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January 23, 2008

***Via E-Mail and Overnight Mail***:

Barry J. Kearney, Esq.
Associate General Counsel
Department of Advice
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Neiman Marcus
Case No. 20-CA-33510

Dear Mr. Kearney:

We represent the Chamber of Commerce of the United States of America ("the Chamber"). The Chamber is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

We thank you for the opportunity to share our views regarding this matter with your office both in writing and in the upcoming meeting with the General Counsel scheduled for Thursday, January 24, 2008.

As we understand it, based on Ms. Paula Katz's letter dated September 7, 2007 and a subsequent conversation with your office in early January, the issue before Advice is whether the employer's requirement of a particular joinder provision in "The Neiman Marcus Group, Inc. Mandatory Arbitration Agreement" (Agreement) constitutes a violation of the § 7 rights of Neiman Marcus employees to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."

The provision in question (¶ 15) – directed in terms not to what employees can do but to the authority of the arbitrator selected to hear a dispute governed by the Agreement – provides, in pertinent part:

> "The arbitrator shall not consolidate claims of different employees into one (1) proceeding, nor shall the arbitrator have the authority to consider, certify, or hear an arbitration as a class action."

In our view, it would be an entirely unprecedented interpretation of § 7 to issue a complaint on the theory that § 7 gives employees a right to a particular joinder device in an arbitration proceeding – a forum dealing not with their rights under the NLRA (including its amendments) but disputes arising under other federal or state employment laws. Employees have a § 7 right – unimpaired by anything in the Agreement – to discuss their grievances with other employees, to seek common counsel, and to pursue their grievances in an arbitration. We can assume for present purposes that they have a right – again, unimpaired by anything in the Agreement – to file their claim as a group. However, they do not, under any plausible reading of the NLRA, have a § 7 right to have their claim in fact proceed as a class action in arbitration. The law is clear that the procedures governing private arbitration, including the availability vel non of the class action joinder device, are determined by the contract between employer and the employee.

The Supreme Court has ruled, in a number of cases dealing with private arbitration agreements under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., that the scope of and procedures governing the arbitration are determined by the agreement of the parties. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held that the FAA-based presumption of arbitrability required the enforcement of predispute agreements dealing with federal or state employment laws. Then, in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 102 (2001), the Court confirmed that employers could impose these agreements on their new and existing employees as a condition of employment. Such agreements are enforceable as a matter of federal law "save upon such grounds as exist at law or in equity for the revocation of any contract." FAA, 9 U.S.C. § 2. Under the FAA, the states must apply general contract principles; they cannot carve out special restrictions for arbitration agreements even where they purport to do so as a matter of their public policy. See *Perry v. Thomas*, 482 U.S. 483 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). Indeed, only Congress can provide for a different rule than the FAA-based presumption of arbitrability.

We note that the employees in question are not represented by a labor union. But even if a § 9 representative were in place, that representative would have no authority under § 8(d) to insist on a union role in determining whether the employer could require its employees to arbitrate disputes involving their individual employee rights under federal or state laws other than NLRA, or what the procedures governing that arbitration would be. This is the holding of the U.S. Court of Appeals for the D.C. Circuit, sitting en banc, in *ALPA v. Northwest Airlines, Inc.*, 199 F.3d 477 (1999). Although *Northwest Airlines* arises under the Railway Labor Act, it has been relied on in two Advice Memoranda finding that agreements to arbitrate non-NLRA statutory claims are nonmandatory subjects of bargaining. As this office stated in *Kelsey-Hayes Co.*, Case 8-CA-36737, 2007 WL 4233188 (NLRB GC, Feb. 28, 2007), p.4:

> "We see a clear rule of law emerging from [*Alexander v.*] *Gardner-Denver*[, 415 U.S. 36 (1974)] and *Gilmer*. Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. ... Because a union has no authority to concede the individual's statutory right of access to courts, the D.C. Circuit concluded that that statutory right is a nonmandatory subject of bargaining."

Similarly, in *Triangle Construction and Maintenance, Inc.*, Case 24-CA-9921, 2004 WL 2791722 (NLRB GC, Nov. 15, 2004), this office, again relying on *Northwest Airlines*, ruled that an employer could unilaterally implement an individual arbitration procedure whereby current bargaining unit employees receive a cash incentive to waive their right to bring statutory employment-related discrimination and personal injury claims in a judicial forum.

The availability or nonavailability of class actions in arbitrations does not alter these principles or provide the NLRB with any new-found authority to regulate the procedures in private arbitrations governed by the FAA. The Court in *Gilmer* rejected the argument that "arbitration procedures cannot adequately further the purposes of [federal age discrimination law] because they do not provide for broad equitable relief and class actions." 500 U.S. at 32. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 454 (2003), the Court made clear that whether the class action device is available in arbitration is a matter of "enforcing the parties' arbitration agreements according to their terms." Thus far, the clear trend of decisions is to uphold joinder provisions that, as in the Nieman Marcus Agreement, clarify the ground-rules for the arbitration by informing the arbitrator that he or she lacks authority to consolidate claims or conduct the proceeding as a class action.[1]

We understand from Ms. Katz's letter of September 7, 2007 (p.4) that your office may be concerned that the Agreement "does require employees to forego the substantive rights afforded

[1] See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1366, 1378 (11th Cir. 2005) (provision barring covered claims from being "brought as a class or collective action" in arbitration not unconscionable under Georgia law and "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*"); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298, 301 (5th Cir. 2004) (provision in arbitration agreement preventing "joinder" permissible under Texas law and the Fair Labor Standards Act (FLSA)); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (arbitration agreement precluding class actions permissible because there is no evidence that "Congress intended to confer a nonwaivable right to a class action under [the FLSA]"); see also *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166 n. 23 (Haw. 1996) (rejecting argument that arbitration agreement was inherently unfair because it eliminated the opportunity for class actions); *Strand v. U.S. Bank Nat'l Assn. ND*, 693 N.W. 2d 918. 921, 926 (N.D. 2005) (arbitration clause in credit card agreement containing class action waiver not unconscionable because limiting the "use of a class action or class arbitration does not prohibit any substantive remedy that would otherwise be available to [plaintiff]"). Even the California Supreme Court, while cutting against this trend, has held that class action waivers in arbitration agreements are not per se unconscionable as a matter of state law. See *Gentry v. Superior Court of Los Angeles*, 165 P.3d 556 (Cal. 2007).

by the state to engage in the concerted activity of having their claims heard jointly, in a consolidated manner, or in a class action." It is doubtful that even as a general matter the class action procedure is a "substantive" right; rather, it is a creature of Federal Rule of Civil Procedure 23, which is governed by the Rules Enabling Act, 29 U.S.C. § 2072(b) ("Such rules [of practice and procedure] shall not abridge, enlarge or modify any substantive right."). In any event, it is not a substantive right under the NLRA.

We look forward to our meeting with you on January 24, 2008 to further discuss these issues.

Respectfully submitted,

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