and must be followed.** As demonstrated in Murphy's Response to Plaintiffs' Notice of Filing, Plaintiffs have offered no cogent argument suggesting why this Court should follow *D.R. Horton* in the face of overwhelming contrary authority.⁴ Nor has any court addressing the issue followed *D.R. Horton*. As Plaintiffs concede, the Eleventh Circuit has previously enforced a collective action waiver in an FLSA case, stating "compulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes." *Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005). In so stating, *Caley* recognized that the right to participate in a collective action under 29 U.S.C. § 216(b) is merely procedural – and thus fully waivable.⁵

Plaintiffs respond to *Caley* by arguing that it came out before *D.R. Horton*. The timing of *Caley*, however, does not render it any less applicable. Plaintiffs have cited no authority for the proposition that the Board may create a substantive right that the Eleventh Circuit has found not

⁴ See Doc. No. 30 at 6-11.

⁵ See also, *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiffs' argument such a clause deprived them of a substantive right under the FLSA); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (stating "while [the] FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action") (emphasis in original); *Hawkins v. Hooters of Amer., Inc.*, 2011 U.S. Dist. LEXIS 72024, * 4 (D.D.C. July 4, 2011) (noting "the ability to proceed as a class is not a substantive right guaranteed by the FLSA"); *Lu v. AT&T Servs.*, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011) (stating "[t]he right to bring a collective action under the FLSA is a procedural [right] -- not a substantive one").

to exist. Without any support in the text of 29 U.S.C. § 216(b), the Board in *D.R. Horton* effectively engrafts a new substantive right into that statutory provision. The Court should reject the Board's efforts to rewrite the FLSA. Courts and Congress – not the Board – determine whether an employee can waive his or her rights to participate in a collective action under the FLSA. Moreover, *D.R. Horton's* recognition of a non-waivable, substantive right to proceed collectively under the NLRA cannot be reconciled with *Caley*. Indeed, the procedural effect of *D.R. Horton* is to overrule *Caley* and the numerous other court decisions finding no substantive right exists. The Board's authority simply does not extend that far.

Plaintiffs also attempt to distinguish a recent decision from the Middle District of Georgia, *Palmer v. Convergys Corporation and Convergys Customer Management Group, Inc.*, 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012). Far from supporting Plaintiffs' position, however, *Palmer* demonstrates precisely why this Court should reject *D.R. Horton* entirely. In *Palmer*, the district court considered a collective action waiver in an **employment application** that waived the employees' right to participate on a class or collective basis "in any claim or lawsuit[.]" *Palmer*, 2012 U.S. Dist. LEXIS 16200, at * 3. Thus, there was no arbitration agreement between the parties in *Palmer*. Therefore, enforcing the waiver necessarily resulted in the plaintiffs waiving the right to proceed collectively **in the only available forum – a judicial forum**. Nonetheless, the district court rejected the plaintiffs' reliance on *D.R. Horton*, finding the decision "does not meaningfully apply to the facts of the present case." While the *Palmer* court did not explicate its reasoning for this conclusion, it is significant that the *Palmer* court allowed precisely what *D.R. Horton* purports not to allow – enforcement of a class action waiver that effectively prevents class or collective proceedings in any forum. Other courts have rejected *D.R. Horton* or its rationale in similar fashion. See *Lavoice v. UBS Fin. Servs.*, 2012 U.S. Dist.

LEXIS 5277, * 19-20 (S.D.N.Y. Jan. 13, 2012) (enforcing employment arbitration agreement that prohibited class and collective proceedings in a judicial or arbitral forum, and declining to rely on *D.R. Horton*); *see also*, *Grabowski v. C.H. Robinson Co.*, 2011 U.S. Dist. LEXIS 105680, * 17-20 (S.D. Cal. Sept, 19, 2011) (enforcing employment arbitration agreement that precluded class or collective arbitration or litigation, and finding that “the NLRA does not operate to invalidate or otherwise render unenforceable” a class and collective action waiver in such an agreement).

Accordingly, Plaintiffs’ entire illegality argument rests on the faulty premise that *D.R. Horton* was correctly decided and must be followed. As Murphy has demonstrated, that is not the case. Therefore, Plaintiffs’ entire illegality argument fails.

D. Even Accepting Plaintiffs’ New Position, They Are Not Entitled to the Relief They Seek.

Plaintiffs now contend they are not seeking a collective arbitration and are only asking that the Court strike the collective action waiver. Under Plaintiffs’ new theory, the Court should strike the collective action waiver and, if Murphy still chooses to enforce arbitration, the Court must then strike the agreement in its entirety. As shown above, that remedy is a stark departure from the relief they asserted they want less than a month ago. Even if the Court entertains this abrupt and untimely change in position, however, Plaintiffs are not entitled to the relief they seek. Simply put, Plaintiffs’ request cannot be squared with existing law for at least two reasons.

First, Plaintiffs theory postulates a result where Murphy will be required to choose whether or not it will proceed with collective arbitration. The Arbitration Agreement, however, specifically prevents either party from choosing to engage in class or collective arbitration, stating “by signing this Agreement, both Individual and Company waive the right to [commence or participate in a collective action].” *See* Doc. 14-1, at 5. Therefore, Plaintiffs are essentially

asking the Court to rewrite the terms of the Arbitration Agreement, a result plainly unlawful under Alabama jurisprudence. *See, e.g., Turner v. West Ridge Apts., Inc.*, 893 So. 2d 332, 335 (Ala. 2004) (stating “[a] court may not make a new contract for the parties or rewrite their contract under the guise of construing it”).

Second, Plaintiffs have offered no cogent authority for such a result. The only case cited by Plaintiffs for their new theory is *In Re American Express Merchants Litigation*, -- F.3d --, 2012 U.S. App. LEXIS 1871 (2d Cir. Feb. 1, 2012) (“*AMEX III*”). Plaintiffs’ reliance on *AMEX III* is entirely misplaced, however. Unlike Plaintiffs’ FLSA claims, *AMEX III* involved statutory claims for antitrust violation that could not be vindicated absent a class mechanism. Specifically, in *AMEX III*, the Second Circuit considered the enforceability of a collective action waiver in a “Card Acceptance Agreement” between American Express and its merchant customers. The merchants brought antitrust claims under the Sherman Act against American Express in federal court, and American Express moved to compel arbitration pursuant to an arbitration provision in the agreement. The Second Circuit found the class action waiver unenforceable because it effectively prevented the plaintiffs from vindicating their statutory rights in federal court. Specifically, the Second Circuit found the requirement of proving economic damages through expert testimony was an insurmountable cost for any individual antitrust litigant, and thus requiring the plaintiffs to proceed on an individual basis effectively deprived them of their statutory protections. *AMEX III*, 2012 U.S. App. LEXIS 1871 at * 35-37. Having found the class action waiver unenforceable on the grounds it prevented the plaintiffs from pursuing their claims, the Second Circuit determined the only appropriate relief was finding the arbitration clause unenforceable as a whole:

Stolt-Nielsen plainly precludes any court from compelling the parties to submit to class-wide arbitration where the arbitration clause is silent as to class-wide

arbitration . . . Since the plaintiffs cannot pursue these claims as class arbitration, either they can pursue them as judicial class action or not at all. If they are not permitted to proceed in a judicial class action, then, they will have been effectively deprived of the protection of the federal antitrust-law. . . . Therefore, in light of the fact that the arbitration provision at issue here does not allow for class arbitration, under *Stolt-Nielsen* and by its terms, if the provision were enforced it would strip the plaintiffs of rights accorded them by statute. We conclude that this arbitration clause is unenforceable.

Id. at * 41-42.

Thus, it is clear the Second Circuit rationale for both finding the arbitration clause invalid and for the deeming it unenforceable rested entirely on the plaintiffs' inability to vindicate their claims on an individual basis.

No such situation arises in our case. The Arbitration Agreement states that "the arbitrator shall have the power to allocate costs and/or attorney's fees pursuant to the applicable statute." Arbitration Agreement, p. 1. Therefore, Plaintiffs presumptively will recover their fees and costs if they prevail. Moreover, under the terms of the Arbitration Agreement, Murphy pays the costs of the arbitration other than filing fees, which can be waived, deferred, or reduced in the event of hardship. *Id.* Indeed, under the Arbitration Agreement, Plaintiffs incur no other costs at all to litigate their individual claims. As the Eleventh Circuit has recognized, Plaintiffs' ability to recover costs and attorney's fees under the FLSA means they are entirely capable of vindicating their rights in an arbitral forum. *See Caley*, 428 F.3d at 1368, 1378-1379; *see also, Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (stating "[e]ven claims arising under a statute a statute designed to further important social policies may be arbitrated, because so long as the prospective litigant effective may vindicate [his or her] statutory cause of action in a arbitral forum, the statute serves its function"). Accordingly, none of the concerns underlying the Second Circuit's decision in *AMEX III* exist in this case, and it is inapposite as a result.

E. Plaintiffs' Concessions Mandate Dismissal of this Action.

Finally, the Court should reject Plaintiffs' argument that they have not conceded Murphy's Motion to Dismiss. In making their argument, Plaintiffs assert that the Motion to Dismiss is premised on the Motion to Compel Arbitration, and therefore, if the Court does not compel arbitration, the Motion to Dismiss is moot. Plaintiffs have misapprehended Murphy's argument and overlooked two critical points.

The Court should recall that Plaintiffs' Complaint asserts their individual claims under the FLSA and their separate "Class Allegations." (Complaint, ¶¶ 24-48, 54.) Plaintiffs do not contest that their individual FLSA claims are subject to arbitration. Therefore, whether or not Plaintiffs are barred from pursuing their collective action claims, their individual claims are subject to dismissal and referral to arbitration. Moreover, nothing in *D.R. Horton* prevents such enforcement against the Plaintiffs' individually. Indeed, *D.R. Horton* expressly permits enforcement in the context of an individual employment claim. See *D.R. Horton*, 2012 NLRB LEXIS 11, at * 56.

Because their individual claims must be dismissed, dismissal of the collective action claims is also proper for two reasons. First, because the Plaintiffs' individual claims must be referred to arbitration pursuant to the Arbitration Agreement, and no class has been certified in this matter, the remaining collective action claims no longer present a justiciable controversy for the Court to oversee, and therefore dismissal of the entire action is proper. See *East Texas Motor Freight Syst. v. Rodriguez*, 431 U.S. 395, 405-406 (1977) (stating class action is properly dismissed if no named-plaintiff has a live claim before class certification). Second, as a practical matter, referring the Plaintiffs' individual claims to arbitration leaves no extant class

representative to prosecute the collective action claims before this Court. Accordingly, irrespective of the waiver provision, the collective action claims are subject to dismissal because they cannot be adjudicated without a class representative. *See, e.g., Kifer v. Ellsworth*, 346 F.3d 1155, 1156 (7th Cir. 2003) (stating “a class action suit cannot proceed in the absence of a class representative”); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (dismissing collective action where the named-plaintiff’s individual claims were subject to arbitration).

III. CONCLUSION

Having recognized they cannot obtain collective arbitration, Plaintiffs have attempted to alter their theory. The Court should reject this untimely effort to amend their position. Nonetheless, even if the Court considers Plaintiffs’ new arguments, they have offered no reason for the Court to follow *D.R. Horton* in derogation of controlling authority. Moreover, even assuming Plaintiffs’ are correct, they still concede their individual FLSA claims, leaving no class representative. The Court must dismiss this action as a result.

Respectfully submitted this 22nd day of February, 2012.

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ATTORNEYS FOR DEFENDANT
MURPHY OIL USA, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

SHEILA HOBSON, CHRISTINE)	
PICKNEY, SUSAN ELLINGTON,)	
and SANTRESSA LOVELACE,)	
Individually and On Behalf of)	
Similarly situated employees,	)	CIVIL ACTION
)	
Plaintiffs,	)	NO. 2:10-cv-01486-HGD
)	
v.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2012, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Respectfully submitted,

/s/Brandon M. Cordell
Brandon M. Cordell, Esq.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

SHEILA HOBSON, <i>et al.</i>,)	
)	
Plaintiffs,)	
)	
vs.	)	Civil Action No. CV-10-S-1486-S
)	
MURPHY OIL USA, INC.,)	
)	
Defendant.)	

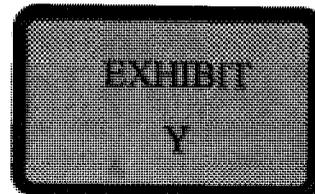
ORDER

Magistrate Judge Harwell Davis, III entered a report and recommendation on defendant’s motion to compel arbitration and dismiss the collective action claim¹ on April 26, 2012, and the parties were allowed fourteen days in which to file objections to the recommendations made therein.² Plaintiffs filed objections to the report and recommendation on May 10, 2012. After obtaining an extension of time, defendant filed a response to plaintiffs’ objections on June 5, 2012.

The court has considered the entire file in this action, including the report and recommendation, and has reached an independent conclusion that the report and recommendation is due to be adopted and approved. Accordingly, the court hereby adopts and approves the findings and recommendation of the Magistrate Judge as the

¹ Doc. no. 14 (Motion to Compel Arbitration and Dismiss Collective Action Claim).

² Doc. no. 36 (Report and Recommendation).



findings and conclusions of this court.

Accordingly, defendant's motion is GRANTED. It is ORDERED that the collective action allegations in this action hereby are DISMISSED WITH PREJUDICE, costs taxed as paid. Further, plaintiffs, Sheila Hobson, Christine Pinckney, Susan Ellington, and Santressa Lovelace are ORDERED to submit their individual claims against defendant for violations of the Fair Labor Standards Act to arbitration in accordance with the Arbitration Agreement executed by each plaintiff at the beginning of their employment with defendant.

Further, the court is of the opinion that the case should be stayed, rather than dismissed, pending a final resolution following arbitration. Though there is case law in other circuits supporting the proposition that, under 9 U.S.C. § 3,³ courts have the discretionary authority to dismiss cases when compelling arbitration, the Eleventh Circuit adheres to a more literal interpretation of the statute. *See Bender v. A.G.*

³ Section 3 reads as follows:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis supplied).

Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992). See also *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1261 (11th Cir. 2003); *Pitchford v. Amsouth Bank*, 285 F. Supp. 2d 1286, 1297 (M.D. Ala. 2003); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1288 (N.D. Ala. 2000); *Bradford v. KFC National Management Co.*, 5 F. Supp. 2d 1311, 1315 (M.D. Ala. 1998); *Nazon v. Shearson Lehman Brothers, Inc.*, 832 F. Supp. 1540, 1543 (S.D. Fla. 1993). Accord *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 268-271 (3d Cir. 2003).

In *Bender*, for example, the Eleventh Circuit concluded that district courts do not have the power to choose dismissal over a stay:

The district court properly found that the state law claims were subject to arbitration, but erred in dismissing the claims rather than staying them. Upon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration. 9 U.S.C. § 3. If the parties do not proceed to arbitration, the court may compel arbitration. 9 U.S.C. § 4. Therefore, we vacate the dismissal of the state law claims and remand with instructions that judgment be entered staying all claims pending arbitration.

Bender, 971 F.2d at 699. In *Lloyd*, the Third Circuit expressed a similar stance on the issue, basing its reasoning primarily on the clear statutory language, but also providing some practical justifications for entering a stay rather than an order of dismissal. See *Lloyd*, 369 F.3d at 268-271. The court noted that a stay “relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the

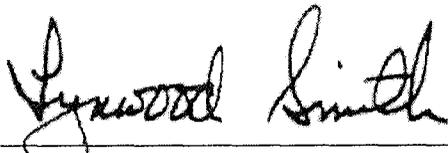
arbitration process is on-going, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court's order to arbitrate." *Id.* at 270.

For the same reasons, it is ORDERED that this action is STAYED pending resolution through arbitration.

Even so, for administrative and statistical purposes, the Clerk is directed to close this file. *See, e.g., Taylor v. Citibank USA, NA*, 292 F. Supp. 2d 1333, 1346 (M.D. Ala. 2003) (closing file administratively after entering stay but advising parties of their right to request reinstatement); *Pitchford*, 285 F. Supp. 2d at 1297 (same); *Nazon*, 832 F. Supp. at 1543 (same). This action will have no effect on the court's retention of jurisdiction, and the file may be reopened, on either party's motion, for an appropriate purpose such as dismissal following settlement, entry of judgment, vacatur, or modification of an arbitrator's award. *See* 9 U.S.C. § 9; *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 201-02 (2000).

The parties are directed to file a notice with the court upon settlement of the case, or the conclusion of arbitration, whichever first occurs.

DONE and ORDERED this 17th day of September, 2012.



United States District Judge

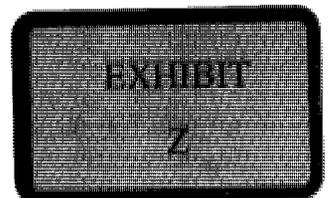
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SHEILA HOBSON, et al.,)	
)	
Plaintiffs)	
	)	Case No. 2:10-cv-01486-HGD
vs.)	
)	
MURPHY OIL USA, INC.,)	
)	
Defendant)	

REPORT AND RECOMMENDATION

The above-entitled civil action is before the court on the Motion to Compel Arbitration and Dismiss Collective Action filed by defendant. (Doc. 14). Plaintiffs, Sheila Hobson, Christine Pickney, Susan Ellington and Santressa Lovelace, have filed a collective action against defendant, Murphy Oil USA, Inc. (Murphy Oil), seeking a judgement for themselves and others similarly situated for unpaid overtime pursuant to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*

Subsequent to the filing of this action, Murphy Oil moved to compel arbitration of this matter and to dismiss the collective action allegations. At the inception of each named plaintiff's employment in 2008, each executed an Arbitration Agreement with Murphy Oil. This agreement states, in pertinent part, that the parties:



agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA"). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, and any other civil rights statute, the Americans With Disabilities Act, The Family and Medical Leave Act, the Fair Labor Standards Act or other wage statutes, the WARN Act, claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever. In the event that arbitration is brought pursuant to any law or statute which provides for allocation of attorneys' fees and costs, the arbitrator shall have the authority to allocate costs and/or attorneys' fees pursuant to the applicable law or statute.

(Doc. 14-1, Ex. A, Arbitration Agreement, at 1).

In addition, Murphy "agree[d] to pay all costs of arbitration charged by AAA, other than filing fees, and to be bound by the Arbitration procedure set forth in this Agreement." (*Id.*).

The plaintiffs and Murphy also agreed to a provision both waiving and prohibiting class or collective actions which states, in pertinent part:

By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member in any court or collective action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class, or collective action claim in arbitration or any other forum.

The parties agree that any claim by, against, or among Manager, Individual and/or Company shall be heard without consolidation of such claim with other person or entity's claim.

(Id. at 2).

The Arbitration Agreement further provides:

Company and Individual expressly agree that the Federal Arbitration Act governs the enforceability of any and all of the arbitration provisions of this Agreement, and judgment upon the award rendered by the Arbitrator may be entered by any court having jurisdiction thereof. Questions of arbitrability (that is, whether an issue may be subject to arbitration under this Agreement) shall be decided by the Arbitrator.

(Id. at 1).

Based on these signed agreements, Murphy Oil moved to compel arbitration and to dismiss the collective action. In response, plaintiffs state they "are not attacking the existence of the arbitration agreement and would agree to arbitration without the collective action waiver. Plaintiffs are instead seeking clarification of the enforceability of the collective action waiver." (Doc. 18, Plaintiffs' Response in Opposition to Defendant's Motion to Compel Arbitration and Dismiss Collective Action, at 1). Plaintiffs state they do not dispute that there is an arbitration agreement or that this dispute would be covered under its provisions. However, they assert that an arbitration agreement's terms must be consistent with the substantive rights of the statute and that a party cannot change the substance of the statute through the terms of an arbitration agreement. They claim that the collective action waiver provision

is inconsistent with the substantive rights conferred by the FLSA. (*Id.* at 3). Therefore, they request that the court strike the class action/collective action waiver provision of the Arbitration Agreement. (*Id.* at 4).

In support of this claim, plaintiffs note that the plain language of the FLSA, under 29 U.S.C. §216(b), creates a right of employees to proceed collectively.¹ Further, citing a number of district court cases as support, plaintiffs claim that a collective action is a substantive provision of the FLSA which cannot be waived by an Arbitration Agreement. (*Id.* at 5-6).

Plaintiffs also assert that the collective action waiver is unconscionable under Alabama law and therefore unenforceable as a matter of law. They state that the waiver provision benefits only Murphy Oil. They note that the potential claims are not large and assert that requiring employees to litigate their claims individually would affect their ability to obtain legal representation and would give defendant an unfair advantage in the competitive market.

¹ Title 29 U.S.C. § 216(b) of the FLSA states:

An action may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

DISCUSSION

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate “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). This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902 (1996); *see also Perry v. Thomas*, 482 U.S. 483, 492-93, n.9, 107 S.Ct. 2520, 2527 n.9, 96 L.Ed.2d 426 (1987).

In *AT&T Mobility LLC v. Conception*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the United States Supreme Court struck down a California rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. The present case does not involve a consumer contract, but it is nevertheless instructive.

The Supreme Court in *AT&T Mobility* held that a general rule prohibiting class-action waivers in arbitration cases interferes with the Federal Arbitration Act’s design for promoting arbitration. *Id.* at ___, 131 S.Ct. at 1749-50. The Supreme Court further noted that:

The “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” *Volt*, 489 U.S., at 478, 109 S.Ct. 1248; *see also Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. ___, ___, 130 S.Ct. 1758, 1763, 176 L.Ed.2d 605 (2010). This purpose is readily apparent from the FAA’s text. Section 2 makes arbitration agreements “valid, irrevocable, and enforceable” as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims “in accordance with the terms of the agreement”; and § 4 requires courts to compel arbitration “in accordance with the terms of the agreement” upon the motion of either party to the agreement (assuming that the “making of the arbitration agreement or the failure . . . to perform the same” is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), to arbitrate according to specific rules, *Volt, supra*, at 479, 109 S.Ct. 1248, and to limit with whom a party will arbitrate its disputes, *Stolt–Nielsen, supra*, at ___, 130 S.Ct. at 1773.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *14 Penn Plaza LLC v. Pyett*, 556 U.S. ___, ___, 129 S.Ct. 1456, 1460, 173 L.Ed.2d 398 (2009); *Mitsubishi Motors Corp., supra*, at 628, 105 S.Ct. 3346.

Id., 131 S.Ct. at 1748-49.

The majority opinion in *AT&T Mobility* noted that class actions are poorly suited for arbitration, stating that:

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than

final judgment. “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” 559 U.S., at ___, 130 S.Ct. at 1775. But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA’s Consumer Arbitration Caseload, online at <http://www.adr.org/si.asp?id=5027> (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court’s case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits. Brief for AAA as Amicus Curiae in *Stolt-Nielsen*, O.T.2009, No. 08–1198, pp. 22–24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days. *Id.*, at 24.

Second, class arbitration requires procedural formality. The AAA’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at <http://www.adr.org/sp.asp?id=21936>, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–812, 105 S.Ct. 2965, 86

L.Ed.2d 628 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a “relatively recent development.” 36 Cal.4th, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “in terrorem” settlements that class actions entail, *see, e.g., Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 677–678 (C.A.7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award only where the award “was procured by corruption, fraud, or undue means”; “there was evident partiality or corruption in the arbitrators”; “the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award . . . was not made.” The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.*, 552 U.S., at 578, 128 S.Ct. 1396. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

Id. at ___, 131 S.Ct. at 1751-52.

Consequently, plaintiffs’ argument that the arbitration waiver is due to be stricken as unconscionable under Alabama law is foreclosed by *AT&T Mobility*.

Further, with respect to plaintiffs’ argument that the arbitration clause is unconscionable, under Alabama law, the burden of presenting substantial evidence indicating that the arbitration provision in the policy is unconscionable is on the plaintiff. *See Ex parte Napier*, 723 So.2d 49, 53 (Ala. 1998). “An unconscionable . . . contractual provision is defined as a . . . provision ‘such as no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.’” *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1992) (quoting *Lloyd v. Service Corp. of Alabama*, 453 So.2d 735, 739 (Ala. 1984), and *Hume v. United States*, 132 U.S. 406, 410, 10 S.Ct. 134, 33 L.Ed. 393 (1889)). In *Layne v. Garner*, the Alabama Supreme Court set out four factors it considered important in determining whether a contract was unconscionable:

In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract.

612 So.2d at 408.

The Alabama Supreme Court has recognized a distinction between "substantive unconscionability" and "procedural unconscionability" and categorized the above factors as either substantive or procedural. Substantive unconscionability

"relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction."

Ex parte Thicklin, 824 So.2d 723, 731 (Ala. 2002) (emphasis omitted) (quoting *Ex parte Foster*, 758 So.2d 516, 520 n.4 (Ala. 1999), quoting in turn 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 1998)). See also *Leeman v. Cook's Pest Control, Inc.*, 902 So.2d 641 (Ala. 2004) (discussing and rejecting claim of unconscionable arbitration clause).

Procedural unconscionability, on the other hand, "deals with 'procedural deficiencies in the contract formation process, such as deception or a refusal to

bargain over contract terms, today often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction.” *Thicklin*, 824 So.2d at 731 (quoting *Foster*, 758 So.2d at 520 n.4, quoting in turn 8 *Williston on Contracts* § 18:10). To avoid an arbitration provision on the ground of unconscionability, the party objecting to arbitration must show both procedural and substantive unconscionability. “[A] finding of a procedural abuse, inherent in the formation process, must be coupled as well with a substantive abuse.” 8 *Williston on Contracts* § 18:10 at 62.

As a general rule, the Eleventh Circuit has held that arbitration agreements precluding class action relief are valid and enforceable. *See Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 819 (11th Cir. 2001) (holding “a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA”). Other federal circuit courts have similarly enforced arbitration agreements despite the fact that class-wide relief was unavailable. *See, e.g., Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting the borrower’s argument “that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the

small amount of her individual damages”); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (holding arbitration “clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable”); *cf. Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (“The Arbitration Agreement at issue here explicitly precludes the [borrowers] from bringing class claims or pursuing ‘class action arbitration,’ so we are therefore ‘obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.’”) (citations omitted). These decisions turn, in part, on the fact that the arbitration agreements in each case, while excluding class actions, do not cut off the plaintiff from all practical avenues of relief. These earlier holdings are consistent with the 2011 decision in *AT&T Mobility*.

In *Leonard v. Terminix Int’l Co.*, 854 So.2d 529 (Ala. 2002), the Alabama Supreme Court concluded that the plaintiffs’ challenge to an arbitration clause was one of “unconscionability by reason of economic feasibility.” *Id.* at 537. Noting that the costs of arbitration included: “(1) a \$500 arbitration filing fee; (2) a minimum \$150 administrative fee per party; (3) an administrative fee of \$150-\$250 per day per party for each hearing date; (4) one-half of the average arbitrator’s fee of \$700 per day; (5) one-half the cost of the charge for a meeting room; and (6) the cost of an attorney,” *id.* at 535, the court sided with the plaintiffs’ contention that “the

arbitration clause mandates a procedure involving costs so great in comparison to the potential recovery that the injured person is effectively precluded from a remedy.” *Id.* at 537. Because the agreement precluded class actions and limited damages by prohibiting recovery for “indirect, special, and consequential damages or loss of anticipated profits,” the Alabama Supreme Court concluded that the arbitration clause in *Leonard* was substantively unconscionable. *Id.* at 538. However, similar facts and circumstances have not been established in this case.

The arbitration agreement in this case requires Murphy Oil to pay all costs of arbitration charged by AAA, other than filing fees. The arbitrator also has the authority to allocate costs and/or attorneys’ fees pursuant to the FLSA. Damages which may be awarded to a successful plaintiff include unpaid overtime compensation and an equal amount as liquidated damages, as well as attorney’s fees and costs and equitable relief. Thus, any claim that plaintiffs likely would be unable to obtain legal representation without the collective action vehicle is unfounded. Likewise, arbitration costs would not be prohibitively expensive.

In the case at bar, plaintiffs seek to enforce the collective action provision of the Fair Labor Standards Act, *supra*, in an arbitration setting at least in part on the ground that a waiver of the collective action provision of that Act is substantive and non-waivable. 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 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*, ___ U.S. at ___, 131 S.Ct. at 1748.

The Supreme Court has specifically stated 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." *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, ___, 130 S.Ct. 1758, 1774-75, 176 L.Ed.2d 605 (2010). Yet, this is precisely what plaintiffs seek to force defendant to do.

In addition to arguing that the FLSA creates an unwaivable right to collective action, plaintiffs also argue that the arbitration agreements between plaintiffs and defendant are unenforceable because they would preclude them from exercising their substantive statutory rights under the FLSA. However, as the Third Circuit has held, "simply because judicial remedies are part of a law does not mean that Congress

meant to preclude parties from bargaining around their availability.” *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (Truth in Lending Act claims are arbitrable even if class action mechanism is unavailable); *see also Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814 (11th Cir. 2001) (same).

In *Randolph, supra*, the Eleventh Circuit was faced with a similar dilemma involving the Truth in Lending Act (TILA). The TILA grants consumers a non-waivable right to litigate, individually and through a class action, any claims arising under the statute. 15 U.S.C. § 1640(a). In *Randolph*, the plaintiff signed an agreement that did not permit classwide arbitration under that Act. The issue was whether an arbitration agreement that barred pursuit of classwide relief for TILA violations was unenforceable for that reason. In deciding this issue, the Eleventh Circuit stated:

The two principal decisions bearing upon this issue are *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), and *Bowen v. First Family Financial Servs., Inc.*, 233 F.3d 1331 (11th Cir. 2000).

In *Gilmer*, the Supreme Court set out the standards for determining whether a federal statutory claim is subject to arbitration. The Court stated that “[i]t is now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA,” and went on to instruct us that:

Although all statutory claims may not be appropriate for arbitration, “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has

evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” . . . If such an intention exists, it will be discoverable in the text [of the statute], its legislative history, or an “inherent conflict” between arbitration and the [statute’s] underlying purposes.

Gilmer, 500 U.S. at 26, 111 S.Ct. at 1652 (citations omitted). The *Gilmer* Court also held that the burden is on the party opposing arbitration to show that Congress intended to prevent waiver of a judicial forum in favor of an arbitral forum for the statutory claims. *Id.* The Court explained that an “inherent conflict” between the policies underlying a federal statute and the enforcement of an agreement to arbitrate claims under that statute does not exist simply because the statute “is designed not only to address individual grievances, but also to further important social policies . . . [because] so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” *Id.* at 27-28, 111 S.Ct. at 1653 (marks and citations omitted).

In light of those *Gilmer* standards, we addressed in *Bowen* the issue of whether the text of TILA and its legislative history, or an inherent conflict between TILA and the FAA, would render an arbitration clause unenforceable, and we concluded that they did not. 233 F.3d at 1334, 1338. *Bowen* involved claims made under ECOA, 15 U.S.C. § 1691, *et seq.*, a necessary premise of which was the proposition “that the TILA grants consumers a non-waivable right to litigate, individually and through a class action, any claims arising under the statute.” *Id.* at 1335. In deciding whether TILA created such a “right,” we considered the plaintiffs’ arguments about the role of class actions in the TILA enforcement scheme. We acknowledged that the text of TILA specifically contemplates class actions as evidenced by the fact that the statute caps the amount of statutory damages available in a TILA class action. *Id.* at 1337. The cap on those damages was enacted in order to overcome courts’ reluctance to certify TILA class actions in light of the potentially crippling statutory damage awards which might otherwise result. *Id.* We also considered in *Bowen* TILA’s legislative history “which stresses the importance of class action procedures in the TILA

scheme,” and which the plaintiffs argued was an indication that “Congress intended to guarantee consumers access to individual lawsuits and class actions to allow them to serve as private attorneys general in enforcing the provisions of the TILA, thereby furthering the policy goals of the statute.” *Id.*

But after discussing TILA’s text and legislative history relating to class action remedies in *Bowen*, we reasoned as follows:

[W]e recognize, of course, that a class action is an available, important means of remedying violations of the TILA. *See* 15 U.S.C. § 1640. However, there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance An intent to create such a “blanket right,” a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the TILA.

Id. at 1337-38 (citations and quotations omitted). We said that “[w]hile the legislative history of § 1640 shows that Congress thought class actions were a significant means of achieving compliance with the TILA, . . . it does not indicate that Congress intended to confer upon individuals a non-waivable right to pursue a class action nor does it even address the issue of arbitration.” *Id.* at 1338. We also concluded that the “private attorneys general” aspect of TILA’s enforcement scheme did not require a different conclusion. *Id.*

244 F.3d at 816-17.

Based on this reasoning, the Eleventh Circuit held that plaintiff had failed to carry her burden of showing that either Congress intended to create a non-waivable right to bring TILA claims in the form of a class action, or that arbitration is

“inherently inconsistent” with the TILA enforcement scheme. *Randolph*, 244 F.3d at 818. Although not a Fair Labor Standards Act case, this case is instructive.

Similar to the plaintiff in *Randolph*, the plaintiffs here have failed to demonstrate that Congress intended to create a non-waivable right to bring FLSA claims in the form of a collective action, or that arbitration is inherently inconsistent with the FLSA enforcement scheme. Under the arbitration agreement, the parties agreed to arbitrate according to the rules of the American Arbitration Association. There is no evidence that these rules will not protect the rights of the individual plaintiffs. In addition, the defendant is responsible for paying all costs associated with the arbitration proceeding, except for the initial filing fee. The agreement requires also that, where attorneys’ fees are allowed under the law, they may be recovered in the arbitration action.

This is an action for unpaid overtime. Unlike other cases where class or collective action waivers have been found to be invalid, the issues here are not complex or time consuming, nor is there a risk of inadequate compensation at the end of a successful case. Likewise, there is nothing to indicate that litigating the issues is uniquely cost-prohibitive. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (class action waiver invalid because cost of litigation by single plaintiff too prohibitive); *see also Livingston v. Assoc. Fin., Inc.*, 339 F.3d 553, 557

(7th Cir. 2003) (same). Once the hours of overtime that have not been paid (if any) are determined and the issue of willfulness is decided, the determination of the damages due is a matter of the application of simple math. Consequently, there is no basis for invalidating the collective action waiver as it applies to this case.

Plaintiffs also asks the court to follow a recent decision by the National Labor Relations Board (NLRB), *In re D.R. Horton*, 2012 WL 36274, 357 NLRB 184 (NLRB, Jan. 3, 2012). In *D.R. Horton*, two members of the three NLRB Board members hearing the case² found that the employer, a home building company, violated § 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that did not allow its employees to file joint, class or collective employment-related claims in any forum, arbitral or judicial. The employer required its employees to sign the agreement as a condition of employment and, based on the agreement, had rejected employees' requests for class arbitration of claims under the FLSA.

The Board held that by requiring only individual arbitration of employment-related claims and excluding access to any forum for collective claims, the employer

² As defendant notes, the NLRB Board normally has five seats. This decision was handed down by two members. Only three were present. Decisions of the Board are only valid with a quorum of at least three members. As alleged in recent litigation in the D.C. Circuit, at the time the *D.R. Horton* decision was issued, the Board arguably lacked a quorum due to the invalidity of the president's recess appointments without Senate approval. See *Nat'l Assn. of Manuf. v. NLRB*, 1:11-CV-01629 (D.D.C. 2011). However, Murphy Oil has not argued that *D.R. Horton* is procedurally invalid for lack of a quorum.

interfered with employees' § 7 right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The collective pursuit of workplace grievances through litigation or arbitration is conduct protected by § 7 and the right under the NLRA to freedom of association. Applying its test for unlawful workplace policies in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board found the mandatory arbitration agreement unlawful because it contains an explicit restriction on protected activity, and because employees could reasonably construe it to prohibit filing charges with the Board.

The Board found that its violation finding did not present a conflict between the NLRA and the Federal Arbitration Act's policy favoring the enforcement of arbitration agreements because the FAA was not intended to disturb substantive rights. The Board further found that even if there were a conflict, its finding accommodates the policies of the two statutes and is consonant with the Supreme Court's FAA jurisprudence. *In re D. R. Horton, Inc.*, 2012 WL 36274, 357 NLRB 184 (NLRB, 2012). The court declines to follow *D.R.Horton* because it directly conflicts with the reasoning of the Supreme Court in *AT&T Mobility*.

Even before *AT&T Mobility*, the United States District Court for the Southern District of Florida held that a FLSA collective action was subject to arbitration pursuant to an arbitration clause in the employment application. *Chapman v. Lehman*

Bros., Inc., 279 F.Supp.2d 1286 (S.D.Fla. 2003). Despite the fact that the arbitration rules of the relevant self-regulatory organizations at issue prohibit employers from enforcing arbitration agreements where an employee has initiated or is a member of a putative class action, the court found that because the plaintiffs brought a collective action under the FLSA as opposed to a class action, the arbitration agreement was enforceable. The court conducted its analysis

under the ambit of the strong federal policy in favor of enforcing arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The FAA is designed to “ensure judicial enforcement of privately made agreements to arbitrate.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). Courts are required to “rigorously enforce [these] agreements” *Id.* at 221, 105 S.Ct. 1238.

Id. at 1288. Its decision rested in part on the distinction between class actions and collective actions, the former being “considerably more involved” than the “unitary ‘similarly situated’ requirements of” 29 U.S.C. § 216(b). *Id.* at 1289. With the *AT&T Mobility* decision enforcing an arbitration clause in a class action context, this holding in favor of enforcing an arbitration clause in a FLSA collective action context is all the more persuasive.

The court concludes that plaintiffs have not met their burden of showing that the arbitration provision included in their employment agreements is unenforceable.

The arbitration provision is neither substantively nor procedurally unconscionable. Therefore, it is enforceable as a matter of contract law.

Based upon the foregoing, it is RECOMMENDED that the defendant's Motion to Compel Arbitration and Dismiss Collective Action be GRANTED.

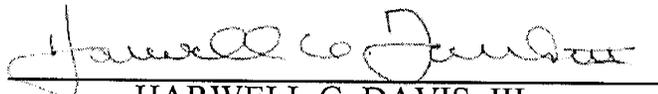
NOTICE OF RIGHT TO OBJECT

The parties are DIRECTED to file any objections to this Report and Recommendation within a period of fourteen (14) days from the date of entry. Any objections filed must specifically identify the findings in the magistrate judge's recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the district court.

Failure to file written objections to the proposed findings and recommendations of the magistrate judge's report shall bar the party from a *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en*

banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 26th day of April, 2012.


HARWELL G. DAVIS, III
UNITED STATES MAGISTRATE JUDGE