ORAL ARGUMENT NOT YET SCHEDULED
NO. 15-1457

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRICE-SIMMS, INC., doing business as Toyota Sunnyvale,

Petitioner/Cross-Appellee,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Appellant.

ON PETITION FOR REVIEW FROM AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
NLRB-32-CA-138015 (November 30, 2015)

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO OPENING BRIEF OF PETITIONER/CROSS-APPELLEE

Robert G. Hulteng
Michael G. Pedhirney
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
Telephone: 415-433-1940
Facsimile: 415-399-8490
rhulteng@littler.com
mpedhirney@littler.com
Attorneys for Petitioner /Cross-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

GLOSSARY

Agreement:	Toyota Sunnyvale's Binding Arbitration Agreement
ADEA:	Age Discrimination in Employment Act
FAA:	Federal Arbitration Act
FLSA:	Fair Labor Standards Act
FRCP:	Federal Rules of Civil Procedure
Motion:	Toyota Sunnyvale's October 1, 2014 Motion to Compel Individual Arbitration
NLGA:	Norris LaGuardia Act
NLRA:	National Labor Relations Act
NLRB or Board:	National Labor Relations Board
Order:	November 30, 2015 Final Decision and Order by the NLRB

I. INTRODUCTION

The National Labor Relations Board ("NLRB" or "the Board") bases its argument supporting its Decision and Order primarily on two faulty premises: (1) class action waivers, and thus the Company's Arbitration Agreement, are illegal under the National Labor Relations Act ("NLRA"); and (2) because the "savings clause" of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, forbids enforcement of illegal contracts, the Agreement is not enforceable irrespective of the FAA. The Board separately maintains that the Company violated Section 8(a)(1) by taking steps to enforce the allegedly unlawful Agreement by filing a motion to compel individual arbitration in California Superior Court. None of these arguments have any merit.

First and foremost, the Board is not entitled to deference on its unreasonable and unsupported interpretation of the NLRA. Further, the Board is not entitled to deference on its interpretation of the FAA. The Supreme Court has repeatedly instructed the Board that it must defer to the policies of other federal statutes when enforcing the NLRA. *See, e.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("*Hoffman Plastic*"); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Although the Board pays lip service to that instruction in the present case, as a practical matter, the Board ignores the instruction. Here, by focusing with tunnel vision on the policies of the NLRA, the Board has failed to

defer to the Supreme Court's decisions construing the FAA and its policies.

The Board's position thwarts the purpose of the FAA, as well as other federal statutes recognizing the procedural nature of collective litigation, and essentially destroys the benefits of the arbitration framework. Accordingly, the Board's Order should be reversed.

II. LEGAL ARGUMENT

A. The Board Is Entitled To No Deference In Its Interpretation Of The Interplay Of The NLRA And FAA.

The Board interprets the NLRA to create an independent *substantive* right to maintain a class or collective action *procedure* in certain court actions. In elevating a court procedure to substantive status, the Board relegates the FAA to also-ran status, or at most a submissive, yielding role in the analysis. Here, as in the past, where it has met rejection by the Supreme Court, the Board has overstepped its authority.

No deference should be given where the Board exceeds its authority under the NLRA. *See Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499-500 (1960). Where "an issue . . . implicates its expertise in labor relations, a *reasonable* construction by the Board is entitled to considerable deference." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (emphasis added). However, deference is not warranted where the Board's decision is neither

rational nor consistent with the NLRA. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 576 (1994); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'") (citation omitted) (quoting *Am. Ship Bldg. Co.*, 380 U.S. at 318). Further, and to the extent the Board attempts to interpret or distinguish pro-arbitration Supreme Court decisions such as *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), this Court is "not obligated to defer to [the Board's] interpretation of Supreme Court precedent under [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] or any other principle." *N.Y. N.Y. LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

Particularly relevant to this dispute is 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." *Southern S.S. Co.*, 316 U.S. at 47. "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* "[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the

NLRA." *Hoffman Plastic*, 535 U.S. at 144 ("where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield.") *Id*. at 147. The Board's remedy in the present case encroaches upon the FAA, which the Board has no authority to enforce or administer, much less nullify.

Sometimes the Board has restrained itself, properly so, when federal statutes it does not administer were in play. For example, in *Can-Am Plumbing, Inc*., the Board acknowledged its "obligation to accommodate the NLRA to other Federal statutes such as the Davis-Bacon Act." *Can-Am Plumbing, Inc*., 350 NLRB 947, 947-48 (2007). Also, in *Int'l Bhd. Of Electrical Workers, Local 48*, 332 NLRB 1492, 1501 (2000), the NLRB deferred to the Labor Department's interpretation of the same statute. In yet another example, *OXY USA, Inc*., 329 NLRB 208, 210-12 (1999), the NLRB deferred to the Department of Labor and the Department of Justice on the legality, under Section 302 of the Labor Management Relations Act, of an employer's proposal in collective bargaining negotiations. And in two other cases, the NLRB deferred to the Equal Employment Opportunity Commission in construing the Americans with Disabilities Act when a question under that statute overlapped with issues under the NLRA. *Roseburg Forest Prods. Co*., 331 NLRB 999, 1001-03 (2000); *PCC Structurals, Inc*., 330 NLRB 868, 871-872 (2000).

However, when the Board has failed properly and adequately to account for congressional directives in statutes other than the NLRA, the Supreme Court has not hesitated to reject Board rulings. *See Hoffman Plastic*, 535 U.S. at 140 (Board improperly awarded back pay to an illegal alien because such relief was foreclosed by federal immigration policy in the Immigration Reform and Control Act, which the Board has no authority to enforce or administer); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-906 (1984) (Board's remedial authority was limited by federal immigration policy contained in the Immigration and Nationality Act); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626-35 (1975), rh'g denied, 423 U.S. 884 (1975) (although a subcontracting agreement negotiated by a union satisfied the literal language of the NLRA, it resulted in a violation of the antitrust statutes); *United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 108-111 (1958) (in interpreting the secondary boycott provisions of the NLRA, the Board improperly adopted its own interpretation of the Interstate Commerce Act).

These same principles must apply to the present case. However, in this instance, the Board merely devotes lip service to the Supreme Court's directive that the NLRB defer to other federal statutes and avoid trenching upon those other statutes' policies. Accordingly, the Board is not entitled to any deference in this case with respect to its interpretations of the NLRA and FAA.

B. The FAA Requires Enforcement Of The Agreed-Upon Terms Of The Parties' Arbitration Agreement.

1. The Board's Reliance On The FAA's Savings Clause Is Insufficient To Justify Its Position.

The Board focuses its analysis singularly on the issue of whether the Agreement violates the NLRA. The Board's analysis, however, does not fully account for the FAA's objectives and the Supreme Court's clear and consistent directives in class action waiver cases. Indeed, the Board's analysis suffers from circular and self-serving reasoning that is inconsistent with the objectives of the FAA.

The Board's central argument is that the Agreement falls under the FAA's savings clause, 9 U.S.C. § 2, because the Board decided that the Agreement is unlawful under the NLRA. Thus, the argument goes, if the Board declares the class waiver unlawful, it is unlawful, and the savings clause precludes enforcement. However, the enforceability of the Agreement is not wholly dependent on the NLRA's policies and objectives. Instead, what is lacking from the Board's argument is any meaningful analysis of the policies and objectives of the FAA.

The savings clause does not exist in a vacuum, but rather it is part of the FAA statutory scheme. The FAA represents congressional preferences that stand on their own. Thus, in *Concepcion*, 563 U.S. at 343, the Supreme Court concluded

that permissible grounds for invalidating arbitration agreements under Section 2 of the FAA may not include a "preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" *Id*. at 343 (citation omitted). Therefore, a rule used to void an arbitration agreement is not controlling under Section 2 of the FAA simply because it would apply to "any contract." Rather, the standard is whether a facially neutral rule prefers procedures that are incompatible with arbitration and thus "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id*.

Under this standard, the Board's "illegality" reason for not enforcing the Agreement does not pass muster. In addition to the fact that the Agreement is not illegal under the NLRA (as discussed in more detail in Toyota Sunnyvale's Opening Brief and below), the Agreement should be enforced because notwithstanding the Board's contention that it is proffering a facially neutral contract defense, the Board is in fact contending that class action waivers in arbitration agreements between employers and "employees" (as defined under Section 2(3) of the NLRA, 29 U.S.C. § 152(3)) are simply illegal under the NLRA, and that is where the analysis begins and ends – because the waiver is illegal under the NLRA, the savings clause bars its enforcement.

But what of the FAA and its policies? Although the Board claims that it is not against arbitration, its decision is effectively an attack on the adequacy of

arbitration procedures. The Supreme Court repeatedly has rejected challenges to the "adequacy of arbitration procedures," concluding such attacks are "out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). A party to an arbitration agreement "'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (citation omitted). As a result of this trade, an arbitration agreement is enforceable even if it permits less discovery than in federal courts and even if a resulting arbitration cannot go forward as a class action or class relief cannot be granted by the arbitrator. *Id.* at 31-33. The Agreement is thus entirely consistent with the FAA, as it fulfills its objective of less formal individual dispute resolution.

Even assuming the Board is asserting a general defense to contract formation not specific to arbitration agreements, the effect of the Board's reasoning stands as an obstacle to the accomplishment of the FAA's objectives. As will be discussed below, requiring availability of class action procedures not agreed upon by the parties thwarts the very purpose of the FAA and arbitration.

2. Requiring The Availability Of Classwide Procedures Interferes With Fundamental Attributes Of Arbitration And Thus Creates A Scheme Inconsistent With The FAA.

In *Concepcion*, 563 U.S. at 340, 351-52, the Supreme Court repudiated a

state court rule finding class action waivers in arbitration agreements to be unconscionable. The Court explained that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id*. at 343. Accordingly, the availability of a class mechanism, as the Board contends the NLRA requires, is an actual impediment to arbitration envisioned by the FAA. The savings clause therefore cannot be a basis for invalidating the waiver of class procedures in the arbitration agreement. *See generally D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Rather, the Board's position disfavors arbitration and "creates a scheme inconsistent with the FAA."

The Supreme Court addressed an argument similar to that being made by the Board here and rejected it. In *American Exp. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the party opposing enforcement of an arbitration agreement's class action waiver argued that if individual arbitration was required, it could not effectively vindicate its rights under the federal anti-trust laws because the cost of proceeding individually would be prohibitive. The Supreme Court, however, rejected the argument, concluding, "One might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the

procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in [*Concepcion*, 563 U.S. 333]." *Italian Colors*, 133 S. Ct. at 2310.

So too here. The parties waived class procedures in favor of streamlined individual arbitration. As the Court held, "federal law" does not provide a "nonwaivable *opportunity*" for class litigation whether under "Rule 23" or "some other informal class mechanism in arbitration." Instead, the parties' agreement to arbitrate individually must be enforced.

3. The Court Should Not Follow *Lewis v. Epic Systems*, Which Erroneously Misinterprets FAA Precedent.

The Board's reliance on *Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016), is also unavailing. While the *Lewis* court found that a mandatory class action waiver violates the NLRA and thus falls within the FAA's savings clause, its reasoning is incorrect and goes against the vast majority of courts that have decided this issue.

First of all, even the *Lewis* panel acknowledged that resort to a class action mechanism is a procedure, referring to it as "a collective **process**." 2016 WL 3029464, at *9 (emphasis added). What *Lewis* got wrong, but almost every other court to consider the issue has gotten right, is that it follows from the premise that a class mechanism is a process, not a substantive right, that class procedures may be waived by contract. *See Gilmer*, 500 U.S. at 26, 32. The FAA thus demands

enforcement of such waivers. *E.g., D.R. Horton, Inc. v. NLRB*, 737 F.3d at 357; *Owen v. Bristol Care, Inc*., 702 F.3d 1050, 1052-53 (8th Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 2016 U.S. App. LEXIS 10002, at *7-8 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295-98 (2d Cir. 2013).

Lewis failed to accommodate Congressional intent that class procedures are just and only that: class *procedures*. The inherently procedural nature of the class action device is a recurring theme in the Supreme Court's decisions. *See, e.g*., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 405-06 (2010); *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 845 (1999). As the Court stated, the "right of a litigant to employ Rule 23 **is a procedural right only**, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (emphasis added).

Instead, *Lewis* dismissively concluded, ". . . just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process . . . . The NLRA does." 2016 WL 3029464 at *9. This shocking conclusion declares that the NLRA, not the collective action procedures in the ADEA and FLSA or Rule 23, is the independent source of the "substantive right" to bring class actions. If that

reasoning does not "trench" on these federal laws, as well as the FAA, nothing does.

Instead, following the Board's and 7th Circuit's flawed reasoning, the NLRA trumps all, including the Rules Enabling Act, 28 U.S.C. § 2072(b) – "which instructs that rules of procedure 'shall not abridge, enlarge, or modify any substantive right,'" *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), – and the FAA. This reasoning suggests that there are three separate bases for pursuing class or collective actions – Rule 23, the ADEA or FLSA collective action process, and the NLRA. If that is the case (which it is not), applying the Board's reasoning, a class action need not satisfy the requirements of Rule 23(a) (*i.e..,* numerosity, commonality, typicality, and fair and adequate representation by the class representative) because the NLRA provides a separate and independent substantive basis for pursuing class relief. Clearly, this is not what Congress intended when it enacted the NLRA.

Lewis also failed to consider the FAA's policies though it purported to "harmonize" the FAA with the NLRA. Instead, however, *Lewis* engaged in circular reasoning (which the Board is asking this Court to repeat), as it simply deferred to the Board's analysis of the NLRA and then concluded that the FAA's savings clause required that the Board-declared illegal class waiver be nullified.

However, this one-sided inquiry is not what controlling Supreme Court authority demands. In *Hoffman Plastic*, 535 U.S. at 144 (a case not cited in *Lewis*), the Supreme Court reviewed a long line of cases reversing NLRB decisions, stating, "we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." Likewise, and as noted above, in *Southern S.S. Co.,* 316 U.S. at 47 (also not cited in *Lewis*), the Court held, "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." The *Lewis* Court's analysis was one-sided, and it did what the Supreme Court forbids: defer to the Board without due regard for the important policies underlying the FAA and other federal laws the Board does not administer, like the Federal Rules of Civil Procedure (including the Rules Enabling Act) and the Age Discrimination in Employment Act (allowing arbitration without availability of class process (*Gilmer*, *supra*, 500 U.S. at 30)).

The *Lewis* decision is accordingly at odds with the Supreme Court authority expressly providing that compelling the class action procedure into arbitration agreements is inconsistent with the FAA. *See*, *e.g.*, *Concepcion*, 563 U.S. at 347-48 (imposing class arbitration is inconsistent with the substantive provisions and policy of the FAA); *Stolt-Nielsen v. Animal Feeds*, 559 U.S. 662, 685-86 (2010)

(the right of a party to enforce an arbitration agreement under Section 2 of the FAA is a substantive right, and a party to such an agreement cannot be compelled to submit claims to class arbitration unless it has agreed to do so); *Italian Colors Restaurant*, 133 S. Ct. at 2312. Indeed, the Supreme Court has repeatedly emphasized that mandating class procedures into an arbitration agreement deprives the parties to the agreement of "the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348; *see also Stolt-Nielsen*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 31 (parties to an arbitration agreement "'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and

expedition of arbitration'") (citation omitted).

Finally, *Lewis*'s rationale leads to absurd conclusions. As noted above, the *Lewis* court concluded that, unlike Rule 23, the ADEA, and the FLSA, the NLRA independently "guarantee[s] collective process" in the form of a class action. 2016 WL 3029464 at *9. If this is true, then the NLRA creates a wholly separate body of substantive class action law that essentially precludes an employer from ever defeating certification or decertifying a class under Rule 23 since the Federal Rules of Civil Procedure cannot limit the NLRA's reach.[1]

For example, denial of certification on the ground that commonality does not exist would (as per *Lewis*) violate the independent substantive class action right created by the NLRA by denying the plaintiffs the "collective process" "guarantee[d]" by the NLRA. This is not a farfetched scenario: arguments against certification based on Rule 23 (a federal law) are analytically the same as the argument that an arbitral class-action waiver contained in an agreement governed by the FAA must be enforced: each is a defense to a class action proceeding as

[1] This is starkly evident where the Board argues that the Company's motion to compel individual arbitration was a violation of Section 8(a)(1) of the NLRA. *See* Respondent's Brief, at 57-62. The Board's position, taken to its logical conclusion, further demonstrates how the Company would be deprived of its right to defend against class actions and essentially guarantees that every class action filed proceeds to trial as a class action – assuming there is no earlier resolution of the dispute. *But see Cellular Sales of Mo., LLC*, 2016 U.S. App. LEXIS 10002 at *9-10 (finding the company's attempt to enforce a class-action waiver did not violate section 8(a)(1) and declining to enforce Board's award).

such. If the latter violated the NLRA's "guarantee [of] collective process," so would the former. This scenario is not at all implausible given the Board's conclusion in this case that Toyota Sunnyvale's mere assertion of the Agreement as a defense to a class action violates the NLRA because it sought "an objective that is illegal under federal law" pursuant to *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983). *See* Respondent's Brief, at 57-62. However, "federal law" includes the FAA, FRCP, Rules Enabling Act, and collective procedures under the ADEA and FLSA, all of which have been enforced by the Supreme Court but brushed aside by the Board and *Lewis*.[2]

C. The Board's Interpretation Of The NLRA Is Unreasonable.

1. The NLRA Lacks A Clear Congressional Command Necessary To Override The FAA.

The Board argues the NLRA applies to lawsuits and thus the availability of class action procedures. As such, the Board concludes that the Agreement, which

[2] As explained in Toyota Sunnyvale's Opening Brief, the Board's remedy and reliance on *Bill Johnson's* are both unwarranted. Toyota Sunnyvale merely defended itself against a lawsuit by moving to compel arbitration. It can hardly be argued that Toyota Sunnyvale's Motion was objectively baseless. To the contrary, on October 24, 2014, the Superior Court of California granted Toyota Sunnyvale's Motion. It followed controlling U.S. Supreme Court precedent. Moreover, prior to Toyota Sunnyvale's Motion, the California Supreme Court, in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 141-42, 59 Cal. 4th 348, 372-73 (Cal. 2014), rejected the Board's conclusion in *D.R. Horton.* As a result, all lower California courts were bound to adhere to the *Iskanian* precedent. *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939-40, 57 Cal. 2d 450, 455 (Cal. 1962).

prospectively prohibited "concerted legal action," violates the NLRA, regardless of whether the Company engaged in any purported acts of retaliation.

As explained in Toyota Sunnyvale's Opening Brief, the FAA "requires courts to enforce agreements to arbitrate according to their terms" and that courts must do so "even when the claims at issue are federal statutory claims, **unless the FAA's mandate has been overridden by a contrary congressional command**." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added). A "congressional command" must be found in an unambiguous statement in the statute, and cannot be gleaned from ambiguous statutory language. *Id.* at 670-73. The burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies, and that a federal statute's silence on the subject of arbitration *must* lead to the enforcement of an arbitration agreement in accordance with its terms. *Id*. at 672 n.4.

Lower courts agree that the NLRA must contain, but does not contain, a clear "congressional command" to override the FAA. *See, e.g.*, *D.R. Horton*, 737 F.3d at 362; *Morvant v. P.F. Chang's China Bistro*, 870 F. Supp. 2d 831, 845-46 (N.D. Cal. 2012); *Jasso v. Money Mart Express, Inc*., 879 F. Supp. 2d 1038, 1048-49 (N.D. Cal. 2012). These courts also found that the NLRA is essentially silent on the matter and that no such provision may be read into it, particularly in light of the fact that the FAA was enacted in 1925 in response to widespread judicial

hostility to arbitration agreements, while the NLRA was enacted later in 1935 and subsequently amended in 1947 – providing Congress with two opportunities to express its command. *Morvant*, 870 F. Supp. 2d at 845; *Jasso*, 879 F. Supp. 2d at 1047 ("there is no language in the NLRA (or in the related Norris-LaGuardia Act) demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA").

The Board has not and cannot identify any contrary congressional command in this instance. The Board tries to dodge this argument contending that it need not show any contrary congressional command because there is no conflict between its interpretation of the NLRA and the savings clause of the FAA. As explained above, the Board's reliance on the savings clause is circular: the Board declares the Agreement unlawful and therefore the savings clause requires that it not be enforced. However, the savings clause is not all there is to the FAA, but rather the strong federal policies requiring enforcement of arbitration agreements as written, supporting individual (as opposed to class) arbitration, ensuring efficient resolution of disputes without the complexity and delays of court process, and acknowledging arbitration's limitations when it comes to class litigation, are paramount. *Concepcion*, 563 U.S. at 343.

Moreover, the Board's interpretation of the NLRA is equally flawed. As explained in Toyota Sunnyvale's Opening Brief, neither the NLRA's plain

language nor its legislative history provides that Section 7 of the NLRA, 29 U.S.C. § 157, creates a substantive right for employees to bring or participate in class or collective actions when an arbitration agreement governed by the FAA provides otherwise. While the NLRA protects concerted activity, it does not preclude defenses regarding the procedural mechanism through which employees may choose to assert a claim against an employer.[3] Thus, if a group of employees asserts purported class claims that lack "commonality" or "typicality," as required by Rule 23 of the Federal Rules of Civil Procedure, the group's ability to bring their claims as a class may be thwarted on such bases, irrespective of the NLRA.

Certainly, it is not an unfair labor practice to assert procedural hurdles created by other federal laws to the class claims as a bar. Likewise, if employees agreed to arbitrate their claims on an individualized basis, the FAA provides a defense to the class claims through the arbitration agreement that, consistent with the FAA's purposes, requires informal, bilateral dispute resolution. Nothing in the NLRA's text evinces a "congressional command" forbidding enforcement of an agreement to arbitrate bilaterally in accordance with the FAA. While employers may not retaliate against employees engaging in concerted activity, nothing in the NLRA guarantees that those efforts will succeed.

[3] Notably, the Board only cites to cases where agreements were found to infringe upon Section 7 rights in the union context. Respondent's Brief, at 35. These cases are inapposite because none discussed agreements in the FAA context.

2. Any Right To Class Action Procedures Is A Waivable Right.

The Board argues that for an arbitration agreement to be enforceable under the FAA and the NLRA, it must allow an employee to invoke collective procedures in obtaining an adjudication of statutory claims. This is directly contrary to *Concepcion*, *Gilmer* and related decisions, which hold that parties do not have a non-waivable right to obtain a collective adjudication of their claims. *Concepcion*, 563 U.S. at 340-343, 351-52; *Gilmer*, 500 U.S. at 30-32; *see Italian Colors Restaurant*, 133 S. Ct. at 2309 ("No contrary congressional command requires us to reject the waiver of class arbitration here"); *14 Penn Plaza LLC*, 556 U.S. at 269 ("At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims").[4]

[4] The Board attempts to distinguish *Gilmer* and related Supreme Court precedent on the ground that the NLRA is different than any other statute that has been analyzed in conjunction with the FAA. The Board asserts that because protecting collective action is an underlying policy of NLRA, there is a substantive right to collective actions, different from the procedural right under the ADEA or FLSA. Respondent's Brief at 51. This distinction, however, fails for two reasons. First, all of the controlling Supreme Court cases to date recognize the strength of the FAA's objectives, and the Board refuses to defer to those objectives. The Supreme Court's reasoning is just as applicable here, where the Board's interpretation of the NLRA and the FAA would create an insurmountable obstacle to and thwart the FAA's objectives. Second, the Board's insistence that the right to collective legal action is substantive (even though the statutory provisions addressing collective proceedings are indisputably procedural) is unsupported. Regardless, the negative

The Board improperly deemed the Agreement invalid solely due to the means it provided for arbitrators to adjudicate claims, regardless of the outcome of the adjudication.

D. The Norris-LaGuardia Act Is Inapplicable Here.

The Board did not rely upon the Norris-LaGuardia Act ("NLGA") in its Order, and does not rely upon the NLGA in its Brief.[5] The Intervenor admits as much. Intervenor's Brief, at 23-24. Yet, the Intervenor still insists upon the relevance of the NLGA. The NLGA divested federal courts of jurisdiction to issue restraining orders and injunctions "in a case involving or growing out of a labor dispute," except as provided therein. 29 U.S.C. § 101. The statute further provides that "yellow-dog" contracts – contracts in which an employee agreed "not to join, become, or remain a member" of a labor organization and agreed his or her employment would terminate if he or she did – are unenforceable in federal courts. *Id*. § 103. The statute also provided that any agreement "in conflict with the public policy declared" therein is "contrary to the public policy of the United States, shall

---

impact on arbitration and the FAA's objectives is the same, whether the purported "right" to collective actions in court is characterized as substantive or procedural.

[5] The NLRB has no statutory authority to enforce the NLGA. The NLRB is not authorized to stretch its jurisdiction to the realm of the NLGA under its enabling statute, the NLRA, 29 U.S.C §§ 151-169. Instead, the NLRB's jurisdiction is limited to responding to petitions for elections and charges of unfair labor practices. At least one court has found that the Board is not entitled to even "some deference" with regards to its interpretation of the NLGA, and that the NLGA did not bar enforcement of the arbitration agreement in that case. *See Morvant*, 870 F. Supp. 2d at 843-44; *see also D.R. Horton*, 737 F.3d at 362, n.10.

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." *Id*.

The Intervenor's attempted analogy of the Agreement to "yellow-dog" contracts fails. Intervenor's Brief, at 12. The Agreement in no way suggests, let alone requires, termination of employment of an employee who promises to arbitrate claims individually and is hired but then files a class action lawsuit in breach of the promise. That, however, is what "yellow-dog" contracts did, and that is what Congress outlawed. 29 U.S.C. § 103. Rather, the Agreement simply permits the Company to move to compel individualized arbitration under the FAA, without any effect on employment status whatsoever.

Further, the Intervenor's claim that the NLGA should be considered as further support for its argument that class action waivers are illegal misinterprets the NLGA. The Intervenor contends that (a) "'any undertaking or promise' purporting to waive the right to engage in such concerted enforcement is unenforceable under section 3" of the NLGA; and (b) an arbitration agreement that would prohibit a class action is such a prohibited agreement. Intervenor's Brief, at 14. This contention, however, is incorrect.

Section 3 of Norris LaGuardia, 29 U.S.C. § 103, deprives the federal courts of jurisdiction to enforce (a) agreements not to join, become, or remain a union member (known as "yellow dog contracts"), or (b) agreements that conflict with a

public policy statement in Section 2 of the same statute, 29 U.S.C. § 102, which provides that employees should be free to engage in various forms of concerted activity. The Intervenor provides no case law showing that an agreement to waive class action procedures contained in a contract governed by the FAA is forbidden under the NLGA. The cases cited by the Intervenor, *e.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), do not establish a right to class action procedures in the teeth of a FAA-governed agreement and do not address the issue. By contrast, Section 4 of Norris LaGuardia, 29 U.S.C. § 104, deprives the federal courts of jurisdiction to issue injunctions to prevent individuals from engaging in a variety of acts relating to labor disputes. Section 4(d), on which the Intervenor incorrectly relies, prohibits an injunction to prevent a person from aiding another person in a labor dispute who is being proceeded against in, or is prosecuting, an action in a federal or state court. This section does not address agreements or contracts of any kind, much less FAA arbitration agreements.

In this regard, *CompuCredit* commands the same result as with the NLRA (explained above). Because the NLGA does not expressly foreclose enforcement of an FAA agreement that provides for individualized arbitration in a cost-efficient, expedited process, as FAA agreements are supposed to do, it cannot be relied on to defeat enforcement of the duty to arbitrate individually.

1. Even Assuming, *Arguendo*, There Is A Conflict Between The FAA And NGLA, The NLGA Must Defer To The FAA.

The Intervenor fails to cite any court decision treating the NLGA as repealing the FAA. If some conflict did exist between the NLGA and the FAA, it would be up to courts, not the Board, to resolve a conflict between two federal statutes outside the Board's jurisdiction. *See, e.g.*, *Cellular Sales of Mo., LLC v. NLRB*, 2016 U.S. App. LEXIS 10002, at *7-8 (reversing NLRB and concluding that employer did not violate section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes); *Owen*, 702 F.3d at 1053. Moreover, if there existed a conflict between the NLGA and the FAA, this Court should reconcile the decades-old NLGA with the Supreme Court's more recent jurisprudence under the FAA.

In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 250-252 (1970), not cited by the Intervenor, the Supreme Court made clear that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In that case, the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement, when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor

Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Boys Markets, Inc.*, 398 U.S. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The Court also found the NLGA "was responsive to a situation totally different from that which exists today." *Id.* at 250. At the time it was passed, federal courts regularly entered injunctions "against the activities of labor groups." *Id.* To stop this, Congress passed the NLGA "to limit severely the power of the federal courts to issue injunctions" in labor disputes. *Id.* at 251. However, in following years, Congress' focus "shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* Because this "shift in emphasis" occurred "without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act," "it became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Id.*

Here, even if the NLGA could be construed as applying to individual employment arbitration agreements, that construction would have to give way in light of the FAA and subsequent developments, especially emanating from the Supreme Court. An arbitration agreement with a waiver of class procedures is

clearly not "the type of situation to which the Norris-LaGuardia Act was responsive." *Id*. at 251-52. An individual employment arbitration agreement governed by the FAA is unrelated to the NLGA's purpose of fostering the growth of labor organizations at the dawn of the last century. Furthermore, just as the LMRA manifests a strong congressional policy in favor of labor arbitration, the FAA evinces a strong policy in favor of the enforcement of arbitration agreements, including and especially (*see, e.g.*, *Concepcion* and *Italian Colors*, *supra*) those containing class waivers. And just as the NLGA must be viewed as accommodating Congress' intentions under the LMRA, so too must it accommodate Congress' intentions under the FAA.

III. CONCLUSION

For each of the reasons set forth above and in the Company's Opening Brief, the Company's Petition should be granted and the Board's Order should be vacated and denied enforcement.

Dated: June 17, 2016

Respectfully submitted,

/s/ Robert G. Hulteng

Robert G. Hulteng
Michael Pedhirney
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
415-433-1940

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,366 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman, Font 14.

Respectfully submitted,

/s/ Robert G. Hulteng

Robert G. Hulteng
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
415-433-1940
rhulteng@littler.com

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2016, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Robert G. Hulteng
Counsel for Petitioner

Firmwide:141049729.1 066411.1005

STATUTORY ADDENDUM

TABLE OF CONTENTS

Except for the following, all applicable statutes, etc., are contained in the Reply To Respondent's Opposition To Opening Brief for Petitioner/Cross-Appellee.

9 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.

28 U.S.C. § 2072

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates [magistrate judges] thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title [28 USCS § 1291].

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.

29 U.S.C. § 104

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [29 USCS § 103];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [29 USCS § 103].

29 U.S.C. § 152(3)

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice,

and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

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] . . ..

Fed. R. Civ. P. 23

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not

parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the

applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Firmwide:141054492.1 066411.1005