Docket No. 12-55578

In the United States Court of Appeals

For the Ninth Circuit

FATEMEH JOHNMOHAMMADI,
Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
Central District of California
No. 2:11-cv-06434-GW-AJW – Honorable George H. Wu

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Appellee Bloomingdale's, Inc. is a wholly-owned subsidiary of Macy's Retail Holdings, Inc. which, in turn, is a wholly-owned subsidiary of Macy's, Inc., a publicly-traded company on the New York Stock Exchange. There is no other corporation that owns 10% or more of Bloomingdale's, Inc.'s stock.

Dated: December 12, 2012

s/Catherine E. Sison
Catherine E. Sison
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

I. STATEMENT OF JURISDICTION

Appellee Bloomingdale's, Inc. ("Bloomingdale's") adopts Appellant Fatemeh Johnmohammadi's ("Johnmohammadi") Statement of Jurisdiction insofar as it sets forth the basis for the District Court's jurisdiction, this Court's jurisdiction to hear Johnmohammadi's appeal, and the timeliness of Johnmohammadi's appeal to this Court from the District Court's order granting Bloomingdale's motion to compel Johnmohammadi's individual employment claims to arbitration, precluding her from pursuing a class action, and dismissing her complaint without prejudice.

II. STATEMENT OF THE ISSUES PRESENTED

Whether the District Court properly held that an employment arbitration agreement containing a class action waiver, voluntarily entered into by the employee, does not violate or interfere with that employee's rights under either the Norris-LaGuardia Act or the National Labor Relations Act and is enforceable under the Federal Arbitration Act in accordance with its terms.

III. STANDARD OF REVIEW

This Court's review of the District Court's order granting Bloomingdale's motion to compel arbitration is de novo. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1157 (9th Cir. 2012). Johnmohammadi, as the party

challenging the enforceability of the arbitration agreement, "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

IV. STATEMENT OF FACTS

Bloomingdale's employed Johnmohammadi as a sales associate in its Sherman Oaks store from November 2005 to November 2010. (Complaint, ¶ 6, 2 ER 250; Noeth Decl., ¶15, 2 ER 168.) In 2003, Macy's, Inc., then known as Federated Department Stores, Inc. and the parent company of Bloomingdale's, rolled out its Solutions InSTORE Program, a comprehensive early dispute resolution program, to all of its current, non-union employees. (Noeth Decl., ¶¶4, 7, 2 ER 163-164.) The version of the Solutions InSTORE Program applicable to Johnmohammadi -- referred to as the Plan Document -- became effective on January 1, 2004. (Noeth Decl., ¶7 and Plan Document, 2 ER 164, 175-197.)

A. Bloomingdale's Four-Step Solutions InSTORE Program Affords Johnmohammadi the Opportunity to Resolve Employment-Related Disputes.

The Solutions InSTORE Program entails a four-step process that provides employees like Johnmohammadi the opportunity to raise and resolve employment-related disputes early and fairly. (Noeth Decl., ¶4, 2

ER 163.) The four steps of the Solutions InSTORE Program, explained in detail in the Plan Document, are as follows:

Step 1: The program begins with "Open Door." Employees are encouraged to bring their concerns to a supervisor or member of local management for resolution.

Step 2: If the employee is not satisfied with the Step 1 resolution, he or she may proceed to Step 2. In Step 2, the employee submits a written complaint to a senior human resource executive for decision. A human resource executive not involved in the underlying decision conducts an investigation and issues a decision.

Step 3: If the employee is not satisfied with the Step 2 decision, and if the claim involves legally-protected rights, the employee may proceed to Step 3. To begin the Step 3 process the employee submits a written Request for Reconsideration to the Office of Solutions InSTORE. If the claim involves disputes related to layoffs, harassment, discrimination, reduction in force, or other alleged statutory violations, a trained professional investigates the dispute thoroughly and objectively. Other disputes,

> including disputes over terminations and final warnings, may be submitted to a Peer Review Panel at the employee's option. In either case, local management is not involved in the decision at this step.
>
> **Step 4:** The fourth and final step of the program is binding arbitration and covers only those employees who have agreed to resolve their disputes in arbitration. Step 4 Arbitration is administered by the American Arbitration Association ("AAA").

(Noeth Decl., ¶¶ 8-10, 2 ER 164-166; Plan Document, 2 ER 177-181.) An employee can proceed directly to Step 4 Arbitration without first completing Steps 1 through 3 of the program. (Noeth Decl., ¶9, 2 ER 165.)

By accepting or continuing employment with Bloomingdale's, all employees agree to be covered by all steps of the program. (Noeth Decl., ¶ 8, 2 ER 164; Plan Document, 2 ER 181.) However, Step 4 is not a mandatory term or condition of employment. (*Id.*) Employees such as Johnmohammadi can voluntarily elect to opt out of Step 4 Arbitration by completing an Election Form and mailing it to the Office of Solutions InSTORE within a prescribed time period. (*Id.*)

An employee's election to opt out of Step 4 Arbitration is confidential. (Noeth Decl., ¶11, 2 ER 166.) No one in the employee's store or other work location has access to this information. (*Id.*) In fact, only a select few company employees in Ohio have access to this information and then only when such information is pertinent to the handling of an employee's claim. (*Id.)* Indeed, in the New Hire Brochure provided to employees at the outset of their employment, Bloomingdale's specifically advises its employees that "[r]espect for your privacy and confidentiality are key features of this program" and that "[o]nly those with a business need to know will be involved." (New Hire Brochure, 2 ER 200.)

Moreover, an employee's election to participate or not participate in arbitration has no effect on his or her employment. (Noeth Decl., ¶12, 2 ER 166-167.) Bloomingdale's has adopted a policy that strictly prohibits retaliation, in any form, against an employee based on his or her election. (*Id.*) Once again, in the New Hire Brochure provided to employees at the outset of their employment, Bloomingdale's specifically advises its employees that "[r]etaliation in any form is something the Company will not tolerate." (New Hire Brochure, 2 ER 202.) Thus, employment at Bloomingdale's is not conditioned on agreeing to arbitration and an employee's decision in this regard does not affect his or her employment.

B. The Solutions InSTORE Program Provided Johnmohammadi a Fair and Efficient Process for Resolving Employment-Related Disputes.

Step 4 Arbitration is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, *et seq.*, "regardless of the state in which the arbitration is held or the substantive law applied in the arbitration." (Plan Document, 2 ER 194.) Under Step 4 Arbitration and subject to certain exceptions, "all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment shall be settled exclusively by final and binding arbitration." (Plan Document, 2 ER 181-182.) However, class or representative actions -- defined as involving "representative members of a large group" who "claim to share a common interest" and who seek "relief on behalf of the group" -- are waived and not allowed. (Plan Document, 2 ER 190.) Moreover, "[c]laims . . . under the National Labor Relations Act shall not be subject to arbitration" and are excluded from the program. (Plan Document, 2 ER 182-83.) If an employee elects to be covered by Step 4 Arbitration, then Bloomingdale's must arbitrate any employment-related disputes with the employee as well. (Noeth Decl., ¶13, 2 ER 167; Plan Document, 2 ER 182.)

Step 4 Arbitration contains certain benefits for employees which would ordinarily not be available to them in a court proceeding and contains

certain failsafe processes which, although less formal than in a court proceeding, ensure that employees like Johnmohammadi can have their claims heard -- and can present testimonial and documentary evidence in support of their claims -- much like they can in a court proceeding (New Hire Brochure, 2 ER 207-209):

> - **Minimal Cost to the Employee.** An employee initiating arbitration pays a filing fee equal to one day's pay or $125, whichever is less. Bloomingdale's pays the other arbitration costs, except for incidentals such as photocopying and producing evidence. (Noeth Decl., ¶14(a), 2 ER 167; Plan Document, 2 ER 192-193.)
> - **Reimbursement of Costs and Fees.** If the employee consults with an attorney for the arbitration, Bloomingdale's reimburses the employee's legal fees up to $2,500 for each continuously rolling 12-month period, no matter what the outcome. If the employee is not represented by an attorney, Bloomingdale's reimburses the employee for incidental costs up to $500 for each continuously rolling 12-month period, no matter what the outcome. (Noeth Decl., ¶13(c), 2 ER 167-168; Plan Document, 2 ER 193.)

- **Employees Decide Whether Attorneys are Involved.** If the employee decides not to have an attorney present at the arbitration, Bloomingdale's cannot have an attorney present at the arbitration. (Noeth Decl., ¶13(b), 2 ER 167; Plan Document, 2 ER 186.)

- **Selection of Arbitrators.** Both Bloomingdale's and the employee participate equally in the arbitration selection process. The AAA provides the parties with a panel of seven arbitrators who have experience deciding employment disputes. Following an opportunity to review the background of the arbitrators on the panel, each party takes turns striking an arbitrator from the panel until only one arbitrator remains. If both parties agree that the remaining arbitrator is unacceptable, the AAA provides the parties with a second panel of seven arbitrators and the selection process begins anew. (Noeth Decl., ¶13(e), 2 ER 168; Plan Document, 2 ER 185.)

- **Discovery.** Discovery is permitted and includes initial document disclosures, interrogatories (20 interrogatories a party, each of which may include a request for production of documents), and depositions (3 depositions a party). The

arbitrator may also allow additional discovery. (Noeth Decl., ¶13(d), 2 ER 168; Plan Document, 2 ER 186-187.)

- **Arbitration Hearing.** The hearing must take place at a location no more than fifty miles from the employee's last place of employment with Bloomingdale's; each party may issue subpoenas compelling the attendance of witnesses; and each party is afforded the opportunity to present testimonial or documentary evidence "relevant and material to the dispute." (Plan Document, 2 ER 185, 188-189.)

- **No Curtailment of Ultimate Relief or Limitation Periods.** The arbitrator has the same power as a judge to grant any relief under any applicable law, including granting attorney's fees and costs. The statutes of limitations that apply to court proceedings apply and are not curtailed in any way. (Noeth Decl., ¶13(e), 2 ER 168; Plan Document, 2 ER 184, 190-191.)

- **Written Decision.** Following the arbitration hearing, the arbitrator is required to issue a written decision specifying any remedies found to be appropriate and may, in the arbitrator's discretion, include in the written decision findings of fact and

conclusions of law. (Noeth Decl., ¶13(g), 2 ER 168; Plan Document, 2 ER 192.)

C. At the Time of Her Hire, Johnmohammadi Was Provided with Detailed Information About the Solutions InSTORE Program and Advised that She Could Voluntarily Elect Not to Participate in Step 4 Arbitration.

At the time of her hire, Johnmohammadi was provided detailed information about the Solutions InSTORE Program -- including but not limited to the Plan Document, the New Hire Brochure, the Election Form, informational postings on the company's website and in stores -- so that she could make an informed decision, confidentially and without fear of reprisal, to participate or not participate in Step 4 Arbitration. (Noeth Decl., ¶15, 2 ER 168-170; Tierney Decl., ¶¶4, 8-10, 2 ER 76, 78-80.)

In applying for employment at Bloomingdale's, Johnmohammadi signed an application for employment, which she acknowledged she read and understood, that advised her about the Solutions InSTORE program:

> Solutions InSTORE: Please note that if you are hired, you will be given thirty (30) days from your date of hire to decide if you want to participate in the final step of the Company's early dispute resolution program, Solutions InSTORE, which is final and binding arbitration. It is important that you read all materials and ask any questions you have so that you are fully informed about what Solutions InSTORE has to offer.

(Tierney Decl., ¶5, 2 ER 77; Employment Application, 2 ER 81-82; Johnmohammadi Dep., 12:18-14:24, 2 ER 67-69.) In addition, she received Bloomingdale's Employee Handbook that she read "cover to cover" and that described all four steps of the program. (Johnmohammadi Dep., 43:5-44:5, 2 ER 70-71; Tierney Decl., ¶¶6-7, 2 ER 77-78; Employee Handbook, 2 ER 90.)

Once hired, Bloomingdale's also provided Johnmohammadi with a New Hire Brochure and an Election Form. (Noeth Decl., ¶¶17-18, 2 ER 170-171; Tierney Decl., ¶¶4, 8, 10, 2 ER 76, 78-80.) The New Hire Brochure explained, in simple language and through the use of easy to follow graphics, the four steps of the Solutions InSTORE Program. (New Hire Brochure, 2 ER 198-209.) It compared arbitration to court proceedings (2 ER 208); set forth facts about arbitration, including that class actions would not be allowed (2 ER 209); and explained that Johnmohammadi would have 30 days from the time of her hire to opt out of Step 4 Arbitration (2 ER 208). It emphasized that the decision to participate in Step 4 Arbitration was a decision she alone had to make:

The Decision is Yours

> **THE SOLUTIONS INSTORE ENROLLMENT PERIOD** will be your opportunity to decide whether you want to receive the benefits of all four steps of this program during your career with the Company. When electing to be covered by the benefits of final and binding arbitration, you and the Company agree to use arbitration as the sole and exclusive means to resolving any dispute regarding your employment; we both waive the right to civil action and a jury trial; if you decide you would like to be excluded from participating in and receiving the benefits of Step 4, we will ask you to tell us in writing by completing the form enclosed in this brochure and returning it to the Office of Solutions InSTORE at the address provided **within 30 days of your hire date**. . . .

(New Hire Brochure, 2 ER 208; emphasis in original).

The attached Election Form makes clear that Johnmohammadi had to act within 30 days of her hire if she did not want to participate in Step 4 Arbitration and that, if she failed to act within the prescribed time, she would be signifying her consent to Step 4 Arbitration. (Election Form, 2 ER 210.) The Election Form specifically instructed Johnmohammadi to "RETURN THIS FORM ONLY IF DECLINING THE BENEFITS OF ARBITRATION," as follows:

> Complete and return this form ONLY IF YOU **DO NOT** WANT TO BE COVERED BY THE BENEFITS OF ARBITRATION during your career with the Company. ***In this case, your completed form must be returned to the Office of Solutions InSTORE and postmarked no later than 30 days from your date of hire***.

(Noeth Decl., ¶¶19-20, 2 ER 171; Election Form, 2 ER 210; emphasis in original.)

D. Johnmohammadi Voluntarily Agreed to Submit any Employment-Related Disputes to Step 4 Arbitration.

Johnmohammadi concedes that she did not complete and return the Election Form and that she thereby agreed to submit any employment-related disputes she may have with Bloomingdale's to Step 4 Arbitration. (Johnmohammadi Dep., 195:2-4, 2 ER 72; Noeth Decl., ¶¶23-29, 2 ER 172-174.) Moreover, as the court below found, Johnmohammadi has *not presented "any facts . . . stating (or even implying) that she did not understand the terms of the arbitration agreement or what she was getting in to and giving up by not opting out of arbitration*." (Tentative Decision, 1 ER 31; emphasis added.) Indeed, as the court below further found, "*she presents virtually no facts countering the facts presented by [Bloomingdale's] suggesting that she was fully informed about the terms of the arbitration agreement and arbitration opt-out, that she nonetheless decided to voluntarily participate in the arbitration program, and that there were no threats of possible termination or other retaliation for failing to participate in arbitration*." (*Id.*; emphasis added.)[1]

[1] The court below held two hearings on Bloomingdale's motion to compel Johnmohammadi's individual claims to arbitration and to dismiss her class allegations. In its Tentative Decision adopted after the first

V. SUMMARY OF ARGUMENT

The issue before this Court is whether Johnmohammadi, who concedes she voluntarily entered into an employment arbitration agreement waiving her right to file a class action, possessed an "absolute," "fundamental," "unwaivable" and "core substantive right" to file a class action that now precludes this Court from enforcing her agreement. Although Johnmohammadi could have refused to enter into her arbitration agreement without fear of reprisal and preserved her right to file class claims in court, she elected not to do so. Johnmohammadi now contends she should not be held to her election because her waiver of the right to file a class action "interfere[s] with, restrain[s], or coerce[s]" her in the exercise of her

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hearing, the court held that Johnmohammadi had voluntarily entered into her arbitration agreement, that the class action waiver in her agreement was enforceable under the FAA, and that the class action waiver did not interfere with any rights she may have under the National Labor Relations Act ("NLRA"). (Tentative Decision, 1 ER 25-33.) In its Tentative Decision adopted after the second hearing, the court held that, notwithstanding the pendency of Johnmohammadi's unfair labor practice charge that she had filed with the National Labor Relations Board ("NLRB") in response to Bloomingdale's motion, it was required, under 9 U.S.C. §4, to order "the parties to proceed to arbitration in accordance with the terms of" their arbitration agreement, and that it had the requisite jurisdiction to issue the order under *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982) and its progeny. (Tentative Decision, 1 ER 3-8.)

rights under both the Norris-LaGuardia Act ("NLGA") and the NLRA. 29 U.S.C. §158(a)(1).

The FAA, however, reflects an "emphatic federal policy" in favor of arbitration and requires courts to enforce employment arbitration agreements, including those containing class action waivers, in accordance with their terms. Only when Congress evinces a clear "congressional command" to override the FAA, either in the text, legislative history, or from an "inherent conflict" between a federal statute's purpose and arbitration, can it signal its intent to "preclude a waiver of the judicial remedies for the statutory rights at issue." In enacting the NLGA and NLRA, Congress never evinced in the texts or legislative histories of these statutes any purpose or intent to confer on an employee a non-waivable right to file a class action. Indeed, the class action device, as set forth in the federal rules, did not then exist.

Moreover, the NLGA recognizes an employee's right "to decline to associate with his fellows" and there is thus no reason why an employee cannot voluntarily agree to waive the right to file a class action and thereby "decline to associate with his fellows." 29 U.S.C. §102. Similarly, the NLRA recognizes an employee's right "to refrain" from engaging in "concerted activity" with his co-workers and there is likewise no reason why

an employee cannot voluntarily agree to waive the right to file a class action and thereby "refrain" from engaging in "concerted activity." 29 U.S.C. §157. Accordingly, Congress never evinced an intention to preclude employees from entering into arbitration agreements containing class action waivers, let alone to create a non-waivable right to file a class action, in either the NLGA or the NLRA. As such, it has not signaled its intent to override the FAA's mandate and Johnmohammadi's arbitration agreement must be enforced in accordance with its terms.

VI. ARGUMENT

Recognizing the limited role of a court in considering a motion to compel arbitration, the court below found that (1) Johnmohammadi "voluntarily" entered into a "mutual agreement to arbitrate" that included a waiver of her right to bring a class action, (2) Johnmohammadi's employment-related claims fall within the scope of the arbitration agreement, and (3) the agreement neither violates nor interferes with Sections 7 and 8 of the National Labor Relations Act and is thus valid and enforceable. (Order, 1 ER 1-2.) *See*, *e.g.*, *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004) (outlining the scope of a court's consideration of a motion to compel).

On appeal, Johnmohammadi neither disputes that she voluntarily entered into an agreement to arbitrate nor disputes that her claims fall within the scope of that agreement. Rather, she contends that her arbitration agreement contains a class action waiver that abrogates her right -- variously described as "absolute," "fundamental," and "unwaivable" -- to file a class action and thus renders her arbitration agreement as a whole unenforceable. See, *e.g.*, Johnmohammadi Opening Brief at 7, 12. 13. According to Johnmohammadi and Amicus California Employment Lawyers Association ("Amicus"), her right to file a class action is protected under both the NLGA, 29 U.S.C. §101, *et seq.*, and the NLRA, 29 U.S.C. §157. Johnmohammadi's contentions are wrong as a matter of law.[2]

A. The FAA Requires that Johnmohammadi's Arbitration Agreement Be Enforced in Accordance with its Terms.

1. The FAA reflects an "emphatic policy in favor" of arbitration.

Congress enacted the FAA in 1925 "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). To this end, arbitration agreements are placed on the same footing as other contracts and "shall be

[2] Bloomingdale's has reproduced the pertinent provisions of the FAA, NLGA and NLRA in the Addendum to this brief.

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 FAA "reflects an emphatic federal policy in favor" of arbitration. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (citation omitted). As the United States Supreme Court has repeatedly emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), and are to be "rigorously enforced." *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

2. Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms.

Although ignored by both Johnmohammadi and Amicus, the courts have consistently enforced arbitration agreements, including those containing class action waivers, in accordance with their terms. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). As such, courts are first and foremost charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) ("the FAA ensures that [the parties'] agreement will be enforced according to its terms"); *CompuCredit Corp. v. Greenwood*,

132 S. Ct. 665, 669 (2012) (the FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (the FAA "requires courts to enforce the bargain of the parties to arbitrate"; citations omitted). To this end, parties are generally free, as a matter of contract, to agree on the procedures that will govern their arbitration. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties to an arbitration may "specify by contract the rules under which that arbitration will be conducted").

As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration with the settled expectation that a court will enforce their agreement, like any other arbitration agreement, in accordance with its terms. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), for example, the Supreme Court vacated a class arbitration award that was not contemplated by the terms of the parties' arbitration agreement but imposed by the panel of arbitrators hearing the parties' disputes solely as a matter of "sound policy." In doing so, the Court reiterated that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Id.* at 1773 (citations omitted). "In this endeavor, 'as with

any other contract, the parties' intentions control.'" *Id.* at 1774 (citation omitted). As parties are "'generally free to structure their arbitration agreements as they see fit,'" they "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes." *Id.* (citations omitted; emphasis in the original). As the parties did not intend to include class arbitration in fashioning the procedures that would govern their arbitration, the panel of arbitrators hearing their disputes erred in allowing the arbitration to proceed on a class basis.

To like effect, in *AT&T Mobility, LLC v. Concepcion*, the Supreme Court enforced an arbitration agreement containing a class action waiver notwithstanding California's policy conditioning the enforceability of such agreements on the availability of class arbitration. In *Concepcion*, AT&T sought to enforce a consumer arbitration agreement that contained a class action waiver. In *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the California Supreme Court had previously held that such a class action waiver in a consumer arbitration agreement was "unconscionable" and violated California's policy against exculpation and thus rendered the agreement unenforceable. *Discover Bank*, 36 Cal.4th at 162-163. At issue

in *Concepcion* was whether §2 of the FAA preempts the so-called *Discover Bank* rule. *Concepcion*, 131 S. Ct. at 1744 (citation omitted).

In holding that the *Discover Bank* rule is in fact preempted by the FAA, the Court in *Concepcion* rejected the California Supreme Court's contention that California's "unconscionability doctrine" and "policy against exculpation" are grounds that "exist at law or in equity for the revocation of any contract" within the meaning of §2 of the FAA. *Id.* at 1746-47. As the *Concepcion* Court reasoned, if a facially neutral rule has a "disproportionate impact on arbitration agreements" and "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it is preempted. *Id.* at 1747-48.

Although the Court in *Concepcion* focused on whether a state law was preempted by the FAA, its statements as to the purpose and meaning of the FAA are broadly worded and applicable to all arbitration agreements that are enforceable under the FAA. In this regard, the Court reaffirmed that "[t]he 'principal purpose' of the FAA" is to "'ensure that private arbitration agreements are enforced according to their terms'" and to afford parties sufficient "discretion" in designing their agreements to allow for "efficient, streamlined procedures tailored" to their needs. *Id.* at 1748-49 (citations omitted). Requiring parties, in contravention of their arbitration agreement, to "'shift from bilateral arbitration to class-action arbitration'" results in a

"'fundamental'" change to their bargain which is "inconsistent with the FAA." *Id.* at 1751 (citations omitted).

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." *Id.* at 1751. Second, "class arbitration *requires* procedural formality" to protect the interests of absent class members. *Id.* Third, "class arbitration greatly increases risks to defendants" because "[t]he absence of multilayered review makes it more likely that errors will go uncorrected" and thus renders class arbitration "unacceptable." *Id.* at 1752. Accordingly, since the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," "[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.

3. Arbitration agreements involving federal statutory rights are enforceable so long as the parties can vindicate the statutory rights which are the basis of their claim.

In enforcing arbitration agreements according to their terms, including those containing class action waivers, the Supreme Court has likewise made

clear that parties may generally agree to arbitrate rights under federal statutes. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (the FAA "mandates enforcement of agreements to arbitrate statutory claims"); *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985) ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the FAA "in controversies based on statutes"). So long as the arbitral process affords the parties the opportunity to vindicate the federal statutory rights that form the basis of their claims, the parties will be held to their agreement to arbitrate. Indeed, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628.

Nevertheless, as both Johnmohammadi and Amicus highlight in their respective briefs, not all disputes implicating federal statutory rights are amenable to arbitration. If Congress has "itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," then such statutory rights are not amenable to arbitration and the FAA's mandate is "overridden by a contrary congressional command." *Mitsubishi*, 473 U.S. at 628; *McMahon*, 482 U.S. at 226. "If Congress did intend to limit or

prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or "from an inherent conflict between arbitration and the statute's underlying purpose." *McMahon*, 482 U.S. at 227 (citations omitted). The burden is on the party contesting the enforceability of the arbitration agreement to demonstrate that Congress intended to preclude the waiver of a judicial forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted). Moreover, in evaluating such a contention, "it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* at 26 (citation omitted).

The Supreme Court recently applied these principles when enforcing an arbitration agreement that precluded the arbitration of class claims brought under the Credit Repair Organizations Act ("CROA"), 15 U.S.C.§1679, *et seq.* *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). In *CompuCredit*, the Court first reaffirmed that the FAA "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* at 669 (citations omitted). In determining whether Congress evinced such a

command in enacting CROA, the Court focused on (1) the Act's disclosure requirement, which informs consumers of their "right to sue" for violations of the Act, (2) its non-waiver provision, which precludes the enforcement of any waiver of the consumer's rights under the Act, and (3) its civil liability provision, which provides consumers the right to bring an individual or class action in "court." *Id.* at 669-70.

It then concluded that none of these provisions could perform the "heavy lifting" required to override the FAA mandate since, among other things, the right to sue in a "court" or to bring a "class action" does not give rise to a "nonwaivable right to initial judicial enforcement." *Id.* at 671. Rather, they are merely procedural matters which the parties are free to bargain away:

> It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish 'the contrary congressional command' overriding the FAA . . . valid arbitration agreements covering federal causes of action would be rare indeed. But this is not the law. . . .
>
> Thus, we have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.

Id. at 670-71 (citations omitted). In other words, the right to a class action, like the right to a judicial forum, is a procedural right that can be waived

even though the statute at issue lists class actions as an available remedy and even though the statute provides that the rights created are non-waivable.

The Court then went on to point out that when Congress intends to preclude an arbitral forum it has done so with "clarity" and, if it had intended to do so here, it would not have done so in such an "obtuse manner." *Id.* at 672. Accordingly, the Court concluded, "[s]o long as the *guarantee* [of the Act's civil-liability provision] -- the *guarantee of the legal power to impose liability* -- is preserved," and thus so long as the parties can vindicate the statutory right forming the basis of their claim, the parties remain free to enter into an arbitration agreement, including one waiving their right to file a class action, that calls for the arbitration of their rights under CROA. *Id.* at 671.

Johnmohammadi's reading of the Court's holding in *CompuCredit* -- that arbitration agreements are enforceable only so long as "***any*** right that is statutorily '*guarantee[d]*' is preserved" -- is simply wrong. Johnmohammadi Opening Brief at 21 (emphasis added). Indeed, Johnmohammadi, among other things, ignores that the Court enforced the class action waiver in the parties' arbitration agreement even though the statutory right to file a class action is itself embedded in CROA's civil-liability provision.

In applying these principles to other federal statutes, the Supreme Court has consistently found that the party opposing arbitration has failed to meet its burden of demonstrating the requisite "congressional command" to override the FAA largely because the arbitral forum would allow the parties the opportunity to vindicate those statutory rights which form the basis of their claims. *See*, *e.g.*, *Mitsubishi*, 473 U.S. at 637 (enforcing arbitration of antitrust claims under the Sherman Act as the parties "effectively may vindicate [their] statutory cause of action in the arbitral forum"); *McMahon*, 482 U.S. at 242, 243 (enforcing arbitration of Securities Exchange Act and RICO claims as the parties could "effectively vindicate" their rights under these statutes in an arbitral forum); *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (enforcing arbitration of Securities Act claims as "the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act"). Johnmohammadi and Amicus misread these cases to suggest that they preclude the arbitration of federal claims based on statutory rights *other than those* which form the basis of a party's cause of action. Johnmohammadi Opening Brief at 20-22. They do not. Indeed, neither Johnmohammadi nor Amicus has cited to a single case that precludes arbitration on that basis.

4. Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements.

The Supreme Court has also held that the FAA extends to employment arbitration agreements, including those containing class action waivers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (the FAA includes within its ambit all employment arbitration agreements save those affecting transportation workers). As the Court stated in *Adams*, "there are real benefits to the enforcement of arbitration claims" that do not "somehow disappear when transferred to the employment context." *Id.* at 123.

The Supreme Court's decision in *Gilmer*, *supra*, is particularly instructive. In *Gilmer*, the Court held that Congress, in enacting the Age Discrimination in Employment Act ("ADEA"), did not evince an intention to exclude ADEA claims from arbitration. After noting that there was nothing in the text of the ADEA or its legislative history specifically excluding arbitration, the Court went on to consider whether the arbitration of ADEA claims "would be inconsistent with the statutory framework and purposes of the ADEA." *Gilmer*, 500 U.S. at 27. In the process, the Court

rejected the argument that the "unequal bargaining power between employers and employees" was a sufficient reason to preclude the arbitration of ADEA claims. *Id.* at 41. "Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.*

The Court also rejected the argument that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for . . . class actions":

> '[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the 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 (citation omitted). The Court thus recognized that a class action, as set forth in the federal rules, is simply a procedural device -- a procedural device which, as the Rules Enabling Act, 28 U.S.C. §2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right" -- and can be, like the choice of a judicial forum, waived. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (a class action only affects procedural rights and "leaves the parties' legal rights and duties intact"); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000)

(the right to file a class action is a "procedural" right "that may be waived by agreeing to an arbitration clause").

Indeed, federal circuit court cases across the country have held -- consistent with *Gilmer* -- that employment arbitration agreements containing class action waivers are not only enforceable but adequate to further the purposes of the employment laws. *See*, *e.g.*, *Quilloin v. Tenet HealthSystem Phil., Inc.*, 673 F.3d 221, 232-233 (3d Cir. 2012) (enforcing class action waiver in an arbitration agreement to preclude an FLSA collective action); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1366, 1378 (enforcing class action waiver in an arbitration agreement to preclude an FLSA collective action as the waiver is "consistent with the goals of 'simplicity, informality, and expedition'" touted by the Supreme Court in *Gilmer*); *Carter v. Countrywide Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing class action waiver in an arbitration agreement as the inability to proceed collectively did not deprive claimants of substantive rights available under the FLSA); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (enforcing a class action waiver in an arbitration agreement because there is no evidence "Congress intended to confer a nonwaivable right to a class action under [the FLSA]"); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) (enforcing class action waiver in arbitration

agreement as there was nothing in the text or legislative history of the FLSA indicating that Congress intended to preclude the arbitration of claims brought under the FLSA); *see also Zekri v. Macy's Retail Holdings, Inc.*, 2010 U.S. Dist. LEXIS 119453, *3 (N.D. Ga. Nov. 4, 2010) (enforcing the same class action waiver under the same arbitration agreement as Johnmohammadi's arbitration agreement because the right to bring an FLSA collective action is not a substantive right and can be waived).

5. Johnmohammadi voluntarily entered into her arbitration agreement, and she should be held to her "bargain to arbitrate" in accordance with the terms of her agreement.

Within the first thirty days of her employment, Johnmohammadi was faced with a choice. In the event she had any disputes with Bloomingdale's, she could bring her claim in court, either individually or on a class basis, or agree to arbitrate and, if she agreed to arbitrate, consistent with the "overarching purpose of the FAA" and so as to "facilitate streamlined proceedings," she would also agree to waive her right to bring a class action. *Concepcion*, 131 S. Ct. at 1752. Johnmohammadi does not dispute that she chose to arbitrate and, as the court below found, Johnmohammadi has failed to present any evidence that she "did not understand the terms of her agreement" or "did not know what she was getting into and giving up by not

opting out of arbitration." (Tentative Decision, 1 ER 31.) Indeed, she presented no evidence that her choice was anything other than "voluntary" or that she perceived any "threats of possible termination or other retaliation for failing to participate in arbitration." (*Id.*) She thus made her choice voluntarily and free of any taint of compulsion or coercion.

As such, and consistent with the "emphatic federal policy in favor" of arbitration, *KPMG*, 132 S. Ct. at 25, the FAA mandates that Johnmohammadi's arbitration agreement, including its class action waiver, be enforced in accordance with its terms and that she be held to her "bargain to arbitrate." *Mitsubishi*, 473 U.S. at 628. Indeed, the NLGA and the NLRA, as construed by Johnmohammadi and Amicus, do not affect Johnmohammadi's ability to vindicate her rights under her state-law wage-and-hour causes of action in the arbitral forum as "*the guarantee of the legal power to impose liability*" for those causes of action is preserved. *CompuCredit*, 132 S. Ct. at 671. She would be entitled to the same relief whether she pursues her claims individually or on a class basis. Further, her agreement to arbitrate her employment disputes and to waive her right to file a class action is, as *Gilmer* and its progeny attest, enforceable, as the right to file a class action, like the choice of a judicial forum, can be waived. *Gilmer*, 500 U.S. at 32.

6. Amicus improperly seeks to raise issues on appeal that were not raised in the court below.

Although Johnmohammadi conceded in the court below that she had entered into her arbitration agreement voluntarily and free of the taint of compulsion or coercion, Amicus improperly seeks to contest the issue for the first time on appeal. *See United States v. Flores-Payon*, 942 F.2d 556, 558 ("[i]ssues not presented to the trial court cannot generally be raised for the first time on appeal" because, among other reasons, "'[i]t would be unfair to surprise litigants on appeal by [a] final decision of an issue on which they had no opportunity to introduce evidence'"; citation omitted). Nevertheless, without waiving its objection to Amicus's arguments, Bloomingdale's addresses them briefly here.

First, Amicus contends that Bloomingdale's imposed its arbitration program on Johnmohammadi as a "mandatory" term of employment and failed to provide her with adequate notice of the program. Amicus Brief at 3, 5. Bloomingdale's in fact gave Johnmohammadi the opportunity to opt out of its program and provided materials to her concerning the program, including the Plan Document, so that she could make an informed decision to participate or not participate in arbitration. (Noeth Decl., ¶15, 2 ER 168-170; Tierney Decl., ¶¶4, 8-10, 2 ER 76, 78-80.)

Second, Amicus contends that the materials provided to Johnmohammadi reflected a "pro-arbitration bias" and did not explain that she would be waiving her right to file a class action if she elected arbitration. Amicus Brief at 6-8. Bloomingdale's materials describing the arbitration program merely reflect the recognized benefits of arbitration. See, *e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (arbitration "'is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices'"; citation omitted). Bloomingdale's can thus hardly be faulted if these materials reflected, in accordance with federal law, a preference for arbitration. *KPMG*, 132 S. Ct. at 25. Moreover, both the Plan Document and the New Hire Brochure specifically explained that Johnmohammadi would be relinquishing her right to file a class action if she elected arbitration. (New Hire Brochure, 2 ER 209; Plan Document 2 ER 190.)

Third, Amicus attacks the propriety of Bloomingdale's 30-day opt out procedure. Amicus Brief at 6-8. This Court has already upheld similar 30-day opt-out procedures in connection with employment arbitration

agreements and found that they afford employees ample opportunity to decide whether to participate in arbitration. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (holding that an employee "assented to the [arbitration agreement] by failing to exercise his right to opt out of the program" within 30 days); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199-1200 (9th Cir. 2002) (holding that an employee, by failing to opt out of arbitration within 30 days, signified his consent to arbitration and was "given ample opportunity to investigate any provisions he did not understand before deciding whether to opt out of" the program).

Finally, Amicus contends that Bloomingdale's arbitration program is inherently coercive as "it never tells employees that their decision to opt-out will be deemed confidential and that employees who opt-out will not be retaliated against for having defied Bloomingdale's clearly expressed preference for arbitration." Amicus Brief at 22. Johnmohammadi was specifically assured that her decision to participate or not participate in arbitration was confidential, that it would not subject her to retaliation, and that it would have no effect on her employment. (Noeth Decl., ¶¶11-12, 2 ER 166-67; New Hire Brochure, 2 ER 200, 202.) Accordingly, there is nothing to suggest that Johnmohammadi did not voluntarily agree to arbitration.

B. The NLGA and NLRA Do Not Create a Non-Waivable Right to File a Class Action and Do Not Evince a Congressional Command to Override the FAA Mandate to Enforce Arbitration Agreements According to their Terms.

1. The NLGA does not vest in employees a non-waivable right to file a class action and Johnmohammadi has failed to meet her burden of demonstrating that the NLGA evinces a congressional command to override the FAA.

According to Johnmohammadi, the NLGA vests in employees the fundamental right to file a class action. Johnmohammadi Opening Brief at 11-12. As she sees it, the class action waiver in her arbitration agreement "strips" her of this "fundamental right" by "precluding [her] from prosecuting [her] wage claims collectively in any forum, arbitral or judicial." *Id.* She therefore concludes that the NLGA evinces a "congressional command" to override the FAA's mandate to enforce arbitration agreements containing class action waivers and that the lower court lacked the requisite jurisdiction to enforce her arbitration agreement. *Id. See also* Amicus Brief at 17, n.9. Johnmohammadi has failed to meet her burden in this regard as there is no basis for her conclusion in the text of the NLGA, its legislative history, or any federal court's construction of the NLGA.[3]

[3] To the extent Amicus is relying on the NLRB's finding in *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184, 2012 NLRB LEXIS 11 (Jan. 3, 2012), that class action waivers are unenforceable under the NLGA, it is important to note

Enacted in 1932, the NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute" or in a case that is "contrary to the public policy declared in this Act." 29 U.S.C. §101. The Act declares that it is "necessary that an employee, "*though he be free to decline to associate with his fellows*,"

> [1] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms of his employment, and . . .
>
> [2] . . . shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self -organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

29 U.S.C. § 102 (emphasis added). The Act further provides that "yellow-dog" contracts -- specifically defined as contracts in which an employee "promises not to join, become, or remain a member of any labor

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that the NLRB has no authority to interpret and enforce the terms of the NLGA. 29 U.S.C. §160 ("The [NLRB] is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in [Section 8] of this title)"). Accordingly, the NLRB's interpretation of the NLGA is not entitled to any deference. *See*, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 ("[w]hile the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel").

organization" or to forgo his employment if he does become a member -- are unenforceable in federal courts. 29 U.S.C. §103.

The Act, in other words, protects the rights of employees, if they so choose, to join a union of their choice (the "freedom of association, self-organization, and designation of representatives") free of "interference, restraint, or coercion" so that the union, if chosen, can engage in the "collective bargaining" process. Neither in the text of the Act nor in any legislative history of the Act presented by either Johnmohammadi or Amicus is a class action ever mentioned. Indeed, at the time Congress enacted the NLGA, the class action device did not exist. Equally telling, the public policy enshrined in the Act specifically recognizes that an employee should "*be free to decline to associate with his fellows.*" 29 U.S.C. §102 (emphasis added). There is then nothing in the Act to suggest that Johnmohammadi cannot, as she did here, voluntarily and without the taint of compulsion or coercion, agree to waive her right to avail herself of the class action device. Johnmohammadi's assertion that she was thereby prevented from prosecuting her wage claims collectively in any forum, arbitral or judicial, is simply not true. Johnmohammadi could have opted out of arbitration and filed any claims she might assert -- including class claims -- in court. But

she elected not to do so. She thus exercised her freedom to "decline to associate with [her] fellows."

Moreover, Johnmohammadi's and Amicus's suggestion that her arbitration agreement is akin to a yellow-dog contract likewise fails. Johnmohammadi's agreement does not provide, as would a "yellow dog" contract, that Bloomingdale's would terminate her employment either if she elected not to participate in arbitration or if, following her agreement to participate, she filed a class action. In fact, as set forth in the materials provided to her about the arbitration program, Bloomingdale's specifically advised her that "[r]etaliation in any form is something the Company will not tolerate." (New Hire Brochure, 2 ER 202.).

Nothing in the NLGA prevents a court from enforcing contracts that have no bearing on an employee's right to organize and bargain collectively, including arbitration agreements. *See*, *e.g.*, *Local 205 v. Gen. Elec. Co.*, 233 F.2d 85, 90 (1st Cir. 1956) ("[i]t is our conclusion that jurisdiction to compel arbitration is not withdrawn by" the NLGA). As explained by the only district court in this Circuit that has squarely addressed the issue, the NLGA "does not bar the enforcement of the Arbitration Agreement [which contains a class action waiver]. . . . [T]he [Act] specifically defines those contracts to which it applies [i.e., yellow dog contracts]. An agreement to arbitrate is

not one of those contracts to which the [Act] applies." *Morvant v. P. F. Chang's China Bistro, Inc.*, 2012 U.S. Dist. LEXIS 63985, *28-29 (N. D. Cal. May 7, 2012) (citation omitted).

To therefore infer, as Johnmohammadi and Amicus do, that the statutory framework and public policy manifested in the NLGA evince a congressional command to override the FAA's mandate to enforce arbitration agreements containing class action waivers is at once devoid of logic and historic support.

2. The NLRA does not vest in employees a non-waivable right to file a class action and Johnmohammadi has failed to meet her burden of demonstrating that the NLRA evinces a congressional command to override the FAA.

Johnmohammadi likewise contends that the NLRA vests employees with the fundamental right to file a class action. Because, as she puts it, "[t]he foundational purpose of the NLRA is to guarantee that employees are empowered to band together to advance their work-related interests on a collective basis," the right to file a class action is necessarily subsumed in such a guarantee and gives rise to a "core substantive right." Johnmohammadi Opening Brief at 17-18. She therefore reasons that the NLRA evinces a "congressional command" to override the FAA's mandate

to enforce arbitration agreements containing class action waivers. Once again, Johnmohammadi has failed to meet her burden in this regard.

Enacted in 1935, Section 7 of the NLRA is concerned with the rights of employees to organize and bargain collectively with respect to the terms and conditions of their employment:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all such activities* . . .

29 U.S.C. §157 (emphasis added). Section 8(a)(1), in turn, makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. §158(a)(1).

Section 7 is concerned with the bargaining process between employers and employees and not with the actual litigation of claims in a judicial or arbitral forum which are governed by their own separate set of rules and procedures. As the Supreme Court has explained, "[i]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions

of their employment." *NLRB v. City Disposal*, 465 U.S. 822, 835 (1984). It thus reflects a "congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements." *Id.* Section 7, then, focuses on the rules of the workplace -- the right to organize and bargain collectively -- and not on the rules -- such as the federal rule governing class actions -- that apply in a court or an arbitration proceeding. Indeed, the rules of a court or an arbitration invoke entirely different processes than the bargaining process between an employer and employee and are clearly outside the scope of Section 7.

It is therefore not surprising that Section 7 does not mention class actions -- let alone create a non-waivable right to file a class action -- and neither Johnmohammadi nor Amicus has cited to any legislative history which would suggest that Congress, in enacting the NLRA, intended to create a right to file a class action. Indeed, since the federal rule governing class actions did not then exist, it would be hard to imagine that Congress, in enacting the NLRA, nevertheless intended to elevate the yet-to-be enacted federal rule governing class actions -- which, as the Rules Enabling Act, 28

U.S.C. §2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right" -- into a "core substantive right."

Johnmohammadi broadly asserts that Section 7 evinces an intent to "protect[] all forms of concerted activity by employees to improve wages or working conditions" including the right to file a class action. Johnmohammadi Opening Brief at 14-19. But the cases she marshals in support merely stand for the unremarkable proposition that an employer cannot retaliate against its employees for concertedly asserting their legal rights. By way of example, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978), the Supreme Court held that the "mutual aid or protection" clause in Section 7 protects employees who seek to improve the terms and conditions of employment "through channels outside the immediate employee-employer relationship." It then went on to observe that the lower appellate courts have construed the clause to protect "employees from retaliation" when they seek "to improve working conditions through resort to administrative and judicial forums." *Id.* at 566. But it left for a later day what constitutes "'concerted' activities in this context." *Id.* at n.15.

In *Salt River Valley Water Users' Association v. NLRB*, 206 F.2d 325 (9th Cir. 1953), this Court held that, under the "mutual aid or protection" clause, an employer could not retaliate against employees for soliciting

signatures from co-workers for a petition to authorize the filing of a collective FLSA action for backpay and wages. These and similar cases all deal with unfair labor practices in the workplace. They implicate rules and regulations governing the workplace and not those rules and regulations, operating outside of the workplace, that govern claims that are filed in judicial or arbitral proceedings. And they do not, explicitly or otherwise, confer a non-waivable right to file a class action.[4]

Johnmohammadi also broadly asserts that "the NLRA prohibits the enforcement of contract terms" -- including, by implication, class action

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[4] Johnmohammadi and Amicus cite to a litany of cases to the same effect. *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Harco Trucking, LLC,* 344 NLRB 478 (2005) (employer violated NLRA by refusing to hire employee for filing a class action lawsuit against its corporate predecessor); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in a lawsuit against employer); *Host Int'l, Inc.*, 290 NLRB 442 (1988) (employer violated NLRA by refusing to hire two employees for, among other things, previously filing a lawsuit with co-workers against the employer); *United Parcel Service, Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for, among other activities, initiating class action lawsuit, circulating petition among employees, and collecting money for retainer); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (employer violated NLRA by discharging three employees who had filed suit against employer); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit).

waivers -- that violate Sections 7 and 8(a)(1) of the NLRA. Johnmohammadi Opening Brief at 19-20. But none of the cases she cites support such a broad proposition. All of the cases involve individual contracts that were intended either to impede union organizing or to be used as a weapon in collective bargaining. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944) (company attempted to use individual contracts as a means to "impede employees" from organizing); *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940) (company threatened employees that if they did not sign individual contracts requiring them to waive the right to strike, among other things, their jobs would not be protected and the company therefore attempted to use these individual contracts as a "means of thwarting the policy of the Act"); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (company entered into individual contracts in which the "employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *NLRB v. Superior Tanning Co.*, 117 F.2d 881 (7th Cir. 1941) (company attempted to use individual contracts as part of a plan to discourage unionization).

The courts found these contracts to be unenforceable as the employers attempted to use them to violate certain specific, well-defined rights granted

employees in Section 7. The courts did not find them to be unenforceable because they encroached upon an abstract right, not specifically enumerated in Section 7, to engage in "concerted activity." These cases do not suggest, much less support, the proposition that a contract involving a more tangential right to engage in "concerted activity" that implicates an entirely different arena than the workplace and operates under an entirely different set of rules and procedures than the workplace -- such as a contract waiving the right to file a class claim which implicates a rule of court -- is unenforceable. Indeed, as the Supreme Court observed in *J. I. Case*, there is nothing that prevents an employer "from contracting with individual employees under circumstances which negative any intent to interfere with the employees' rights under the Act." *J. I. Case*, 321 U.S. at 340-41. Where the employer is "under no legal obligation to bargain collectively," the employer is "free to enter into individual contracts." *Id.* at 337. Johnmohammadi's arbitration agreement is just such a contract as it seeks neither to impede union organizing nor to interfere with the bargaining process and specifically excludes union members from its coverage. (Plan Document, 2 ER 181 (specifically excluding employees who "are covered by the terms of a collective bargaining agreement").)

Moreover, by voluntarily agreeing to waive her right to file class claims in arbitration, Johnmohammadi has not, as she suggests, given up her right to "band together" with her co-workers and "advance their work-related interests." Johnmohammadi Opening Brief at 17-18. She still has the right -- protected under Section 7 -- to discuss her claims with other employees, to pool her resources with these other employees, to solicit these other employees' support, and to coordinate with these other employees to file similar, individual claims. Indeed, if Johnmohammadi is somehow prevented from engaging in these "concerted activities," she can file a claim directly with the NLRB as claims under the NLRA are specifically excluded from coverage under her arbitration agreement. (Plan Document, 2 ER 182-83 ("[c]laims . . . under the National Labor Relations Act shall not be subject to arbitration" and are explicitly excluded from arbitration).)

Although ignored by both Johnmohammadi and Amicus but of critical importance here, Section 7 specifically confers on employees the right -- so long as it is exercised free of the taint of compulsion or coercion -- "*to refrain*" from engaging in "concerted activities." 29 U.S.C. §157 (emphasis added). Johnmohammadi is thus free to engage or not to engage in "concerted activities" as she sees fit. *See, e.g.*, *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 324 (1974) ("[e]mployees have the right recognized in

§7 of the Act 'to form, join, or assist labor organizations' or 'to refrain' from such activities"); *Allegheny Ludlum Corp.*, 333 NLRB 734, 737 (2001) ("employees have the right to, inter alia, support or oppose union representation and to participate or refrain from participating in an NLRB election campaign").

In *Salt River*, for example, a case heavily relied on by both Johnmohammadi and Amicus, this Court reversed an NLRB finding of an unfair labor practice against an employer for allegedly coercing an employee to remove his name from a petition authorizing employees to file a collective FLSA action for backpay and wages. It did so because the employee had removed his name voluntarily and without coercion and did not perceive the employer's remarks expressing displeasure with the petition as a "threat." *Salt River*, 206 F.2d at 329. In other words, the employer could not have committed an unfair labor practice as the employee had simply exercised his right "to refrain" from "concerted activities."

Of course, if an employee can "refrain" from engaging in "concerted activity," the NLRA could not have created, as Johnmohammadi and Amicus contend, an "absolute," "fundamental" and "unwaivable" right to file a class action. Johnmohammadi Opening Brief at 7, 12, 13. Johnmohammadi could, as she did here, "refrain" from engaging in

"concerted activities" and agree not to invoke the class action device. Just as a union acting on behalf of its members can agree to waive a judicial forum and to require its members to arbitrate their individual employment claims, there is no reason why Johnmohammadi cannot do so as well on her own behalf. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) ("[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative"). Just as Johnmohammadi can waive her constitutional right to a jury trial by entering into her arbitration agreement, there is no reason why she cannot also waive her procedural right to file a putative class action.

Indeed, she could have opted out of arbitration and pressed whatever claims she might have in a court on a class basis. Her decision to forgo a judicial forum and to forgo the class action procedure -- made free of the taint of compulsion or coercion -- cannot be construed to constitute an unfair labor practice within the meaning of Section 8(a)(1). *See Webster v. Perales*, 2008 U.S. Dist. LEXIS 7503, *10-12 (N.D. Tex. Feb 1, 2008) (enforcing agreements to arbitrate as plaintiffs could not establish that "Section 7 forbids employees from *waiving* their right to a judicial forum by agreeing to arbitrate disputes" and because they entered into their arbitration

agreements "voluntarily and without duress, pressure or coercion" within the meaning of Section 8(a)(1)).

Accordingly, Johnmohammadi's and Amicus's contention that the statutory framework and public policy manifested in the NLRA evince a congressional command to override the FAA's mandate to enforce arbitration agreements containing class action waivers is not tenable.

3. The NLRB's decision in *D. R. Horton* does not address arbitration agreements that are entered into voluntarily and over-steps the Board's area of expertise when it held that both the NLGA and NLRA trump the FAA.

Although scarcely relied on by Johnmohammadi in her Opening Brief but heavily relied on by her in the court below, the NLRB's decision in *D.R. Horton, supra*, is the only authority that even remotely touches upon Johnmohammadi's and Amicus's position. However, the Board's decision in *D. R. Horton* -- that arbitration agreements containing class action waivers that are imposed as a mandatory term of employment violate the NLRA -- is itself fraught with problems.[5] Moreover, the Board's decision does not

[5] Issues have been raised as to whether the Board had a valid quorum at the time it issued its decision in *D. R. Horton* because the term of Member Becker, one of the two purported members of the Board that issued *D. R. Horton*, arguably expired before the Board issued its decision. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). Similarly, issues have been raised as to whether the two-member panel lacked authority to issue its

address arbitration agreements that are entered into voluntarily and impermissibly over-steps the Board's area of expertise when it ruled that both the NLGA and NLRA trump the FAA.

a. *D. R. Horton* does not address arbitration agreements that are entered into voluntarily.

The Board in *D. R. Horton* specifically excluded from its ambit those arbitration agreements, such as Johnmohammadi's, that are entered into, not as a mandatory term and condition of employment, but voluntarily and without compulsion. Specifically, it did not touch upon "the more difficult question[]" of whether "an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential disputes through non-class arbitration rather than litigation in court." *D. R. Horton*, 2012 NLRB LEXIS 11, at *56

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decision as there is no record that the Board delegated authority to a three-member panel as required by 29 U.S.C. §153(b). Two members can constitute a quorum only "so long as the delegee group was properly constituted." *Id.* at 2640. In any event, D. R. Horton has appealed the Board's decision to the Fifth Circuit where its appeal is still pending. *D. R. Horton v. NLRB*, 5th Cir. Case 21 No. 12-60031 (filed Jan. 13, 2012). The NLRB's decision is not self-executing and has no legal effect unless and until the Fifth Circuit enforces it. *See*, *e.g.*, *NLRB v. P*I*E* Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) ("[t]he Board . . . still must go to a court of appeals and ask that Court to issue an order enforcing the Board's order").

n.28. It also withheld judgment on whether *Perales*, *supra*, which held that these agreements are enforceable, "was correctly decided." *D. R. Horton*, 2012 NLRB LEXIS 11, at *33 n.18.

As explained above, Johnmohammadi was free "to refrain" from engaging in any "concerted activity" implicated by a class action waiver when she entered into -- voluntarily and free of the taint of compulsion or coercion -- her arbitration agreement. As such, her election "to refrain" from such activity cannot give rise to a violation of Section 8(a)(1) and is enforceable. *See Salt River*, 206 F.2d at 329; *see also Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *6-7 (S.D. Tex. Oct. 4, 2012) (holding that, even if it were inclined to follow the *D. R. Horton* decision, it would still enforce the employees' arbitration agreements as the employees were "expressly permitted to opt out" of arbitration).

b. The NLRB's attempt to reconcile the interests of the FAA, NLGA and NLRA is not entitled to deference and is erroneous as a matter of law.

Even assuming the Board properly ruled that the NLRA prohibits class action waivers in arbitration agreements entered into as a mandatory term of employment, the Board's attempt, in what it conceded to be "an issue of first impression," to engage in a "careful accommodation" of the

competing interests of the FAA and the NLRA and NLGA falls outside of its area of expertise and is not entitled to deference. *D. R. Horton*, 2012 NLRB LEXIS 11, at *32, 34-35. Moreover, the Board's conclusion -- that its ruling "does not conflict with the letter or interfere with the policies underlying the FAA" -- is clearly erroneous. *Id.*

In attempting to reconcile and accommodate the competing interests of the statutes involved, the Board overlooked that it lies with Congress, not the Board, to enact the rules governing the scope and enforceability of arbitration agreements, and it is for the courts, not the Board, to enforce and interpret these congressional mandates. Indeed, as the courts have made clear, whenever the Board construes statutes other than the NLRA, it strays outside of its area of expertise and its conclusions respecting these other statutes are not entitled to deference. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[i]t is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives"); *Bildisco & Bildisco*, 465 U.S. at 529 n.9 ("[w]hile the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"); *Hoffman Plastic*

Compounds, Inc., 535 U.S. 137, 144 (2002) ("we have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"); *see also Association of Civilian Technicians v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000)("courts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute").

Turning to the Board's reasoning itself, the Board stated that its ruling neither conflicts with nor undermines the policy underlying the FAA. According to the Board, "the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other contracts." *D. R. Horton*, 2012 NLRB LEXIS 11, at *38-39. By conditioning the enforceability of an arbitration agreement on the availability of class arbitration, the Board argued, it simply "treat[s][arbitration agreements] no worse than any other private contract that conflicts with Federal labor law." *Id.* However, as the Supreme Court observed in *Concepcion*, facially neutral rules that have "a disproportionate impact on arbitration agreements" are not saved simply because they apply to "any contract." *Concepcion*, 131 S. Ct. at 1747-48. The appropriate inquiry is whether the rule "stand[s] as an obstacle to the accomplishment of the FAA's objectives." In this respect,

as *Concepcion* makes clear, "[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. A rule finding that arbitration agreements containing class action waivers are unlawful under the NLRA forces employers and employees either into class arbitration, and thus to forgo their right to "specify *with whom* they choose to arbitrate their disputes," *Stolt-Nielsen*, 130 S. Ct. at 1774, or, worse yet, to forgo "the emphatic federal policy in favor" of arbitration, *KPMG*, 132 S. Ct. at 25, and abandon the arbitral forum altogether. Either way, the Board's holding "would stand as an obstacle to the accomplishment of the FAA's objectives."

Next, the Board, citing to *Gilmer,* reasoned that "the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the statute.'" *D. R. Horton*, 2012 NLRB LEXIS 11, *39-40. The Board overlooked that in such cases as *Gilmer* the Supreme Court focused on whether an arbitral forum would allow the parties an opportunity to vindicate those federal statutory rights which form the basis of their claims. The proper inquiry is on whether the arbitral forum preserves "the

guarantee of the legal power to impose liability" for those statutory rights at issue in the arbitration. *CompuCredit*, 132 S. Ct. at 671. The Board thus focused on the wrong statute (the NLRA rather than the federal statute that forms the basis of the parties' claims), failed to ask the right question (whether the parties can vindicate those statutory rights forming the basis of their claims), and came to the wrong answer (the arbitration agreement is invalid if it does not provide for class arbitration even if the parties can effectively vindicate their statutory rights forming the basis of their claims).

In determining whether Congress "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," *Gilmer* required the Board to look to the text of the NLRA, its legislative history, or an "inherent conflict" between the NLRA's purposes and the arbitration of the underlying claims. *Gilmer*, 500 U.S. at 26. However, the Board never looked to the text or the legislative history of the NLRA, and there is simply nothing in the text or legislative history which would suggest that Congress evinced a clear congressional command to override the FAA's mandate to enforce employment arbitration agreements containing class action waivers in accordance with their terms. *See CompuCredit*, 132 S. Ct. at 673 (if a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according

to its terms"). Moreover, as *Gilmer* and its progeny attest, employment arbitration agreements containing class action waivers, such as the Board would prohibit here, have been enforced and held to be adequate to further the purposes of the employment laws. It is thus hard to conceive an "inherent conflict" between the NLRA and the arbitration of claims arising under the employment laws.

Finally, the Board stated that employment arbitration agreements containing class action waivers fall within the FAA's savings clause and are void as against public policy. *D. R. Horton*, 2012 NLRB LEXIS 11, at *47. Under the savings clause, arbitration agreements are enforceable "save upon such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. §2. Since contracts can theoretically be voided if against public policy, the Board reasoned that employment arbitration agreements containing class action waivers can be voided under the savings clause. However, to void an agreement on public policy grounds, the policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *W. R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (citation omitted). In finding a non-waivable right to file a class action in what it conceded to be

"an issue of first impression," the Board failed to identify any well-defined public policy in the NLRA or the NLGA for such a right -- indeed, it has taken the Board over 80 years in administering the NLRA to uncover such a "core substantive right" -- and the right, such as it is, can thus arise only from the Board's "general considerations of supposed public interests." Of course, in its eagerness to establish such a right, the Board necessarily overlooked the "emphatic federal policy" reflected in the FAA favoring arbitration and the FAA's mandate to enforce arbitration agreements, including those containing class action waivers, in accordance with their terms.

c. The majority of federal courts have declined to follow *D. R. Horton.*

The Board's conclusion that its holding in *D. R. Horton* "does not conflict with the letter or interfere with the policies underlying the FAA" has been rejected by the vast majority of the federal courts that have been called upon to consider the issue. *See*, *e.g.*, *Carey v. 24 Hour Fitness,* 2012 U.S. Dist. LEXIS 143879, at *6 ("[t]he *Horton* decision is neither binding nor subject to deference, and is inconsistent with Fifth Circuit and Supreme Court authority"); *Delock v. Securitas Servs. USA, Inc.*, 2012 U.S. Dist. LEXIS 107117, * 11-18 (E.D. Ark. Aug. 1, 2012) (declining to follow *D. R.*

Horton as its reasoning "conflicts with the FAA and is inconsistent with" *Gilmer*, *Concepcion*, and *CompuCredit*); *Spears v. Mid-America Waffles, Inc.*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012) (*D. R. Horton* is contrary to *Concepcion*); *De Oliveria v. Citicorp. N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573, *7 (M.D. Fla. May 18, 2012) (declining to follow *D. R. Horton* in light of Eleventh Circuit case law enforcing class action waivers in arbitration agreements in FLSA collective actions); *Morvant*, 2012 U.S. Dist. LEXIS 63985, *33 (declining to follow *D. R. Horton* as its reasoning "does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms"); *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, *26-27 (N.D. Cal. April 13, 2012) (declining to follow *D. R. Horton*, in part, "[b]ecause Congress [in enacting the NLRA] did not expressly provide that it was overriding any provision in the FAA" and, as a result, "the Court cannot read such a provision into the NLRA and is constrained to enforce the instant agreement according to its terms"); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 5277, *20 (S.D.N.Y. Jan. 13, 2012) (declining to follow *D. R. Horton* "to support a conflicting reading" of *Concepcion*).

VII. CONCLUSION

The District Court's Order should be affirmed. Accordingly, Bloomingdale's respectfully requests this Court to affirm the District Court's Order in all respects, to award Bloomingdale's its costs on appeal, and to issue such other and further relief as this Court deems appropriate.

VIII. CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,135 words.

IX. STATEMENT OF RELATED CASES

Bloomingdale's is not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

Dated: December 12, 2012

Respectfully submitted,

s/Catherine E. Sison
Catherine E. Sison
Attorney for Appellee
Bloomingdale's, Inc.

ADDENDUM

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

29 U.S.C. §2:

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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

29 U.S.C. §4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in

the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Norris-LaGuardia Act, 29 U.S.C. §101, *et seq.*

29 U.S.C. §101:

No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [29 USCS §§101 et seq.]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [29 USCS §§101 et seq.].

29 U.S.C. §102:

In the interpretation of this Act [29 USCS §§101 et seq.] and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or

other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

29 U.S.C. §103:

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act [29 USCS §102], is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

National Labor Relations Act, 29 U.S.C. §157 *et seq.*

29 U.S.C. §157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS §158(a)(3)].

29 U.S.C. §158(a)(1):

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS §157].

9th Circuit Case Number(s) 12-55578

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