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)

JOINT DEFERRED APPENDIX

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National Labor Relations Board

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Respectfully submitted this 24th day of June, 2016.

TAB 1

FORM NLRB-501 (2-08)

NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-138015	10/2/2014

INSTRUCTIONS:

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

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Price-Simms, Inc.

b. Tel. No. (650) 550-7160

c. Cell No. N/A

f. Fax No. N/A

g. e-Mail
N/A

h. Number of workers employed
N/A

d. Address *(Street, city, state, and ZIP code)*
898 W. El Camino Real
Sunnyvale, CA 94087

e. Employer Representative
Littler Mendelson, P.C.
Robert G. Hulteng
650 California Street, 20th Floor
San Francisco, CA 94108-2693

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Car Dealership

j. Identify principal product or service
New and Used Cars

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Price-Simms, Inc. is maintaining a provision in their arbitration policy that requires employees to forego any rights they have to the resolution of employment-related disputes by collective action or class action.

RECEIVED
NLRB REGION 32
2014 OCT -2 PM 2:41
OAKLAND, CA.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Richard Vogel

4a. Address *(Street and number, city, state, and ZIP code)*
3440 Seven Hills Road
Castro Valley, CA 94546

4b. Tel. No. N/A

4c. Cell No. (510) 415-6491

4d. Fax No. N/A

4e. e-Mail
ricvog1@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* N/A

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Nicholas J. De Blouw
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 2255 Calle Clara, La Jolla, CA 92037

10/2/14
(date)

Tel. No. (858) 952-0354

Office, if any, Cell No. (858) 999-1118

Fax No. (858) 551-1232

e-Mail
Nick@bamlawca.com

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

PRIVACY ACT STATEMENT

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

NOTICE

You will note that the enclosed complaint has a Notice of Hearing for a specific date. Please compare that date now with your calendar and those of your parties and witnesses, for current conflicts. Requests for a brief postponement made within 10 days of complaint issuance will normally be honored. If no such request for a postponement is made to the undersigned, it will be assumed that no party has any objections to the hearing date. Thereafter, it can be assumed that any postponement requests will be denied by the undersigned (or resisted before an Administrative Law Judge), absent truly unforeseeable and unpreventable conflicts that arose following the ten-day period. In this regard, Board hearing dates are not considered to be subordinate to other social, business, or legal interests of the parties that may thereafter arise. Postponement requests for "settlement negotiations" are ordinarily denied (or resisted).

Any postponement request must be made in writing and give (a) the reason for the request; (b) the opposing party's position on postponement; and (c) suggested alternative dates of the requester and opposing party.

George Velastegui
Regional Director

TAB 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE

and **Case 32-CA-138015**

RICHARD VOGEL, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Charging Party Richard Vogel (Vogel), an Individual. It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board), and alleges that PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE (Respondent) has violated the Act as described below:

1.

The charge in this proceeding was filed by the Charging Party on October 2, 2014, and a copy was served by regular mail on Respondent on October 3, 2014.

2.

(a) At all material times, Respondent, a California corporation with an office and place of business in Sunnyvale, California, has been engaged in the sale and servicing of automobiles.

(b) During the 12-month period ending December 31, 2014, Respondent in conducting its operations described above in paragraph 2(a), derived gross revenues in excess of

$500,000 and purchased and received at its Sunnyvale, California facility goods or services valued in excess of $5,000 which originated outside the State of California.

3.

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

4.

(a) At all material times since at least April 2, 2014, Respondent has promulgated and maintained at its Sunnyvale, California facility, a Binding Arbitration Agreement, a copy of which is attached hereto as Exhibit A, and a Toyota Sunnyvale Employee Handbook Employee Acknowledgement and Agreement, attached hereto as Exhibit B, (collectively, the Agreement), which contains the following language:

> In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims").

(b) At all times material since at least April 2, 2014, Respondent has required its current and former employees employed at its Sunnyvale, California facility to execute the Agreement described in paragraph 4(a) as a condition of employment.

(c) The provisions of the Agreement described above in subparagraph 4(a) interfere with employees' Section 7 rights to engage in collective legal activity by binding employees, including the Charging Party, to an irrevocable waiver of their rights to participate in collective and class litigation.

5.

(a) On October 1, 2014, Respondent sought to enforce the Agreement described above in paragraph 4(a) by filing a Motion to Compel Individual Arbitration and Stay Judicial Proceedings to compel individual arbitration rather than class-wide litigation of claims in a class-action wage-and hour complaint filed against Respondent by the Charging Party in *Richard Vogel v. Price-Simms, Inc.*, Case No. 1-14-CV-261268 (Superior Court of California, Santa Clara County).

(b) On October 24, 2014, the Superior Court of California granted Respondent's Motion described above in paragraph 5(a).

6.

By the conduct described above in paragraphs 4 and 5(a), Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

7.

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

WHEREFORE, as a part of the remedy for the unfair labor practices alleged in paragraphs 4 and 5(a) the General Counsel seeks an order requiring Respondent to cease and desist from promulgating, maintaining, and enforcing a mandatory and binding arbitration policy that requires employees as a condition of employment to arbitrate all employment-related claims and forgo any rights they have to resolution of employment related disputes by collective or class action and enforcing those portions of its arbitration policy prohibiting collective and class actions.

The General Counsel further seeks as a remedy for the unfair labor practices alleged in paragraphs 4 and 5(a) that Respondent be required to reimburse the Charging Party for any litigation expenses directly related to opposing Respondent's Motion to Compel Individual Arbitration and Stay of Judicial Proceedings (or any other legal action taken to enforce the arbitration agreement). In addition, the General Counsel seeks an order requiring Respondent to file a Motion to Vacate the Order and Judgment, dated October 24, 2014, issued by the Superior Court of California in Case No. 1-14- CV-261268 and described above in paragraph 5(b), provided that a motion to vacate can still be timely filed.

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

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint. The answer must be **received by this office on or before February 13, 2015 or postmarked on or before February 12, 2015.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not

be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on April 6, 2015, at 9:00 a.m., in the Oakland Regional Office of the Board, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, and continuing on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 30th day of January 2015.

George Velastegui
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

Richard Vogel

Instructions: Have employee sign and date and then place in personnel file.

AGREEMENTS

Between Toyota Sunnyvale "Company"

and Richard Vogel "Employee"

At Will Employment Agreement

I agree as follows: My employment and compensation is terminable at-will, is for no definite period, and my employment and compensation may be terminated by the Company (employer) at any time and for any reason whatsoever, with or without good cause at the option of either the Company or myself. Consequently, all terms and conditions of my employment may be changed or withdrawn at Company's unrestricted option at any time, with or without good cause. No implied, oral, or written agreements contrary to the express language of this agreement are valid unless they are in writing and signed by the President of the Company (or majority owner or owners if Company is not a corporation). No supervisor or representative of the Company, other than the Owner of the Company, has any authority to make any agreements contrary to the foregoing. This agreement is the entire agreement between the Company and the employee regarding the rights of the Company or employee to terminate employment with or without good cause, and this agreement takes the place of all prior and contemporaneous agreements, representations, and understandings of the employee and the Company.

Richard Vogel 6/7/12

Signature - Richard Vogel Date

Binding Arbitration Agreement

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees

EXHIBIT A

A009

in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration; thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement. **I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.**

Richard Vogel 6/7/12

Signature - Richard Vogel Date

Toyota Sunnyvale Employee Handbook

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

Richard Vogel

This will acknowledge that I have reviewed the Employee Handbook posted in the HotlinkHR system, that I have a username and password as well as access to a company computer allowing me to view the Employee Handbook as needed, and that I have familiarized myself with its contents. By signing below, I also acknowledge that I have received a copy of this Employee Acknowledgment and Agreement.

I understand that this handbook represents the current policies, regulations, and benefits and that any and all policies or practices can be changed at any time by the Company. The Company retains the right to add, change or delete wages, benefits, policies and all other working conditions at any time (except the policy of "at-will employment" and Arbitration Agreement, which may not be changed, altered, revised or modified without a writing signed by the President of the Company).

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the

EXHIBIT B
A011

Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. **Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration; thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.**

I further understand that nothing in the Employee Handbook creates, or is intended to create, a promise or representation of continued employment and that my employment, position and compensation all are at-will, and may be changed or terminated at the will of the Company or I, with or without cause or notice.

This is the entire agreement between the Company and I regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues to the extent that they differ from the foregoing. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company. No supervisor or representative of the Company, other than its President, has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after I am hired do not alter this Agreement.

If any term or provision, or portion of this Agreement, is declared void or unenforceable, it shall be severed and the remainder of this Agreement shall be enforceable.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND AGREEMENT.

Richard Vogel (Electronic Signature)	6/7/2012 2:46:04 PM
Signature -	Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

Form NLRB-4338
(2-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Case(s) 32-CA-138015

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown *and* the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds thereafter must be set forth in *detail;*

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request;

and

(5) Copies must be simultaneously served on all other parties (*listed below*), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Adam Simms, General Manager
Price-Simms, Inc. D/B/A Toyota Sunnyvale
898 W El Camino Real
Sunnyvale, CA 94087-1153

Richard Vogel
3440 Seven Hills Road
Castro Valley, CA 94546

Nicholas J. De Blouw, Attorney At Law
Blumenthal, Nordrehaug & Bhowmik
2255 Calle Clara
La Jolla, CA 92037-3107

Robert G. Hulteng, Attorney At Law
Littler Mendelson P.C.
650 California Street, 20th Floor
San Francisco, CA 94108-2601

Michael G. Pedhirney, Esq.
Littler Mendelson P.C.
650 California St, 20th Floor
San Francisco, CA 94108-2601

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

TAB 3

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

RICHARD VOGEL, Charging Party, vs. PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE, Charged Party.	Case No. 32-CA-138015

RESPONDENT PRICE-SIMMS, INC.'S ANSWER TO COMPLAINT

Michael G. Pedhirney
LITTLER MENDELSON, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 677-3117

Counsel for Price-Simms, Inc., d/b/a Toyota Sunnyvale

RESPONDENT'S ANSWER TO COMPLAINT

COMES NOW PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE (hereinafter "Respondent"), in answer to the Complaint issued on January 30, 2015 in the above-captioned matter by Regional Director George Velastegui on behalf of the General Counsel of the National Labor Relations Board, and alleges as follows:

1. In response to Paragraph 1 of the Complaint, Respondent admits that it received the charge in this proceeding. Upon information and belief, Respondent admits that the charge was filed by the Charging Party on or about October 2, 2014. Except as so specifically admitted, Respondent denies each and every allegation contained in Paragraph 1 of the Complaint.

2. (a) In response to Paragraph 2(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 2(b) of the Complaint, Respondent admits the material allegations contained therein.

3. In response to Paragraph 3 of the Complaint, Respondent admits the material allegations contained therein.

4. (a) In response to Paragraph 4(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 4(b) of the Complaint, Respondent admits the material allegations contained therein.

(c) In response to Paragraph 4(c) of the Complaint, Respondent denies each and every allegation contained therein.

5. (a) In response to Paragraph 5(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 5(b) of the Complaint, Respondent admits the material allegations contained therein.

6. In response to Paragraph 6 of the Complaint, Respondent denies each and every allegation contained therein.

7. In response to Paragraph 7 of the Complaint, Respondent denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

As a FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that assuming, *arguendo*, any allegation in the Complaint is found to be a violation, the remedy requested is inappropriate as a matter of law.

As a SECOND, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the allegations in the Complaint are barred because the Binding Arbitration Agreement referred to in the Complaint is lawful under the Federal Arbitration Act.

As a THIRD, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the National Labor Relations Board has no jurisdiction over those alleged unfair labor practices set forth in the Complaint which are barred by the six-month statute of limitations set forth in Section 10(b) of the Act.

As a FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that no relief can be granted to the Charging Party based upon the equitable doctrines of laches, waiver and/or unclean hands.

As a FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the requested remedy violates the United States Constitution, including, but not limited to, the right to due process.

Respondent reserves the right to assert any additional affirmative defenses it discovers during the course of these proceedings.

WHEREFORE, Respondent respectfully requests the Administrative Law Judge dismiss the Complaint in its entirety and grant Respondent all appropriate relief.

Dated: February 10, 2015

LITTLER MENDELSON
A Professional Corporation

By: 
MICHAEL G. PEDHIRNEY
Attorney for Respondent
PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On February 10, 2015, I served the within document(s):

- **RESPONDENT PRICE-SIMMS, INC.'S ANSWER TO COMPLAINT**

☐ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

Nicholas J. De Blouw, Esq.
Blumenthal, Nordrehaug & Bhowmik
2255 Calle Clara
La Jolla, CA 92037-3107
Email: DeBlouw@bamlawca.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or, if an overnight delivery service shipment,

deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on February 10, 2015, at San Francisco, California.

Charisse Goodman

Firmwide:131595765.1 066411.1005

Goodman, Charisse

From: Pedhirney, Michael G.
Sent: Tuesday, February 10, 2015 10:40 AM
To: Goodman, Charisse
Subject: Fwd: 32-CA-138015-Answer to Complaint

Sent from my iPhone

Begin forwarded message:

From: "NLRBRegion32@nlrb.gov" <e-Service@nlrb.gov>
Date: February 10, 2015 at 10:30:05 AM PST
To: <mpedhirney@littler.com>
Subject: RE:32-CA-138015-Answer to Complaint
Reply-To: <e-Service@nlrb.gov>

Confirmation Number: 35361182

You have successfully accomplished the steps for E-Filing document(s) with NLRB Region 32, Oakland, California. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	2/10/2015 10:23:45 AM (GMT-08:00) Pacific Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 32, Oakland, California
Case Name:	Price-Simms, Inc. d/b/a Toyota Sunnyvale
Case Number:	32-CA-138015
Filing Party:	Charged Party / Respondent
Name:	Pedhirney, Michael G.
Email:	mpedhirney@littler.com
Address:	Littler Mendelson, P.C. 650 California Street, 20th Floor San Francisco, CA 94108-2693
Telephone:	415.433.1940 Ext: 3117
Fax:	415.399.8490
Attachments:	Answer to Complaint: Price Simms 2.10.15 Answer to Complaint 32-C 138015.pdf

Click here to view your list of E-Filed documents.

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TAB 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRICE-SIMMS, INC. d/b/a TOYOTA SUNNYVALE

and **32-CA-138015**

RICHARD VOGEL, an Individual

MOTION FOR SUMMARY JUDGMENT

Comes now the General Counsel for the National Labor Relations Board, herein called the Board, by the undersigned, and alleges as follows:

1. On October 2, 2014, Richard Vogel (Charging Party) filed the unfair labor practice charge in Case 32-CA-138015, alleging that Price-Simms, Inc. d/b/a Sunnyvale Toyota (Respondent) violated Section 8(a)(1) of the Act by promulgating, maintaining and/or enforcing a rule prohibiting employees' participation in collective or class actions. (A copy of the charge, marked as Exhibit 1, is attached hereto and made part hereof, as are all of the documents marked as Exhibits and referred to hereinafter.)

2. On January 30, 2015, the Regional Director for the Thirty-Second Region of the Board issued and served a Complaint and Notice of Hearing in Case 32-CA-138015, alleging that at all times material therein, Respondent promulgated, maintained, and enforced a Binding Arbitration Agreement and a Toyota Sunnyvale Employee Handbook Employee Acknowledgment Agreement (collectively, the Agreement) that was signed by its current and former employees at its Sunnyvale, California facility. (Exhibit 2). The Complaint cited the relevant language of the Agreement and alleged that the promulgation, maintenance, and enforcement of the Agreement violated Section 8(a)(1) of the Act. (Exhibit 3).

3. On February 10, 2015, Respondent filed an Answer to the Complaint, admitting, as alleged in the Complaint, that Respondent promulgated, maintained, and enforced the Agreement that was executed by its current and former employees at its Sunnyvale, California facility. (Exhibit 4).

4. In support of this Motion for Summary Judgment, the undersigned notes the following regarding the Complaint and Answer herein:

(a) Respondent's Answer admits the following paragraphs of the Complaint:

(1) Paragraph 1: Filing and receipt of the charge.[1]

(2) Paragraph 2(a) and 2(b): Jurisdictional facts.

(3) Paragraph 3: The conclusion that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

(4) Paragraph 4(a) and 4(b): At all material times, Respondent promulgated, maintained, enforced, and required its current and former employees at its Sunnyvale, California facility to execute the Agreement as a condition of employment, with the relevant language of the Agreement cited therein.

(5) Paragraph 5(a): Respondent sought to enforce the language in the Agreement cited in Paragraph 4(a) by filing a Motion to Compel Individual Arbitration and Stay Judicial Proceedings to compel individual arbitration rather than class-wide litigation of claims in a class-action wage-and-hour complaint filed against Respondent by the Charging Party in *Richard Vogel v. Price-Simms, Inc.*, Case No. 1-14-CV-2611268 (Superior Court of California, Santa Clara County).

(6) Paragraph 5(b): On October 24, 2014, Superior Court of California granted Respondent's motion described in Paragraph 5(a).

(b) Respondent's Answer denies the following paragraphs of the Complaint:

[1] In its answer to Paragraph 1, the Respondent admitted that the charge was filed by the Charging Party on October 2, 2014 and it admitted that it received the charge. Respondent's answer states that, "except as so specifically admitted, Respondent denies each and every allegation contained in Paragraph 1 of the Complaint." The General Counsel deems this Answer to effectively admit Paragraph 1 of the Complaint.

(1) Paragraph 4(c): The legal conclusion that the provisions of the Agreement cited in Paragraph 4(a) interfere with employees' Section 7 rights to engage in collective legal activity by binding employees, including the Charging Party, to an irrevocable waiver of their rights to participate in collective and class litigation.

(2) Paragraph 6: The legal conclusion that by the conduct described in Paragraphs 4 and 5(a), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(3) Paragraph 7: The legal conclusion that Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent's Answer does not raise any bona fide issue of fact and denies only the legal conclusions to be drawn from the factual allegations pleaded in the Complaint and admitted in Respondent's Answer thereto. Moreover, even though Respondent has in its Answer denied the legal conclusions, it cannot be more clear that Respondent's promulgation and maintenance of the Agreement is unlawful under Board law as the language of the Agreement binds employees to an irrevocable waiver of their Section 7 rights to participate in collective and class litigation. The instant case is governed by the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part,* 737 F.2d 344 (5th Cir. 2013).[2]

The Board in *D.R. Horton* found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." 357 NLRB No. 184, slip op. at 12 (2012) (emphasis in original). In *D.R. Horton*, the employer required each new and current employee to execute a mutual arbitration agreement (MAA) as a condition of employment. *Id.*, slip op. at 1. The Board reasoned that the MAA

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[2] The Board reaffirmed its *D.R. Horton* decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014). In that case, the Board noted that arguments that Member Becker, who participated in the *D.R. Horton* decision, had been invalidly appointed or that his appointment had expired, were rejected by the Supreme Court in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014). *See also Mathew Enterprises, Inc. dba Stevens Creek Chrysler Jeep Dodge v. NLRB,* No. 11-1310 (D.C. Cir. Nov. 7, 2014).

clearly and expressly barred employees "from exercising substantive rights that have long been held protected by Section 7 of the Act," and "implicate[d] prohibitions that predate the NLRA," on which modern Federal labor policy is based. *Id.*, slip op. at 4, 6.

The *D.R. Horton* Board also affirmed that "employees who join together to bring employment-related claims on a class wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." *Id.*, slip op. at 3. Section 8(a)(1) of the Act 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" of the National Labor Relations Act. The Board made clear that "the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity." *D.R. Horton*, 357 NLRB No. 184, slip op. at 7, citing *Lutheran Heritage Village-Livonia,* 343 NLRB 641(2004). In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." *Id.*, slip op. at 13.[3]

Respondent's Agreement requires that employees, as a condition of employment, waive having claims heard or arbitrated as a class or collective action. In this regard, this case is indistinguishable from *D.R. Horton.* Employees cannot seek judicial redress of any kind under the Agreement, and it prohibits class or collective actions in arbitration. The Binding Arbitration Agreement requires that "any claim, dispute, and/or controversy…which would otherwise

[3] The Board declined to address whether an employer can lawfully require employees to waive their right to pursue class or collective action in court at all, so long as the employees retain the right to pursue such class claims in arbitration. *Id.*, slip op. at 13, n.28.

require or allow resort to any court or other governmental dispute resolution forum…shall be submitted to and determined exclusively by binding arbitration…", and the Agreement prohibits any such arbitration to be brought in anything but an individual manner. (Exhibit 2). Similarly, the Employee Acknowledgment and Agreement also requires all employment disputes to be resolved only by way of individual arbitration. Maintenance of the Agreement violates Section 8(a)(1) of the Act because it explicitly restricts Section 7 activity under the analysis used by the Board in *Lutheran Heritage Village, supra.* Like the arbitration agreement at issue in *D.R.Horton,* it plainly restricts Section 7 activity and, as a condition of employment, interfere with employees' Section 7 rights to participate in collective and class litigation.

6. In *Murphy Oil USA, Inc., supra,* the Board expressly reaffirmed *D.R. Horton* despite the Fifth Circuit's refusal to enforce the earlier decision. The Board applied the *D.R. Horton* rationale to find that an employer violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in court when employees filed a collective claim under the Fair Labor Standards Act. *Ibid.,* slip op. *at 2.* This is precisely what Respondent has done herein when on October 1, 2014, it sought to enforce the Agreement by filing a Motion to Compel Individual Arbitration and Stay Judicial Proceedings (herein, the Motion) to compel individual arbitration rather than class-wide litigation of claims.

Respondent may contend that the Agreement specifically states that an employee "will not be disciplined, discharged, or otherwise retaliated against for exercising [her] Section 7 rights…including but not limited to challenging the limitation on a class, collective, or joint action." (Exhibit 2). However, the Board rejected this same argument in *Murphy Oil USA,* pointing out that employees would reasonably read such a provision as merely stating they

would not suffer retaliation for engaging in such protected activity, but, nevertheless, the right to engage in the activity remained waived. *Supra,* slip op. at 19.

7. Since the underlying Arbitration Agreement is unlawful, Respondent's Motion seeking to enforce it is also unlawful as it further interferes with the employees' Section 7 rights to engage in collective legal activity. It is axiomatic that the enforcement of an unlawful rule violates the Act. The Board has held that if the objective of the lawsuit in question is "unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice." *Teamsters Local 776 (Rite- Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). As the sole objective of the Motion is enforcement of a contractual provision prohibiting employees from engaging in Section 7 activity, it is unnecessary to determine whether the Petition was retaliatory or baseless. Instead, *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), supports proceeding against Respondent's filing of the Motion. In footnote 5 of *Bill Johnson's*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Id.* In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, supra.

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB 278, 297 (1996). In particular, an illegal objective may be found for two reasons relevant here. The first reason is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself. *Granite State Joint Board, Textile Workers Union,* 187 NLRB 636, 637 (1970),

enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers,* 185 NLRB 380, 383 (1970), enf'd. in rel. pt., 459 F.2d 1143 (D.C. Cir. 1972), aff'd, 412 U.S. 84 (1973). In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were the mechanism to enforce and collect the unlawful fines.

The second reason a lawsuit or legal pleadings will be found unlawful is where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct but also seeks to use the arbitrator or the court to directly interfere with the Section 7 activity. *Long Elevator*, 289 NLRB 1095 (1988). Thus, for example, in *Manno Electric, Inc.*, the Board found that an employer's judicial cause of action attacking employee statements made to the Board was not only preempted but also had an illegal objective. 321 NLRB at 297.

Here, both reasons apply. First, Respondent's Petition seeks to enforce an arbitration agreement that is itself unlawful as it expressly prohibits employees' collective legal activity, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the motion is simply an attempt to enforce the underlying act. Second, the Petition also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of the Petition is to prohibit employees from engaging in Section 7 activity. The Petition would impose individual arbitration, which specifically attempts to prevent employees' protected concerted legal activity. Therefore, the Petition has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act. The Board has made it clear that *BE&K Construction* did not affect the fn. 5 exemption in *Bill Johnson's* for lawsuits with an illegal objective. *See Plasterers Local 200 (Standard Drywall,*

Inc.)("SDI-IV), 357 NLRB No. 179, fn. 7 (2011). Citing its earlier decision in *Plasterers Local 200 (Standard Drywall, Inc.*, 357 NLRB No. 160, fn. 7 (2011)("SDI-III)"), "[t]he Board noted that the Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), did not undermine the Court's earlier statement that legal proceedings that have an objective that is illegal may be enjoined without infringing on the First Amendment." *SDI-IV*, 357 NLRB No. 179, fn. 7; *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737, fn. 5 (1983); citing, *SDI-III*, 357 NLRB No. 160, slip op. at 3, relying on *E. P. Donnelly*, 357 NLRB No. 131, slip op. at 2 fn. 4 (2011). *See also, Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004).

8. Moreover, the Board's determination that a mandatory arbitration agreement infringes upon Section 7 substantive rights is hardly novel.[4] Agreements such as Respondent's Agreement are essentially "yellow dog" contracts as they require employees to "promise" not to engage in protected activity. *Barrow Utilities & Electric*, 308 NLRB 4, fn. 5 (1992). The Board has consistently found that an employer violates Section 8(a)(1) by soliciting such agreements, as this conduct "has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . .." *Hecks, Inc.* 293 NLRB 1111, 1121 (1989).[5] In contrast to Respondent's assertions, the Board has long interpreted the

4 See *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942), in which three employees filing a complaint with the FLSA was deemed protected activity; See also *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), circulation of employee petition to represent others for FLSA claim deemed protected-concerted activity.

5 *Hecks, Inc.*, 293 NLRB 1111, 1121 (1989) ("[b]y requesting . . . employees to promise to be bound by the Respondent's written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company, the Respondent . . . has interfered with, restrained, and coerced [its] employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act"); *Western Cartridge Co.*, 44 NLRB at 6-8, fn.5, 19 (invalidating individual employment contract that purportedly gave employer right to fire any employee who "participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations,'" because it effectively restricted employees' right to engage in concerted activity); *Superior Tanning Co.*, 14 NLRB

Act to prohibit employers from forcing employees to waive their Section 7 rights by signing individual employment contracts, and this legal conclusion is deeply entrenched in Board law.

Based on the foregoing, Respondent's anticipated defense that footnote 5 does not apply because the Board's decision is novel is contrary to *Bill Johnson's* and its progeny and utterly ignores the Board's long history of legal precedent proclaiming this type of restriction on Section 7 activity to be illegal. In particular, it should be noted that the Board expressly adopted the above-reasoning in its decision in *Murphy Oil,* supra, when it found that the respondent violated Section 8(a)(1) of the Act by filing a motion in state court seeking to enforce a mandatory arbitration agreement. In so holding, the Board applied a footnote 5 "illegal objective" analysis.

9. The Board should not consider Respondent's affirmative defense in its Answer to the Complaint that the Board has no jurisdiction over the unfair labor practices alleged therein because the statute of limitations in Section 10(b) has expired. The Charging Party's allegations regarding the Agreements are not time-barred because Section 10(b) of the Act does not bar allegations in situations where an agreement is invalid on its face and maintained or enforced within the 10(b) period. See *Control Services,* 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); *See also, The Guard Publishing Co.,* 351 NLRB 1110, 1110, fn.2 (2007). Finally, both the Class Action Complaint and Respondent's Notice of Petition to Compel Arbitration were filed during the 10(b) period. Thus, for the above reasons, none of the allegations in the charge are barred by the statute of limitations.

10. It is anticipated that, on brief, Respondent will argue that *D.R. Horton* was wrongly decided. This argument is based upon the refusal of the Fifth Circuit to enforce the *D.R. Horton* decision and its criticisms by other federal circuit courts. While the Board dealt with and

942, 951 (1939), enfd. 117 F.2d 881, 888-91 (7th Cir. 1941) (compulsory individual contracts covering employees' terms and conditions of employment promulgated by the employer to discourage unionization, were unlawful).

rejected these arguments, including the argument that *D.R. Horton* was inconsistent with the Federal Arbitration Act, in *Murphy Oil USA,* supra, the simple response is that this is the controlling Board authority until it is reversed by the Supreme Court. *Waco, Inc., supra* at 749 fn. 14; *Los Angeles New Hosp.,* 244 NLRB 960, 962, fn. 4 (1979), enf'd 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.,* 342 NLRB 378 fn. 1 (2004).

11. As outlined in the Complaint, the General Counsel seeks to remedy the legal consequences of Respondent's promulgation, maintenance, and enforcement of its unlawful policies contained in the Agreement and return employees to the *status quo ante.* Thus, in addition to the standard rescission, notice posting, and make-whole requirements, Respondent should be required to move the Superior Court of California, Santa Clara County to vacate its order for individual arbitration, if a motion to vacate can still be timely filed. Any such motion to vacate should be made jointly with the Charging Party if he so requests. See *Baptist Memorial Hospital,* 229 NLRB 45, 46 (1977) (joint motion required). It should be noted that nothing in the remedy sought by the General Counsel would preclude Respondent from amending its Motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.[6]

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing

6 This would be consistent with the General Counsel's long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). As the Board noted in *D.R. Horton,* supra, at p. 16, "We hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis." Conversely, if an employer does voluntarily agree to provide for class arbitration, it can lawfully prohibit class legal action.

positions that are antithetical to the Act. Thus, *in Loehmann's Plaza,* 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have an injunction granted against the union withdrawn. In *Federal Security, Inc.,* 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.

In order to restore the *status quo ante,* Respondent should be also required to reimburse the Charging Party for any litigation expenses, including attorneys' fees, incurred that are directly related to opposing Respondent's unlawful Motion. *See Bill Johnson's Restaurants,* 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers,* 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.,* 300 NLRB 64, 67, 77 (1990). Such a remedy was ordered in *Murphy Oil, USA, supra,* slip. op. at 21.

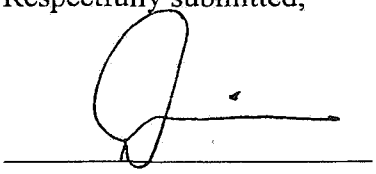
12. On March 5, during a telephone call, Respondent's attorney advised Counsel for the General Counsel that he agreed that this case is appropriate for submission based upon a Motion for Summary Judgment. Respondent's attorney confirmed this with Counsel for the General Counsel via email dated March 9, 2015. (Exhibit 5).

Where, as here, there are no factual issues warranting a hearing, it has long been the practice of the Board to grant Summary Judgment. *Henderson Trumbell Supply Co.,* 205 NLRB 245 (1973); *Richmond, Division of Pak-Well,* 206 NLRB 260 (1973); *Tri-City Linen Supply,* 226 NLRB 669 (1976).

WHEREFORE, in view of the matters set forth above, and upon consideration of the documents attached hereto and incorporated in this Motion, and as Respondent's Answer raises no issues of fact or law requiring a hearing in this proceeding, the undersigned prays that the Board find and conclude that Respondent has violated Section 8(a)(1) of the Act and that it issue a Decision and Order in conformity with the allegations in the Complaint.

DATED AT Oakland, California this 10th day of March 2015.

Respectfully submitted,



David B. Willhoite
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 1301 N
Oakland, CA 94612-5224

EXHIBIT 1

EXHIBIT 1

Form NLRB-501 (2-08)

NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case	Date Filed
32-CA-138015	10/2/2014

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

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Price-Simms, Inc.

b. Tel. No. (650) 550-7160

c. Cell No. N/A

f. Fax No. N/A

g. e-Mail
N/A

h. Number of workers employed
N/A

d. Address *(Street, city, state, and ZIP code)*
898 W. El Camino Real
Sunnyvale, CA 94087

e. Employer Representative
Littler Mendelson, P.C.
Robert G. Hulteng
650 California Street, 20th Floor
San Francisco, CA 94108-2693

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Car Dealership

j. Identify principal product or service
New and Used Cars

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

Price-Simms, Inc. is maintaining a provision in their arbitration policy that requires employees to forego any rights they have to the resolution of employment-related disputes by collective action or class action.

RECEIVED
NLRB REGION 32
2014 OCT -2 PM 2:41
OAKLAND, CA.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Richard Vogel

4a. Address *(Street and number, city, state, and ZIP code)*
3440 Seven Hills Road
Castro Valley, CA 94546

4b. Tel. No. N/A

4c. Cell No. (510) 415-6491

4d. Fax No. N/A

4e. e-Mail
ricvog1@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* N/A

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Nicholas J. De Blouw
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 2255 Calle Clara, La Jolla, CA 92037

10/2/14
(date)

Tel. No. (858) 952-0354

Office, if any, Cell No. (858) 999-1118

Fax No. (858) 551-1232

e-Mail
Nick@bamlawca.com

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

PRIVACY ACT STATEMENT

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

EXHIBIT 2

EXHIBIT 2

Richard Vogel

Instructions: Have employee sign and date and then place in personnel file.

AGREEMENTS

Between Toyota Sunnyvale "Company"

and Richard Vogel "Employee"

At Will Employment Agreement

I agree as follows: My employment and compensation is terminable at-will, is for no definite period, and my employment and compensation may be terminated by the Company (employer) at any time and for any reason whatsoever, with or without good cause at the option of either the Company or myself. Consequently, all terms and conditions of my employment may be changed or withdrawn at Company's unrestricted option at any time, with or without good cause. No implied, oral, or written agreements contrary to the express language of this agreement are valid unless they are in writing and signed by the President of the Company (or majority owner or owners if Company is not a corporation). No supervisor or representative of the Company, other than the Owner of the Company, has any authority to make any agreements contrary to the foregoing. This agreement is the entire agreement between the Company and the employee regarding the rights of the Company or employee to terminate employment with or without good cause, and this agreement takes the place of all prior and contemporaneous agreements, representations, and understandings of the employee and the Company.

Richard Vogel 6/7/12

Signature - Richard Vogel Date

Binding Arbitration Agreement

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees

in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration; thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement. **I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.**

Richard Vogel 6/7/12

Signature - Richard Vogel Date

Toyota Sunnyvale Employee Handbook

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

Richard Vogel

This will acknowledge that I have reviewed the Employee Handbook posted in the HotlinkHR system, that I have a username and password as well as access to a company computer allowing me to view the Employee Handbook as needed, and that I have familiarized myself with its contents. By signing below, I also acknowledge that I have received a copy of this Employee Acknowledgment and Agreement.

I understand that this handbook represents the current policies, regulations, and benefits and that any and all policies or practices can be changed at any time by the Company. The Company retains the right to add, change or delete wages, benefits, policies and all other working conditions at any time (except the policy of "at-will employment" and Arbitration Agreement, which may not be changed, altered, revised or modified without a writing signed by the President of the Company).

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the

Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. **Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration: thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.**

I further understand that nothing in the Employee Handbook creates, or is intended to create, a promise or representation of continued employment and that my employment, position and compensation all are at-will, and may be changed or terminated at the will of the Company or I, with or without cause or notice.

This is the entire agreement between the Company and I regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues to the extent that they differ from the foregoing. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company. No supervisor or representative of the Company, other than its President, has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after I am hired do not alter this Agreement.

If any term or provision, or portion of this Agreement, is declared void or unenforceable, it shall be severed and the remainder of this Agreement shall be enforceable.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND AGREEMENT.

Richard Vogel (Electronic Signature)	6/7/2012 2:46:04 PM
Signature -	Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

EXHIBIT 3

EXHIBIT 3

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE

and **Case 32-CA-138015**

RICHARD VOGEL, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Charging Party Richard Vogel (Vogel), an Individual. It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board), and alleges that PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE (Respondent) has violated the Act as described below:

1.

The charge in this proceeding was filed by the Charging Party on October 2, 2014, and a copy was served by regular mail on Respondent on October 3, 2014.

2.

(a) At all material times, Respondent, a California corporation with an office and place of business in Sunnyvale, California, has been engaged in the sale and servicing of automobiles.

(b) During the 12-month period ending December 31, 2014, Respondent in conducting its operations described above in paragraph 2(a), derived gross revenues in excess of

$500,000 and purchased and received at its Sunnyvale, California facility goods or services valued in excess of $5,000 which originated outside the State of California.

3.

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

4.

(a) At all material times since at least April 2, 2014, Respondent has promulgated and maintained at its Sunnyvale, California facility, a Binding Arbitration Agreement, a copy of which is attached hereto as Exhibit A, and a Toyota Sunnyvale Employee Handbook Employee Acknowledgement and Agreement, attached hereto as Exhibit B, (collectively, the Agreement), which contains the following language:

> In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims").

(b) At all times material since at least April 2, 2014, Respondent has required its current and former employees employed at its Sunnyvale, California facility to execute the Agreement described in paragraph 4(a) as a condition of employment.

(c) The provisions of the Agreement described above in subparagraph 4(a) interfere with employees' Section 7 rights to engage in collective legal activity by binding employees, including the Charging Party, to an irrevocable waiver of their rights to participate in collective and class litigation.

5.

(a) On October 1, 2014, Respondent sought to enforce the Agreement described above in paragraph 4(a) by filing a Motion to Compel Individual Arbitration and Stay Judicial Proceedings to compel individual arbitration rather than class-wide litigation of claims in a class-action wage-and hour complaint filed against Respondent by the Charging Party in *Richard Vogel v. Price-Simms, Inc.*, Case No. 1-14-CV-261268 (Superior Court of California, Santa Clara County).

(b) On October 24, 2014, the Superior Court of California granted Respondent's Motion described above in paragraph 5(a).

6.

By the conduct described above in paragraphs 4 and 5(a), Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

7.

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

WHEREFORE, as a part of the remedy for the unfair labor practices alleged in paragraphs 4 and 5(a) the General Counsel seeks an order requiring Respondent to cease and desist from promulgating, maintaining, and enforcing a mandatory and binding arbitration policy that requires employees as a condition of employment to arbitrate all employment-related claims and forgo any rights they have to resolution of employment related disputes by collective or class action and enforcing those portions of its arbitration policy prohibiting collective and class actions.

The General Counsel further seeks as a remedy for the unfair labor practices alleged in paragraphs 4 and 5(a) that Respondent be required to reimburse the Charging Party for any litigation expenses directly related to opposing Respondent's Motion to Compel Individual Arbitration and Stay of Judicial Proceedings (or any other legal action taken to enforce the arbitration agreement). In addition, the General Counsel seeks an order requiring Respondent to file a Motion to Vacate the Order and Judgment, dated October 24, 2014, issued by the Superior Court of California in Case No. 1-14- CV-261268 and described above in paragraph 5(b), provided that a motion to vacate can still be timely filed.

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

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Complaint. The answer must be **received by this office on or before February 13, 2015 or postmarked on or before February 12, 2015.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not

be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on April 6, 2015, at 9:00 a.m., in the Oakland Regional Office of the Board, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, and continuing on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED AT Oakland, California this 30th day of January 2015.

/s/ George Velastegui

George Velastegui
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

Attachments

EXHIBIT 4

EXHIBIT 4

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

RICHARD VOGEL, Charging Party, vs. PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE, Charged Party.	Case No. 32-CA-138015

RESPONDENT PRICE-SIMMS, INC.'S ANSWER TO COMPLAINT

Michael G. Pedhirney
LITTLER MENDELSON, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 677-3117

Counsel for Price-Simms, Inc., d/b/a Toyota Sunnyvale

RESPONDENT'S ANSWER TO COMPLAINT

COMES NOW PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE (hereinafter "Respondent"), in answer to the Complaint issued on January 30, 2015 in the above-captioned matter by Regional Director George Velastegui on behalf of the General Counsel of the National Labor Relations Board, and alleges as follows:

1. In response to Paragraph 1 of the Complaint, Respondent admits that it received the charge in this proceeding. Upon information and belief, Respondent admits that the charge was filed by the Charging Party on or about October 2, 2014. Except as so specifically admitted, Respondent denies each and every allegation contained in Paragraph 1 of the Complaint.

2. (a) In response to Paragraph 2(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 2(b) of the Complaint, Respondent admits the material allegations contained therein.

3. In response to Paragraph 3 of the Complaint, Respondent admits the material allegations contained therein.

4. (a) In response to Paragraph 4(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 4(b) of the Complaint, Respondent admits the material allegations contained therein.

(c) In response to Paragraph 4(c) of the Complaint, Respondent denies each and every allegation contained therein.

5. (a) In response to Paragraph 5(a) of the Complaint, Respondent admits the material allegations contained therein.

(b) In response to Paragraph 5(b) of the Complaint, Respondent admits the material allegations contained therein.

6. In response to Paragraph 6 of the Complaint, Respondent denies each and every allegation contained therein.

7. In response to Paragraph 7 of the Complaint, Respondent denies each and every allegation contained therein.

AFFIRMATIVE DEFENSES

As a FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that assuming, *arguendo*, any allegation in the Complaint is found to be a violation, the remedy requested is inappropriate as a matter of law.

As a SECOND, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the allegations in the Complaint are barred because the Binding Arbitration Agreement referred to in the Complaint is lawful under the Federal Arbitration Act.

As a THIRD, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the National Labor Relations Board has no jurisdiction over those alleged unfair labor practices set forth in the Complaint which are barred by the six-month statute of limitations set forth in Section 10(b) of the Act.

As a FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that no relief can be granted to the Charging Party based upon the equitable doctrines of laches, waiver and/or unclean hands.

As a FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Respondent alleges that the requested remedy violates the United States Constitution, including, but not limited to, the right to due process.

Respondent reserves the right to assert any additional affirmative defenses it discovers during the course of these proceedings.

WHEREFORE, Respondent respectfully requests the Administrative Law Judge dismiss the Complaint in its entirety and grant Respondent all appropriate relief.

Dated: February 10, 2015

LITTLER MENDELSON
A Professional Corporation

By: _____
MICHAEL G. PEDHIRNEY
Attorney for Respondent
PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On February 10, 2015, I served the within document(s):

- **RESPONDENT PRICE-SIMMS, INC.'S ANSWER TO COMPLAINT**

☐ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

Nicholas J. De Blouw, Esq.
Blumenthal, Nordrehaug & Bhowmik
2255 Calle Clara
La Jolla, CA 92037-3107
Email: DeBlouw@bamlawca.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or, if an overnight delivery service shipment,

deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on February 10, 2015, at San Francisco, California.

Charisse Goodman

Firmwide:131595765.1 066411.1005

EXHIBIT 5

EXHIBIT 5

Willhoite, David B.

From: Pedhirney, Michael G. <MPedhirney@littler.com>
Sent: Monday, March 09, 2015 11:24 AM
To: Willhoite, David B.
Subject: RE: Toyota Sunnyvale -- Case No. 32-CA-138015

Sensitivity: Personal

Flag Status: Completed

David:

The Employer is amenable to proceeding by way of summary judgment. Please let me know if you have any questions or need anything further. Thank you.

From: Pedhirney, Michael G.
Sent: Tuesday, March 03, 2015 5:34 PM
To: 'David.Willhoite@nlrb.gov'
Subject: Toyota Sunnyvale -- Case No. 32-CA-138015

David:

Good evening. I understand that you are representing the General Counsel in the above-referenced matter. I assume that the parties can present the case for the decision to the ALJ on a stipulated record. Do you agree>

Please let me know if you would like to discuss this further. There should be no need for a live hearing given that the issue appears to be an entirely legal dispute, without any dispute of fact.

I am happy to discuss at your convenience. Thank you.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE **and** **RICHARD VOGEL, an Individual**	**Case(s) 32-CA-138015** **Date: March 10, 2015**

AFFIDAVIT OF SERVICE OF MOTION FOR SUMMARY JUDGMENT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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VIA EMAIL: rhulteng@littler.com

Michael G. Pedhirney, Esq.
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Nicholas J. De Blouw, Attorney At Law
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VIA EMAIL: njdeblouw@bamlawca.com

Richard Vogel
3440 Seven Hills Road
Castro Valley, CA 94546
VIA EMAIL: ricvog1@gmail.com

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20005
VIA EFILE

March 10, 2015
Date

Frances Hayden, Designated Agent of NLRB
Name

Frances Hayden
Signature

TAB 5

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RICHARD VOGEL, Charging Party, vs. PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE, Charged Party.	Case No. 32-CA-138015

RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Michael G. Pedhirney
LITTLER MENDELSON, P.C.
650 California Street, 20th Floor
San Francisco, CA 94108
Telephone: (415) 677-3117

Counsel for Price-Simms, Inc., d/b/a Toyota Sunnyvale

OPPOSITION TO THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT

Respondent PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE ("Respondent," "Toyota Sunnyvale," or "the Employer"), pursuant to Section 102.24(b) of the Board's Rules and Regulations, hereby submits its Opposition to the General Counsel's ("GC") Motion for Summary Judgment ("Motion"). Respondent opposes the GC's Motion and requests that, in the event the Board chooses to entertain the GC's Motion, the Board issue a Notice to Show Cause why the Motion should not be granted so that Toyota Sunnyvale can thoroughly brief the issues before the Board.

The Employer respectively contends that the GC's Motion must be denied because Respondent's Binding Arbitration Agreement ("Agreement") is lawful. As determined by the numerous state and federal courts that have analyzed the issue, the Board's decisions in *D.R. Horton*, 357 NLRB No. 184 (January 3, 2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (October 28, 2014) – the authorities supporting the instant charge – failed to give appropriate weight to the Federal Arbitration Act (9 U.S.C. §§ 1, *et seq.*) ("FAA"). In the Motion, the GC contends that *D.R. Horton* and *Murphy Oil* necessarily require a finding that the Employer's Agreement violates the Act. However, Respondent respectfully contends that the NLRB should decline to follow *D.R. Horton* and *Murphy Oil* because the decisions were wrongly decided on the merits. Contrary to the flawed holdings in *D.R. Horton* and *Murphy Oil*, there is nothing in Section 7 of the Act that preserves an employee's procedural ability to bring or participate in a class or collective action. Moreover, as courts have repeatedly ruled since January 2012, *D.R. Horton* (and now *Murphy Oil*) failed to provide appropriate deference to the FAA's requirement that arbitration agreements be enforced as written absent a contrary congressional command, which the NLRA lacks. *See, e.g., D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013);

Richards v. Ernst & Young, LLP, 734 F.3d 871, 873-74 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). Thus, *D.R. Horton* and *Murphy Oil* are inconsistent with the mandates of the FAA and United States Supreme Court precedent. Accordingly, the Board should deny the GC's Motion.

In any event, even if the Board is inclined to grant the GC's Motion (which it should not), the remedy requested by the GC is improper. The GC requests the extraordinary remedy of requiring Toyota Sunnyvale to "file a Motion to Vacate the Order and Judgment, dated October 28, 2014, issued by the Superior Court of California in Case No. 1-14-CV-261268, provided that a motion to vacate can still be timely filed." The proposed remedy is inappropriate because the NLRB cannot mandate by proxy that state and federal courts refuse to honor the Respondent's Agreement by scripting what Respondent says in court or the defenses it can raise.[1] The right to be heard is the most fundamental due process requirement of our judicial system.

Moreover, federal and state courts can and will consider the NLRB's finding that a contractual arbitration policy including a class action exclusion violates the Act. Federal and state courts are prohibited from enforcing contracts that violate the NLRA. While deference is usually given to the Board on interpretation of the Act, no such requirement exists when such a ruling conflicts with another federal statute such as the FAA. It is now becoming routine for plaintiffs to attack arbitration policies with class or collective action exclusions in court citing *D.R. Horton* and/or *Murphy Oil*. While these attacks are being uniformly rejected, this is the proper way for the issue to be raised and decided.

[1] Beyond that, once a court has given a final ruling, such final action cannot be retroactively changed by the NLRA.

For the aforementioned reasons, the GC's Motion should be denied. In the event that the GC is not inclined to immediately dismiss the GC's Motion, Respondent requests that the Board issue a Notice to Show Cause to allow the Employer to more fully brief these issues.

Dated: March 18, 2015

LITTLER MENDELSON
A Professional Corporation

By: _____
MICHAEL G. PEDHIRNEY
Attorney for Respondent
PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On March 18, 2015, I served the within document(s):

- **RESPONDENT'S OPPOSITION TO THE GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT**

☐ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

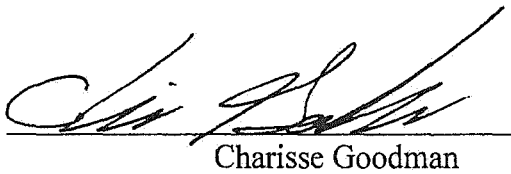
Nicholas J. De Blouw, Esq.
Blumenthal, Nordrehaug & Bhowmik
2255 Calle Clara
La Jolla, CA 92037-3107
Email: DeBlouw@bamlawca.com

David B. Willhoite, Esq.
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224
Email: David.Willhoite@nlrb.gov

Gary W. Shinners
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20005
Email: Gary.Shinners@nlrb.gov

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or, if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on March 18, 2015, at San Francisco, California.



Charisse Goodman

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TAB 6

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRICE-SIMMS, INC. d/b/a
TOYOTA SUNNYVALE

and **Case 32-CA-138015**

RICHARD VOGEL

ORDER TRANSFERRING PROCEEDING TO THE BOARD and NOTICE TO SHOW CAUSE

On March 10, 2015, the General Counsel filed with the National Labor Relations Board a Motion for Summary Judgment on the ground that the Respondent's answer admits the factual allegations in the complaint, and that therefore the pleadings and exhibits demonstrate that there are no issues of fact and an evidentiary hearing is unnecessary. On March 18, 2015, the Respondent filed an opposition to granting the motion, requesting in the alternative that a notice to show cause issue. Having duly considered the matter,

IT IS ORDERED that the above-entitled proceeding be transferred to and continued before the Board in Washington, D.C., and that the hearing scheduled for April 8, 2015 be postponed indefinitely.

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before April 7, 2015 (with affidavit of service on the parties to this proceeding), why summary judgment should not be granted in favor of either party. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., March 24, 2015.

By direction of the Board:

Gary Shinners

Executive Secretary

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRICE-SIMMS, INC, d/b/a TOYOTA SUNNYVALE and RICHARD VOGEL	**Cases** 32-CA-138015 DATE OF SERVICE March 24, 2015

AFFIDAVIT OF SERVICE OF ORDER TRANSFERRING PROCEEDING TO THE BOARD AND NOTICE TO SHOW CAUSE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

CERTIFIED & REGULAR MAIL
ROBERT G. HULTENG, ATTORNEY AT LAW
LITTLER MENDELSON P.C.
650 CALIFORNIA STREET, 20TH FLOOR
SAN FRANCISCO, CA 94108-2601

E-SERVICE
MICHAEL G. PEDHIRNEY, ESQ.
LITTLER MENDELSON P.C.
650 California St, Fl 20
San Francisco, CA 94108-2601

REGULAR MAIL
ADAM SIMMS, General Manager
Price-Simms, Inc. d/b/a Toyota Sunnyvale
898 W El Camino Real
Sunnyvale, CA 94087-1153

CERTIFIED & REGULAR MAIL
NICHOLAS J. DE BLOUW, ATTORNEY AT LAW
BLUMENTHAL, NORDREHAUG & BHOWMIK
2255 CALLE CLARA
LA JOLLA, CA 92037-3107

REGULAR MAIL
Richard Vogel
3440 Seven Hills Road
Castro Valley, CA 94546

E-SERVICE
Region 32, Oakland, California
NATIONAL LABOR RELATIONS BOARD
1301 Clay St Ste 300N
Oakland, CA 94612-5224

Subscribed and sworn before me this 24 of March 2015.	DESIGNATED AGENT A Jones NATIONAL LABOR RELATIONS BOARD

TAB 7

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRICE-SIMMS, INC. d/b/a TOYOTA SUNNYVALE

and **32-CA-138015**

RICHARD VOGEL, an Individual

RESPONSE TO NOTICE TO SHOW CAUSE

On March 24, 2015, the Board issued a Notice to Show Cause why it should not grant the General Counsel's March 10, 2015 Motion for Summary Judgment in this case. The Board set a deadline of April 7, 2015 for the parties to file briefs in this matter. Comes now the General Counsel for the National Labor Relations Board, herein called the Board, by the undersigned, and responds as follows.

Counsel for the General Counsel relies upon the facts and legal arguments set forth in his Motion for Summary Judgment. However, for purposes of clarity and emphasis, Counsel for the General Counsel respectfully submits the following:

1. The instant case is governed by the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied in relevant part,* 737 F.2d 344 (5th Cir. 2013). In *D.R. Horton*, the Board held that a policy or agreement that is imposed as a condition of employment and that precludes employees from pursuing employment-related collective claims in any court or arbitral forum

unlawfully restricts employees' Section 7 right to engage in protected concerted activity. Such policies, therefore, violate Section 8(a)(1) of the Act. Just as in *D.R. Horton*, Respondent's Agreements violate Section 8(a)(1) of the Act because they are imposed as a condition of employment and prohibit collective dispute resolution in any forum. As is true with any other protected concerted activity, Respondent may not require that employees waive their right to participate in such collective action.

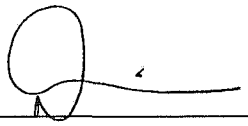
2. Should Respondent argue on brief that the Board's decision in *D.R. Horton* was decided by an improperly constituted Board, that defense should be summarily rejected because the full Board subsequently reaffirmed its *D.R. Horton* decision in *Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 (Oct. 28, 2014). In that case, the Board noted that arguments that Member Becker, who participated in the *D.R. Horton* decision, had been invalidly appointed or that his appointment had expired, were rejected by the Supreme Court in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014). See also, *Mathew Enterprises, Inc., dba Stevens Creek Chrysler Jeep Dodge v. NLRB*, No. 11-1310 (D.C. Cir. Nov. 7, 2014). In any event, regardless of the validity of Member Becker's appointment, the full Board's decision in *Murphy Oil* clearly supports the finding of a violation in this case.

3. It is anticipated that, on brief, Respondent will argue that *D.R. Horton* was wrongly decided. This argument is based upon the refusal of the Fifth Circuit to enforce the *D.R. Horton* decision and its criticisms by other federal circuit courts. However, the Board dealt with and rejected these arguments, including the argument that *D.R. Horton* was inconsistent with the Federal Arbitration Act, in *Murphy Oil U.S.A., supra*. Even if there were a direct conflict between the FAA and the Act, the terms of the Norris-LaGuardia Act and the rules of statutory

interpretation indicate that the FAA would have to yield. *Murphy Oil U.S.A.*, 361 NLRB No. 72, slip op. 11-12.

DATED AT Oakland, California this 7th day of April 2015.

Respectfully Submitted,



David Willhoite
Counsel for the General Counsel
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

PRICE-SIMMS INC., D/B/A TOYOTA SUNNYVALE **and** **RICHARD VOGEL, an Individual**	**Case(s)** **32-CA-138015** **Date:** **April 7, 2015**

AFFIDAVIT OF SERVICE OF RESPONSE TO NOTICE TO SHOW CAUSE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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Richard Vogel
3440 Seven Hills Road
Castro Valley, CA 94546
VIA EMAIL: ricvog1@gmail.com

National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, N.W.
Washington, DC 20005
VIA E-FILE

April 7, 2015
Date

Frances Hayden, Designated Agent of NLRB
Name

Frances S. Hayden
Signature

TAB 8

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RICHARD VOGEL, Charging Party, vs. PRICE-SIMMS, INC., D/B/A TOYOTA SUNNYVALE, Charged Party.	Case No. 32-CA-138015

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

Michael G. Pedhirney
Aleksandr Katsnelson
LITTLER MENDELSON P.C.
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Tel: (415) 433-1940

Attorneys for Respondent
PRICE-SIMMS, INC. d/b/a/ TOYOTA SUNNYVALE

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RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

I. INTRODUCTION

Respondent PRICE-SIMMS, INC. d/b/a TOYOTA SUNNYVALE ("Respondent," "Toyota Sunnyvale," "the Company," or "the Employer"), pursuant to the Board's March 24, 2015 issuance of a Notice to Show Cause, hereby submits that the General Counsel's ("GC") Motion for Summary Judgment should be denied and summary judgment should be granted in favor of the Employer. As explained further below, the GC's Motion must be denied because the GC's argument relies solely on wrongly decided case law, and because the GC requests a remedy that, if granted, would violate fundamental constitutional principles.

In the Motion, the GC contends that *D.R. Horton*, 357 NLRB No. 184 (January 3, 2012), which was recently affirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014),[1] necessarily requires a finding that the Employer's Binding Arbitration Agreement (the "Agreement") violates the Act.[2] Respondent respectfully contends that the NLRB should decline to follow *D.R. Horton* because the decision was wrongly decided on the merits. Contrary to the flawed holding in *D.R. Horton*, there is nothing in Section 7 of the Act that preserves an employee's procedural ability to bring or participate in a class or collective action. Moreover, as courts have repeatedly ruled since January 2012, *D.R. Horton* failed to provide appropriate deference to the Federal Arbitration Act's (9 U.S.C. §§ 1, *et seq.*) ("FAA") requirement that arbitration agreements be enforced as written absent a contrary congressional command, which the NLRA lacks. Thus, *D.R. Horton* and its NLRB progeny are inconsistent with the mandates of the FAA and United States Supreme Court precedent. Moreover, the remedy sought by the GC is impermissible because the Board does not have the authority to require courts to undo

[1] *D.R. Horton* and *Murphy Oil* were recently reaffirmed in *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (March 16, 2015).
[2] Attached hereto as Exhibit A is a complete version of the BAA.

determinations they have already made and to accept the Board's interpretation of the Act without reservation.

For the aforementioned reasons, and as explained in further detail below, the GC's Motion should be denied, and the Board should grant summary judgment in favor of Respondent.

II. STATEMENT OF FACTS

A. The Parties.

Toyota Sunnyvale operates a car dealership which sells and services Toyota brand vehicles at a facility in Sunnyvale, California. On October 2, 2014, the Charging Party, a Toyota Sunnyvale employee, filed an unfair labor practice charge alleging that the Employer violated the NLRA by promulgating, maintaining and/or enforcing a rule prohibiting employees from participating in collective or class actions. (Complaint ("Compl."), ¶¶ 1, 4, 5, 6.)

B. The Agreement.

Respondent has promulgated and maintained a Binding Arbitration Agreement, which all Toyota Sunnyvale employees sign as a condition of their employment. Under the Agreement, employees agree that all disputes arising out of or related to their employment with Toyota Sunnyvale "shall be submitted to and determined exclusively by binding arbitration."[3] (Exhibit A.) The Agreement expressly states:

> In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration . . . . (Exhibit A.)

[3] The BAA expressly states that employees may bring claims before an administrative agency where the law allows such claims, including claims before the NLRB. (Exhibit A.)

Accordingly, the Agreement requires that all arbitrable disputes subject to the Agreement be resolved through arbitration on an individualized basis.

C. The GC's Motion.

The GC's Complaint attacks only the express terms of the Agreement. Noticeably absent from the GC's Complaint and Motion are: (1) any suggestion that Toyota Sunnyvale failed to adequately notify its employees that the Agreement includes a class/collective action waiver; (2) any allegation that anyone from Toyota Sunnyvale interfered with, restrained, or coerced any employee with respect to his or her decision regarding whether to agree to the terms of the Agreement; and (3) any allegation that Toyota Sunnyvale prevented any of its employees from disclosing the existence, content, or results of any arbitration of a dispute between any employee and the Employer.

III. LEGAL ARGUMENT

The GC's Summary Judgment Motion is entirely dependent on the validity of *D.R. Horton* and its NLRB progeny. As explained below, this argument is unavailing because, as courts throughout the United States have determined in nearly unanimous fashion, *D.R. Horton* was wrongly decided.

A. The Board Should Not Rely On *D.R. Horton* Or Its NLRB Progeny.

Respondent respectfully contends that the Board should refuse to follow *D.R. Horton* or its NLRB progeny, because the decision was wrongly decided on its merits, is inconsistent with the FAA, and contradicts binding Supreme Court precedent and other federal and state decisions.

1. *D.R. Horton* Was Incorrectly Decided On Its Merits.

a. Section 7 Does Not Protect The Procedural Right To Bring Or Participate In Class Or Collective Actions In A Court Of Law Or In Arbitration.

Respondent respectfully contends that *D.R. Horton* was wrongly decided on its merits, as was *Murphy Oil* and now *Cellular Sales of Missouri*, both of which adopted the reasoning of *D.R. Horton*. In reaching its conclusion that Section 7 protects the right to bring or participate in a class or collective action, the *D.R. Horton* Board relied on cases in which the Board ruled that the NLRA prohibits an employer from taking an adverse employment action against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer, whether individually or in concert with other employees. *See, e.g., Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *Le Madri Restaurant*, 331 NLRB 269, 275-78 (2000); *Mojave Elec. Coop.*, 327 NLRB 13, 18 (1998); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–49 (1942).

Respondent does not dispute that Section 7 prohibits employers from disciplining or retaliating against employees who knowingly, voluntarily, and affirmatively wish to engage in legal process to act concertedly. However, Section 7 does not and cannot reach into the judicial system to regulate the procedural manner in which such an action shall be litigated.[4] Nor does Section 7 prevent an employee from accepting the benefits of a neutral individual arbitration system that replaces access to the judicial system and its procedural mechanisms, including class actions. None of the Board's pre-*D.R. Horton* authority supports the conclusion that the

[4] The ability to litigate on behalf of a class is merely a *procedural*, rather than *substantive* device provided by Rule 23 of the Federal Rules of Civil Procedure. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

procedural right to bring or participate in a class or collective action is protected under Section 7.[5] Indeed, there is nothing in the NLRA's plain language or the Act's legislative history that indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions. As explained by the Supreme Court, "the term 'concerted [activity]' is not defined in the Act." *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984).

At the time the NLRA was enacted, neither Rule 23 of the Federal Rules of Civil Procedure nor the Fair Labor Standards Act existed. This is significant because the Senate Report accompanying the NLRA provided:

> [The] bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair. Sen.Rep.No.573, 74th Cong., 1st Sess. 8 (1935).

Because Congress never intended to guarantee individual employees a statutory right to bring or participate in class actions, there is no basis for concluding that Section 7 encompasses the right to partake in a class or collective action. The FAA preempts the NLRA and requires that arbitration agreements containing class and collective action waivers in the employment context be upheld.

The GC contends that a violation of Section 8(a)(1) of the Act has occurred. This contention cannot be established factually or legally. Section 7 of the NLRA provides employees with the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection" and "the right to refrain from any or all such activities." *See* 29 U.S.C. § 157.

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[5] In fact, the previous General Counsel of the Board issued a July 16, 2010 memorandum concluding that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without *per se* violating the Act. (General Counsel Memorandum GC 10-06) (attached as Exhibit B). The memo carefully draws a distinction between prohibited employer discipline for seeking collective litigation and the employers' right to seek court enforcement of individual arbitration agreements, including a class action waiver. *Id.*

Section 8(a)(1) of the Act forbids employers to "interfere with, restrain or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). The Board's well-settled test for determining a Section 8(a)(1) violation is an objective one:

> [I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

See also Miami Systems Corp., 320 NLRB 71, n. 4 (1995), enf'd in relevant part sub nom., 111 F.3d 1284 (6th Cir. 1997) ("The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . . ."); *Keith Miller*, 334 NLRB 824 (2001). The General Counsel bears the ultimate burden of proving interference, restraint or coercion in violation of the NLRA. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998). In the context of alleged 8(a)(1) violations stemming from an employer's use of arbitration policies containing class/collective action waivers, as indicated above, the courts have universally rejected any such Act violation. *See, e.g.*, *Sutherland*, 726 F.3d at 297-98 n. 8; *Owen*, 702 F.3d at 1055.

In summary, the *D.R. Horton* Board erred by expanding Section 7 to protect not only an employee's right to seek redress through judicial or administrative process, but also the form in which such relief may be adjudicated.

2. *D.R. Horton* And Its NLRB Progeny Are Inconsistent With The FAA And Contrary To Binding Supreme Court Precedent And Other Federal and State Decisions.

D.R. Horton and its Board progeny are also critically flawed because of their failure to accommodate the policies Congress advanced in the FAA, and thus, the decision is inconsistent with binding Supreme Court precedent.

The FAA encourages private alternative dispute resolution, with informal, inexpensive, and bilateral arbitration as its focus. The FAA provides that "[a] written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The Supreme Court, and virtually every other court confronted with the issue, has principally held that this applies to class action waivers as well. *See, e.g., AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748-53 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (the agreement must affirmatively permit class actions in order for an arbitrator to preside over the case as a class action); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (finding that the FAA's mandate to enforce arbitration agreements was not "overridden by a contrary congressional command" because the statutes at issue made no mention of class arbitration).

The U.S. Supreme Court has held that, because of the FAA's mandate, an arbitration agreement containing a class waiver must be enforced. *Concepcion*, 131 S. Ct. at 1748-53. In *Concepcion,* the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of such an agreement on the availability of classwide arbitration. *Concepcion*, 131 S. Ct. at 1753. The Supreme Court held that the FAA preempts any state law that prohibits a class waiver in an arbitration agreement. *Id.* at 1753. The Court reasoned that "[r]equiring the availability of classwide arbitration interferes

with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. The Court, applying longstanding Supreme Court precedent, including *Moses H. Cone*, 460 U.S. at 24-25, concluded the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms – including provisions that waive the right to pursue class or collective relief in arbitration. *Id.* at 1745-56.

Shortly after the *D.R. Horton* decision, the Supreme Court reaffirmed the principle set forth in *Concepcion* that the FAA "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665, 669 (2012). The Supreme Court later endorsed this principle again in *Italian Colors Restaurant*, 133 S. Ct. at 2312, n. 3. The Court emphasized in *CompuCredit* that this requirement applies "even when the claims at issue are federal statutory claims, **unless the FAA's mandate has been overridden by a contrary congressional command.**" 132 S. Ct. at 669 (citations omitted) (emphasis added). The Court stressed that 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. It is because *CompuCredit* and *Italian Colors Restaurant* extend to employment-related arbitration agreements with equal force that every Circuit Court faced with the issue of addressing the Board's *D.R. Horton* decision has rejected *D.R. Horton*, acknowledging its conflict with Supreme Court precedent. *See, e.g., D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("*D.R. Horton II*"); *Richards v. Ernst & Young, LLP,* 734 F.3d 871, 873-74 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297-98 n. 8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1055 (8th Cir. 2013).

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies, and further held 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. 132 S. Ct. at 672, n. 4. To meet this burden, a "congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *See id.* at 670-73. Thus, the Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673. There is no "contrary congressional command" in Section 7 of the NLRA – or anywhere else in the Act – that requires the Board to abrogate otherwise lawful and enforceable arbitration agreements that contain class or collective action waivers. Toyota Sunnyvale respectfully contends that *D.R. Horton*'s conclusion on this issue was wrongly decided. As explained above, there is nothing in the NLRA's plain language or the Act's legislative history that indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions, particularly where those claims are premised upon rights not contained in the NLRA itself.

The NLRB's decision in *D.R. Horton* has recently been overturned by the Fifth Circuit Court of Appeals, in part because: (1) the Board failed to give appropriate weight to the FAA; and (2) there is no basis on which to find that the NLRA supports a Congressional command necessary to override the FAA's requirement that arbitration agreements be enforced in accordance with their terms. *D.R. Horton II*, 737 F.3d at 362. Since *D.R. Horton* was decided, the vast majority of federal and state courts across the country that have considered this decision have rejected it as wrongly decided and contrary to Supreme Court precedent, and have refused to apply it. *See, e.g., Richards*, 734 F.3d at 873-74; *Sutherland*, 726 F.3d at 297-98 n. 8; *Owen*,

702 F.3d at 1055.[6] One primary reason state and federal courts across the United States have rejected *D.R. Horton* is its irresolvable conflict with the FAA.[7]

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[6] *See also, e.g., Dixon v. NBCUniversal Media, LLC*, 947 F.Supp.2d 390, 403, n. 11 (S.D.N.Y. May 28, 2013); *Morris v. Ernst & Young LLP*, 2013 U.S. Dist. LEXIS 95714 at *34-37 (N.D. Cal. July 9, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. LEXIS 90256 at *39-40, n. 11 (C.D. Cal. June 25, 2013); *Brown v. Citicorp Credit Servs.*, 2013 U.S. Dist. LEXIS 59616 at *4-5 (D. Id. April 24, 2013); *Noffsinger-Harrison v. LP Spring City LLC*, 2013 U.S. Dist. LEXIS 16442 at *15-16 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865 at *23-25 (C.D. Cal. Feb. 5, 2013); *Long v. BDP Int'l, Inc.*, 919 F.Supp.2d 832, 852, n. 11 (S.D. Tex. Jan. 22, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *4-6 (S.D. Tex. October 4, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038, 1049 (N.D. Cal. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 845 (N.D. Cal. 2012); *Delock v. Securitas Security Services USA, Inc.*, 883 F.Supp.2d 784, 789-91 (E.D. Ark. 2012); *Spears v. Waffle House*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573, *6-7 (M.D. Fla. May 18, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 5277, *19-20 (S.D.N.Y. Jan. 13, 2012); *Cohen v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 174700 (S.D.N.Y. Dec. 4, 2012); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (M.D. Ga. February 9, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1134 (2012); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 372-73; *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487, 514-15 (2012); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537, 1559-60 (2012); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 U.S. Dist. LEXIS 129102, at *20, n. 7 (S.D.N.Y. September 9, 2013); *Ryan v. JPMorgan Chase & Co.*, 924 F.Supp.2d 559, 563 (S.D.N.Y. February 21, 2013); *Green v. Zachry Indus., Inc.*, 36 F.Supp.3d 669, 675 (W.D. Va. March 25, 2014); *Smith v. BT Conferencing, Inc.*, 2013 U.S. Dist. LEXIS 158362, at *22 (S.D. Ohio November 5, 2013); *Sylvester v. Wintrust Fin. Corp.*, 2013 U.S. Dist. LEXIS 140381, at *28 (N.D. Ill. September 30, 2013); *Hickey v. Brinker Int'l Payroll Co., L.P.*, 2014 U.S. Dist. LEXIS 20387, at *5 (D. Colo. February 18, 2014); *Martinez v. Leslie's Poolmart, Inc.*, 2014 U.S. Dist. LEXIS 156218 at *12-13, n. 5 (C.D. Cal. November 3, 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 U.S. Dist. LEXIS 147752 at *34 (C.D. Cal. October 7, 2014); *Ortiz v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 140552 at *21 (E.D. Cal. October 1, 2014); *Fardig v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 87284 at *24 (C.D. Cal. June 13, 2014); *Longnecker v. Am. Express Co.*, 2014 U.S. Dist. LEXIS 72554 at *30 (D. Ariz. May 28, 2014); *Cohn v. Ritz Transp., Inc.*, 2014 U.S. Dist. LEXIS 53381 at *9 (D. Nev. April 17, 2014); *Appelbaum v. AutoNation Inc.*, 2014 U.S. Dist. LEXIS 50588 at *29 (C.D. Cal. April 8, 2014); *Zabelny v. CashCall, Inc.*, 2014 U.S. Dist. LEXIS 2626 at *41 (D. Nev. January 8, 2014); *Siy v. CashCall, Inc.*, 2014 U.S. Dist. LEXIS 1472 at *40 (D. Nev. January 6, 2014); *Cohn v. Ritz Transportation, Inc.*, 2014 U.S. Dist. LEXIS 53382 at *26 (D. Nev. January 2, 2014); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 U.S. Dist. LEXIS 166647 at *13-14 (N.D. Cal. November 22, 2013).

[7] *See, e.g., Lloyd.*, 2013 U.S. Dist. LEXIS 129102 at *20, n. 7 ("To the extent that Plaintiffs rely on [*D.R. Horton*], for the proposition that a waiver of the right to proceed collectively under the FLSA is unenforceable as a violation of the NLRA, this Court declines to follow that decision");

For the foregoing reasons, the GC's reliance on *D.R. Horton* is misplaced. Accordingly, the GC's Motion should be denied and summary judgment should be granted in Toyota Sunnyvale's favor.

B. The Remedy Sought By The General Counsel Is Impermissible And Must Be Denied.

The GC improperly requests that "in addition to the standard rescission, notice posting, and make-whole requirements," the Board also order Respondent to move the Superior Court of California, Santa Clara County to vacate its order for individual arbitration, if a motion to vacate can still be timely filed. (*See* GC's Motion for Summary Judgment, p. 11.) The GC also improperly requests that the Board require Respondent to reimburse the Charging Party "for any litigation expenses, including attorneys' fees, incurred that are directly related to opposing Respondent's [] Motion." (*Id.*) The GC is essentially asking that the Board impermissibly issue a remedial order that effectively seeks to undo an earlier ruling by a court and deprives Toyota

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Tenet Healthsystem Phila., Inc., 2012 U.S. Dist. LEXIS 116280 at *9-10 (E.D. Pa. Aug. 14, 2012) (finding an arbitrator's decision to disregard *D.R. Horton* did not render her decision "a manifest disregard of the applicable law" that would justify setting aside the arbitration award); *Long*, 919 F. Supp. 2d at 852, n. 11 (S.D. Tex. 2013) (refusing to follow *D.R. Horton* and noting it "has been widely criticized and not followed by various of district courts"); *Jasso*, 879 F.Supp.2d at 1049 (granting employer's motion to compel and rejecting plaintiff employee's contention that class action waivers are not enforceable in employment disputes in light of the Board's reasoning in *D.R. Horton*); *Morvant*,, 870 F.Supp.2d at 845 (same); *Delock*, 883 F.Supp.2d at 789-91 (noting that the *D.R. Horton* Board "did not have the benefit of *CompuCredit*" and finding that "[a] fair reading of the FAA and the precedents . . . requires this Court to enforce the [parties'] agreement to arbitrate all employment-related disputes individually, not collectively" and that the FAA prevails in a conflict with the NLRA); *Spears*, 2012 U.S. Dist. LEXIS 90902, *5-6 (rejecting argument that *D.R. Horton* rendered arbitration agreement unenforceable even though the agreement included a waiver of class claims); *De Oliveira*, 2012 U.S. Dist. LEXIS 69573 at *6-7 (finding collective action waiver in arbitration agreement enforceable despite plaintiff's argument that *D.R. Horton* renders the agreement unenforceable); *LaVoice*, 2012 U.S. Dist. LEXIS 5277, *19-20 (declining to follow *D.R. Horton*); *Palmer*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (finding *D.R. Horton* did not "meaningfully apply" to determine the validity of employee class action waiver agreements). *See also Iskanian,* 59 Cal. 4th at 372-73 (rejecting plaintiff's assertion that *D.R. Horton* prohibited enforcement of his class action waiver, concluding, "Sections 7 and 8 of the NLRA do not represent a contrary Congressional command overriding the FAA's mandate.").

Sunnyvale of the right to make legal arguments in support of the enforceability of the Agreement. Such a sweeping remedial order is unprecedented and beyond the Board's authority.

1. Respondent Should Not Be Ordered To Move To Vacate The Superior Court's Decision Regarding The Enforceability Of The Binding Arbitration Agreement.

The GC cites *Baptist Memorial Hospital*, 229 NLRB 45 (1977) for the proposition that the Board may validly require an employer to join with the affected plaintiffs to vacate a court's enforcement of the Binding Arbitration Agreement. Factually distinct from the circumstances at issue here, in that case, the Board ordered an employer to join with the charging party to petition a court to expunge ***an arrest and criminal conviction*** resulting from the employer's enforcement of its unlawful no-access policy. 229 NLRB at 45. In ordering such an extraordinary remedy, the Board recognized that "[i]n so doing, we realize that in the final analysis it is for the local court to determine whether or not [the employee's] conviction should be reversed and the record expunged. ***By our action herein, we are not seeking to usurp the authority of the court but merely to effectuate the policies and purposes of the Act.***" 229 NLRB at n. 13 (emphasis added). Here, unlike in *Baptist Memorial*, the court entered an order enforcing the Binding Arbitration Agreement after full briefing and argument by the parties involved, including the opportunity to consider *D.R. Horton* and its progeny. If the Board orders Respondent to file a motion to vacate where the court had the opportunity to consider the legality of the Binding Arbitration Agreement under *D.R. Horton* and its progeny, it will result in exactly the sort of interference with the judicial process the Board in *Baptist Memorial* was determined to avoid. Indeed, the authority cited by the GC serves only to reinforce the conclusion that persuading the

court to reconsider is improper.[8] Therefore, the GC's request that the Board require Respondent to file a motion to vacate the court order enforcing the class action waiver should be denied.

2. The Board Does Not Have The Authority To Require Courts To Undo Determinations They Have Already Made And To Require Courts To Accept The Board's Interpretation Of The Act Without Reservation.

If the Board were to order Toyota Sunnyvale to withdraw its legal position regarding the enforceability of the Binding Arbitration Agreement and to pay the Charging Party's attorney's fees incurred challenging the Agreement, the Board would effectively be compelling the Company to seek to negate an earlier court determination regarding the enforceability of the Agreement, which was arrived at by a duly-appointed Judge who reviewed legal arguments made by the parties, and to forfeit well-accepted legal arguments regarding the validity of the Agreement. This remedy is not permissible because it would essentially strip Toyota Sunnyvale of its due process right to be heard with respect to its argument that the Agreement is lawful and enforceable. Moreover, ordering such a remedy would violate the separation of powers doctrine, as it would amount to Board action that improperly encroaches on the functions of the judiciary.

Additionally, the Santa Clara County Superior Court's order to enforce the class action waiver was rendered on October 24, 2014. (Complaint, ¶ 5(b).) Filing any motion to vacate so long after a court has ruled on the issue of the enforceability of the Binding Arbitration Agreement, apart from the fact that any such motion could be untimely, could expose Toyota Sunnyvale to the risk of sanctions for filing an unwarranted and untimely motion that re-raises an issue previously decided by the court.

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[8] The Board cases cited by the GC in support of its position that the Board may compel the Employer to disavow legal contentions that were accepted by a court of law are inapposite. Both *Loehmann's Plaza*, 305 NLRB 663 (1991), and *Federal Security, Inc.*, 336 NLRB 703 (2001) involved the Board ordering an employer to take affirmative steps in pending litigation that was preempted by the NLRA. *Loehmann's Plaza*, 305 NLRB at 669-71; *Federal Security, Inc.*, 336 NLRB at 703, n. 1. Such a situation is not present here: none of the lawsuits in the record involve legal claims that are even arguably preempted by the NLRA.

a. The proposed remedy would violate Respondent's due process rights.

It is widely recognized that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *see also Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"). By requiring Toyota Sunnyvale to concede the issue of the enforceability of the Agreement's class or collective action waiver in a case where a court has already determined the Binding Arbitration Agreement and waiver to be enforceable and in future cases in which the Agreement may be applicable, the order would deprive the Company of its due process right to be fully heard on the issue.

The Board cannot compel courts to capitulate to the Board's interpretation of the Act, which is what the Order would effectively seek to accomplish by precluding the Employer from arguing in favor of the validity of the Agreement. Courts are free to reject the Board's interpretation of the Act. Indeed, as explained above, numerous courts have upheld class or collective action waivers and have expressly refused to follow the Board's decision in *D.R. Horton.*

The Charging Party, represented by counsel of his choosing, was afforded the opportunity to oppose the Company's motion to compel individual arbitration. The Charging Party and his counsel had the right to make any and all arguments supporting the contention that the Agreement is invalid or unenforceable, including any arguments that the Agreement violated the Act. It is inappropriate to require Toyota Sunnyvale to re-raise these issues with the court and concede its position regarding the enforceability of the Agreement.

b. The proposed remedy would violate the separation of powers doctrine.

"[A] constitutional attack based on a violation of separation of powers is properly launched against [an] executive action . . . that effects the reopening of a judgment . . .." *Wyatt v. Syrian Arab Republic*, 736 F.Supp.2d 106, 114 (D.D.C. 2010). By requiring Toyota Sunnyvale to concede the issue of the enforceability of the Agreement's class or collective action waiver in a case where a court has already determined the Agreement and waiver to be enforceable, the Board would be violating the separation of powers doctrine by encroaching on the functions of the judiciary. *See Lee v. Macon*, 270 F.Supp. 859, 865-66 (M.D. Ala. 1967) ("Executive officials, acting through [an executive agency] may not, by terminating funds, in effect disapprove a court-adopted plan . . . Neither may such officials finally determine . . . that [one] is not in compliance with a court-adopted plan and act independently of any court action to terminate financial assistance . . . To permit [this] would be an abdication on the part of the Court of its authority to require compliance with a court order."). As explained above, the Board cannot compel courts to capitulate to the Board's interpretation of the Act, which is what the Order would effectively seek to accomplish by negating an earlier court determination regarding the enforceability of the Agreement.

IV. CONCLUSION

For the foregoing reasons, the GC's Motion should be denied and summary judgment should be granted in favor of the Employer. As demonstrated above, it must be found that the voluntary Agreement does not violate Section 8(a)(1) of the National Labor Relations Act and the instant charge must be dismissed.

Dated: April 7, 2015.

Respectfully submitted,

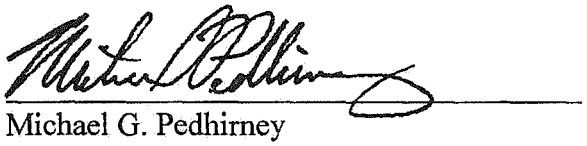

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EXHIBIT A

E-FILED: Oct 1, 2014 2:06 PM, Superior Court of CA, County of Santa Clara, Case #1-14-CV-261268 Filing #G-66599

Richard Vogel

Instructions: Have employee sign and date and then place in personnel file.

AGREEMENTS

Between : Toyota Sunnyvale "Company"

and Richard Vogel "Employee"

At Will Employment Agreement

I agree as follows: My employment and compensation is terminable at-will, is for no definite period, and my employment and compensation may be terminated by the Company (employer) at any time and for any reason whatsoever, with or without good cause at the option of either the Company or myself. Consequently, all terms and conditions of my employment may be changed or withdrawn at Company's unrestricted option at any time, with or without good cause. No implied, oral, or written agreements contrary to the express language of this agreement are valid unless they are in writing and signed by the President of the Company (or majority owner or owners if Company is not a corporation). No supervisor or representative of the Company, other than the Owner of the Company, has any authority to make any agreements contrary to the foregoing. This agreement is the entire agreement between the Company and the employee regarding the rights of the Company or employee to terminate employment with or without good cause, and this agreement takes the place of all prior and contemporaneous agreements, representations, and understandings of the employee and the Company.

Richard Vogel 6/7/12

Signature - Richard Vogel Date

Binding Arbitration Agreement

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees

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in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration; thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement. **I UNDERSTAND BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH I AND THE COMPANY GIVE UP OUR RIGHTS TO TRIAL BY JURY.**

Richard Vogel 6/7/17

Signature - Richard Vogel Date

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Toyota Sunnyvale Employee Handbook

EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT

Richard Vogel

This will acknowledge that I have reviewed the Employee Handbook posted in the HotlinkHR system, that I have a username and password as well as access to a company computer allowing me to view the Employee Handbook as needed, and that I have familiarized myself with its contents. By signing below, I also acknowledge that I have received a copy of this Employee Acknowledgment and Agreement.

I understand that this handbook represents the current policies, regulations, and benefits and that any and all policies or practices can be changed at any time by the Company. The Company retains the right to add, change or delete wages, benefits, policies and all other working conditions at any time (except the policy of "at-will employment" and Arbitration Agreement, which may not be changed, altered, revised or modified without a writing signed by the President of the Company).

I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. I acknowledge that the

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Company's business and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However, in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this Agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provisions or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. **Both the Company and I agree that any arbitration proceeding must move forward under the Federal Arbitration Act (9 U.S.C. §§ 3-4) even though the claims may also involve or relate to parties who are not parties to the arbitration agreement and/or claims that are not subject to arbitration: thus, the court may not refuse to enforce this arbitration agreement and may not stay the arbitration proceeding despite the provisions of California Code of Civil Procedure § 1281.2(c). The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable. Thus, the Company and Employee voluntarily waive the right to have a court determine the enforceability and/or scope of this Agreement.**

I further understand that nothing in the Employee Handbook creates, or is intended to create, a promise or representation of continued employment and that my employment, position and compensation all are at-will, and may be changed or terminated at the will of the Company or I, with or without cause or notice.

This is the entire agreement between the Company and I regarding dispute resolution, the length of my employment, and the reasons for termination of employment, and this agreement supersedes any and all prior agreements regarding these issues to the extent that they differ from the foregoing. It is further agreed and understood that any agreement contrary to the foregoing must be entered into, in writing, by the President of the Company. No supervisor or representative of the Company, other than its President, has any authority to enter into any agreement for employment for any specified period of time or make any agreement contrary to the foregoing. Oral representations made before or after I am hired do not alter this Agreement.

If any term or provision, or portion of this Agreement, is declared void or unenforceable, it shall be severed and the remainder of this Agreement shall be enforceable.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS.

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND AGREEMENT.

Richard Vogel (Electronic Signature)	6/7/2012 2:46:04 PM
Signature -	Date

[RETAIN IN EMPLOYEE PERSONNEL FILE]

EXHIBIT B

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-06 June 16, 2010

To: All Regional Directors, Officers-in-Charge and Resident Officers

From: Ronald Meisburg, General Counsel

Subject: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies

Issues have arisen regarding the validity of mandatory arbitration agreements that prohibit arbitrators from hearing class action employment claims while at the same time requiring employees to waive their right to file any claims in a court of law, including class action claims. This Guideline Memorandum describes the legal framework to use in considering these and related issues when they arise in the future.[1]

Briefly summarized, Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection. In *Eastex, Inc., v. NLRB*,[2] the Supreme Court recognized that the right of employees to act concertedly under Section 7 includes the right to be free from employer retaliation when employees seek to improve their working conditions by resort to administrative and judicial forums. To hold such activity unprotected "would leave employees open to retaliation for much legitimate activity that could improve their lot as employees."[3] At the same time, however, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp. (Gilmer),*[4] determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution. The orderly development of the law under the Act and the sound exercise of prosecutorial discretion by the General Counsel demand that we take account of the long term, well developed body of case law in this area.

Cases coming before the General Counsel have raised the question whether there is a conflict between the Board law protecting employees who concertedly seek to vindicate their employment rights in court and the court law upholding individual waivers of the right to pursue class action relief. Resolving this important question requires

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[1] This memorandum only covers mandatory arbitration agreements unilaterally imposed by employers in non-union settings. Such agreements between employers and individual employees may be dissolved upon the employees' selection of an exclusive bargaining representative pursuant to Section 9(a) of the NLRA. See *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944); *14 Penn Plaza v. Pyett,* ___U.S. ___, 129 S.Ct. 1456 (2009).

[2] 437 U.S. 556, 565-66 (1978).

[3] Id.

[4] 500 U.S. 20, 31 (1991).

careful attention to the precise scope of the rights afforded to employers and employees under the relevant statutes. In addition, all the legitimate interests of the affected parties should be weighed in the balance. It should not be overlooked that employers and employees alike may derive significant advantages from arbitrating claims rather than adjudicating them in a court of law. For example, employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators.

Analysis of mandatory arbitration programs should be guided by the following principles:

(1) The concerted filing of a class action lawsuit or arbitral claim seeking to enforce employment statutes is protected by Section 7 of the Act, and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

(2) Any mandatory arbitration agreement established by an employer may not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit to improve working conditions.

(3) Nonetheless, an employer's conditioning employment on an employee's agreeing that the employee's individual non-NLRA statutory employment claims will be resolved in an arbitral forum is permissible under the Supreme Court's holding in *Gilmer,* supra. The validity of such individual employee forum waivers is normally determined under non-NLRA law, such as the Federal Arbitration Act and the employment statutes at issue.

(4) So long as the wording of these individual forum waiver agreements makes clear to employees that their Section 7 rights are not waived and that they will not be retaliated against for concertedly challenging the validity of those agreements through class or collective actions seeking to enforce their employment rights, an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration. Similarly, an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

In sum, if mandatory arbitration agreements are drafted to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved and that only individual rights are waived, no issue cognizable under the NLRA is presented by an employer's making and enforcing an individual employee's agreement that his or her non-NLRA employment claims will be resolved through the employer's mandatory arbitration system. In such cases, an employer is acting in accord with its rights under *Gilmer* and its progeny.

I. ANALYSIS

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity.

The Board has found protected concerted activity to include the filing of collective and class action lawsuits regarding employment matters. For example, in *Trinity Trucking & Materials Corp.*,[5] the Board held that the filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was protected activity. In *Le Madri Restaurant*,[6] the Board found that an employer unlawfully discharged two employees for engaging in protected concerted activity, which included filing a lawsuit in federal court on behalf of 17 other employees. The lawsuit alleged violations of federal and state labor laws. In *Novotel New York*,[7] the Board found that an "opt-in" class action lawsuit alleging employer violations of the Fair Labor Standards Act ("FLSA") was protected concerted activity. In *United Parcel Service, Inc.*,[8] the Board found that an employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks. Most recently, the Board in *Saigon Gourmet*[9] concluded that the employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage and hour lawsuit and by discharging employees because they engaged in protected concerted activities. The Board acknowledged that the employer "knew that employees were preparing to file a wage and hour lawsuit, [which is] clearly protected concerted activity . . . [.]".[10]

In light of the above precedent, class action lawsuits that can be characterized as having been filed by employees for their mutual aid and protection implicate NLRA rights. Unlike other statutory contexts—where a class action lawsuit could be viewed as merely a procedural mechanism for enforcing a separate underlying right—the NLRA's cornerstone principle is that employees are empowered to band together to advance their work-related interests on a collective basis.

This conclusion, however, should not be read as overstating that all class action lawsuits or grievances involve protected concerted activity. Such claims also must continue to be analyzed under the standard for "concerted activity" set forth by the

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[5] 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978) (contrary decision by arbitrator deemed repugnant to the purposes of the Act).
[6] 331 NLRB 269, 275-76 (2000).
[7] 321 NLRB 624, 633-636 (1996) (union did not engage in objectionable pre-election conduct by aiding employee lawsuit).
[8] 252 NLRB 1015, 1018, 1022 & fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982) (employee initiated and filed class action lawsuit, including circulating petition among employees to join suit; "[i]t is well settled that activities of this nature are concerted, protected activities[.]").
[9] 353 NLRB No. 110, see fn. 4, supra.
[10] Id., slip op. at 1.

Board in *Meyers* and its progeny.[11] In addition, class action lawsuits—like any employee lawsuits—are not protected by Section 7 if brought for a forbidden object or if the allegations are knowingly and recklessly false or pursued in bad faith.[12] Moreover, while employees have the right to request class action status from a court or arbitrator, they do not have the right to be granted such status if the claims at issue do not satisfy class action standards such as commonality, numerosity, etc. That said, a mandatory arbitration agreement that prohibits all class action grievances and lawsuits necessarily inhibits some protected activity.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

Because, as discussed above, employees have a Section 7 right concertedly to seek to enforce their statutory employment rights before courts and other administrative tribunals, an employer's conditioning employment on an employee's waiving his or her right to engage in concerted activity would violate fundamental employee rights.[13] For similar reasons, a mandatory arbitration agreement that could be reasonably read by an employee as prohibiting him or her from joining with other employees to file a class action amounts to an overly broad employer rule and hence is unlawful.[14]

Possible modifications for remedying an overly broad mandatory arbitration agreement would include the insertion of language in the agreement assuring

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[11] See *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), reaffirmed, *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (stating that concerted activity cannot be presumed, and only group activity—two or more employees acting together, or an individual seeking to initiate/invoke group activity, or activity by one who raises a group complaint to the employer—is concerted.

[12] *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union violated §8(b)(4)(ii)(A) by filing grievance predicated on a contract construction that, if accepted, would render the contract provision violative of §8(e)); *Leviton Mfg. Co.*, 203 NLRB 309 (1973) (employees' filing of civil suit against employer is protected activity absent proof that proceeding was commenced maliciously or in bad faith) enf. denied 486 F.2d 686 (1st Cir. 1973) (finding bad faith); *Altex Ready Mixed Concrete Corp.*, 223 NLRB 696, 699-700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (charge that employee provided a knowingly false affidavit in support of union injunction not proven).

[13] See e.g., *Barrow Utilities and Electric,* 308 NLRB 4, 11, fn. 5 (1992) ("The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."); *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991) ("It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7.").

[14] See *U-Haul Company of California, Inc.*, 347 NLRB 375, 377-78 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007), (employer interfered with employee rights by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board).

employees: (i) that the employer's arbitration agreement does not constitute a waiver of employees' collective rights under Section 7, including the employees' right concertedly to pursue any covered claim before a state or federal court on a class, collective, or joint action basis; (ii) that the employer recognizes the employees' right concertedly to challenge the validity of the forum waiver agreement upon such grounds as may exist at law or in equity; and (iii) that no employee will be disciplined, discharged, or otherwise retaliated against for exercising their rights under Section 7.

3. Supreme Court and circuit court precedent establishes that employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act.

In *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31 (1991) *(Gilmer),* the Supreme Court decided that an employer could require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims to a private arbitral forum for resolution. The courts of appeals have extended *Gilmer* in holding that employment agreements that require the employee to waive the filing of class or collective claims both in court and in the employer's arbitration procedure are not *per se* unenforceable. See, e.g., *Carter v. Countrywide Credit Industries, Inc.,* 362 F.3d 294, 298 (5th Cir. 2004); *Horenstein v. Mortgage Market, Inc.,* 9 Fed.Appx. 618, 619, 2001 WL 502010, 1 (9th Cir. 2001). Rather, the legitimacy of such programs is tested under the standards of the Federal Arbitration Act, which provides that pre-dispute arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, courts have upheld an individual's waiver of the right to seek class action relief both in arbitration and in court so long as the court is satisfied that class action relief is not essential to the vindication of the particular substantive law at issue. Compare *Johnson v. West Suburban Bank*, 225 F.3d 366, 368-378 (3d Cir. 2000) and *Carter v. Countrywide Credit Industries, Inc.*, supra at 298 with *Kristian v. Comcast Corp.*, 446 F.3d 25, 53-61 (1st Cir. 2006). The validity of such individual employee forum waivers is normally determined by reference to the employment law at issue and does not involve consideration of the policies of the National Labor Relations Act.

These cases should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum, is also in effect waiving his or her individual right to pursue a class action. Although these courts have not analyzed individual class action waivers with the provisions of Section 7 of the NLRA in mind, Section 7 does not require a different outcome. Under the principles enunciated in *Meyers Industries (Meyers I),* 268 NLRB 493, 497 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers* 11), 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), Board law requires a careful distinction between purely individual activity and concerted activity for mutual aid and protection. *Holling Press, Inc.,* 343 NLRB 301, 302 (2004); *United Pacific Insurance,* 270 NLRB 981, 982 (1984), review denied sub nom. *Whitman v. NLRB,* 767 F.2d 935 (9th Cir. 1985) (Table). While an employer may not condition employment on its employees' waiving collective rights protected by the NLRA, individual employees

possessed of an individual right to sue to enforce non-NLRA employment rights can enter into binding individual agreements regarding the resolution of their individual rights in arbitration. So long as purely individual activity is all that is at issue in the individual class action waiver cases that have been upheld under *Gilmer*, the results of those cases are consistent with extant Board law.

No merit was found in arguments that, while a *Gilmer* forum waiver alone may not raise Section 7 issues, an employer's demand that employees agree not to institute a class action to further his or her individual claims does implicate Section 7, because filing a class action is inherently concerted activity on behalf of others. It was concluded that an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude otherwise would be a return to the concept of "constructive concerted activity" that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-496 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions "designed for the benefit of all employees" is concerted activity "in the absence of any evidence that fellow employees disavow such representation"). So expanding the concept of "concerted activity" would also have the effect of overturning cases such as *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004), thereby disserving the Congressional objectives that have been recognized in *Gilmer* and its progeny.

For these reasons, it is concluded that no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and that no Section 7 right is violated when that individual agreement is enforced.

4. Even if an employee is covered by an arrangement lawful under *Gilmer*, the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement.

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

II. INSTRUCTIONS FOR PROCESSING CHARGES INVOLVING EMPLOYER AGREEMENTS THAT DENY EMPLOYEES THEIR SECTION 7 RIGHT TO FILE A CLASS ACTION LAWSUIT

In investigating this type of charge, the Regional Offices should examine the wording of all employer documents distributed to and/or signed by employees relating to the employer's mandatory arbitration programs. The Region should carefully investigate whether the activity engaged in by any employee covered by the agreement meets the *Meyers* test for concerted activity. The Region should further investigate whether the employer took action against employees that might be deemed a threat or discipline, and whether the employer discharged or constructively discharged any employee.

To summarize, in cases raising these issues, the following principles are applicable:

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

3. Employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act. So long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found.

4. Even if an employee is covered by an arrangement lawful under *Gilmer,* the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement and may not be threatened or disciplined for doing so. The employer, however, may lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

/s/
R.M.

MEMORANDUM GC 10-06

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On April 7, 2015, I served the within document(s):

- **RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE**

☐ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is chgoodman@littler.com.

Nicholas J. De Blouw, Esq.
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or, if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct. Executed on April 7, 2015, at San Francisco, California.

Charisse Goodman

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TAB 9

Price-Simms, Inc. d/b/a Toyota Sunnyvale *and* Richard Vogel. Case 32–CA–138015

November 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an agreement that prohibits its employees from participating in collective or class litigation in all forums.

Pursuant to a charge filed by Richard Vogel on October 2, 2014, the General Counsel issued the complaint on January 30, 2015. The complaint alleges that, since at least April 2, 2014, the Respondent has promulgated and maintained the Binding Arbitration Agreement and Toyota Sunnyvale Handbook Employee Acknowledgement Agreement (the "Agreement"), and required its Sunnyvale employees to execute the Agreement as a condition of employment. The complaint further alleges that the Agreement requires that Sunnyvale employees bring all disputes arising out of or related to their employment to individual binding arbitration.

The relevant portion of the Agreement reads as follows:

> I . . . acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. . . . In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action or arbitration (collectively "class claims").[1]

The complaint alleges that, by promulgating and maintaining the Agreement, the Respondent interfered with employees' Section 7 rights to engage in collective legal activity by binding employees, including the Charging Party, to an irrevocable waiver of their rights to participate in collective and class litigation.

The complaint additionally alleges that the Respondent violated the Act when it sought to enforce this Agreement on October 1, 2014, by filing a motion to compel individual arbitration in a wage and hour class action filed by Charging Party Vogel in California Superior Court.[2]

On February 10, 2015, the Respondent filed an answer admitting all of the factual allegations in the complaint but denying the legal conclusions and asserting certain affirmative defenses.

On March 10, 2015, the General Counsel filed a Motion for Summary Judgment. On March 18, 2015, the Respondent filed an opposition to the General Counsel's motion. On March 24, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 7, 2015, the General Counsel and the Respondent filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14–60800, 2015 WL 6457613, ___ F.3d. ___ (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees to waive the right to commence or participate in class or collective actions in all forums, whether arbitral or judicial. As stated above, the Respondent's answer admits all of the factual allegations in the complaint. Specifically, the Respondent's answer admits that it required its current and former employees at its Sunnyvale, California facility to execute the Agreement as a condition of employment and that the Agreement expressly requires that all employment-based

[1] The Binding Arbitration Agreement and the Handbook each contain this language. Employees are required to sign both documents, and the Charging Party did so.

[2] *Richard Vogel v. Price-Simms, Inc.*, Case No. 1–14–CV–261268 (Superior Court of California, Santa Clara County). The court granted the Respondent's motion on October 24, 2014.

claims be resolved through individual, binding arbitration. The Respondent's answer further admits that it sought to enforce the Agreement by filing a motion to compel individual arbitration and stay judicial proceedings in *Richard Vogel v. Price-Simms, Inc.*, in order to require individual arbitrations of the class action wage and hour claims. We therefore find that there are no material issues of fact; nor has the Respondent raised any other issues warranting a hearing.

The Respondent contends in its answer that the unfair labor practices alleged in the complaint are barred by the 6-month statute of limitations set forth in Section 10(b) of the Act. As to the allegations that the Respondent unlawfully maintained and enforced the Agreement, we find no merit to this contention. It is well settled that regardless of when an unlawful rule was first promulgated, the Board will find a violation where the rule was maintained or enforced during the 6-month period prior to the filing of a charge. See, e.g., *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 1 (2015). Here, the Agreement was in effect at all relevant times, and the Respondent filed its motion to enforce the Agreement 1 day before the unfair labor practice charge was filed. Accordingly, we reject the Respondent's 10(b) affirmative defense as to the maintenance and enforcement allegations.

We reach a contrary finding, however, as to the 'promulgation' allegation. Notwithstanding that the Respondent admitted that it has promulgated the Agreement since at least April 2, 2014 (within the 10(b) period), the General Counsel's Motion for Summary Judgment makes clear that the Agreement was promulgated well outside the 10(b) period. As shown by Exhibit 2 to the General Counsel's motion, Vogel himself signed the Agreement on June 7, 2012. Accordingly, we find merit to the Respondent's 10(b) defense in this respect and shall dismiss the unlawful promulgation allegation.

Next, the Respondent argues that *D.R. Horton, Inc.*, *Murphy Oil USA*, Inc., and *Cellular Sales of Missouri*, LLC, supra, were wrongly decided when finding that similar mandatory arbitration provisions violated Section 8(a)(1). We disagree. Accordingly, we apply *D.R. Horton* and *Murphy Oil USA* here, and find that the Respondent violated Section 8(a)(1) by maintaining and enforcing the Agreement. The Agreement expressly requires employees to bring all employment-related claims to individual arbitration and to waive—in any forum—their right to pursue claims on a class or collective basis. We therefore find that the Respondent's maintenance of the Agreement violates the Act.[3]

Additionally, we find that the Respondent unlawfully sought to enforce the Agreement. In *Murphy Oil*, the Board found that the employer's motion to dismiss a collective FLSA action in Federal district court, and compel individual arbitration pursuant to its mandatory arbitration agreement, violated Section 8(a)(1) because that enforcement action unlawfully restricted employees' exercise of Section 7 rights. 361 NLRB slip op. at 19. As in *Murphy Oil*, the Respondent unlawfully enforced its arbitration agreement when it petitioned the California Superior Court to stay the class action wage and hour claim in order to compel employees to arbitrate their claims individually.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a California corporation with an office and place of business in Sunnyvale, California, has been engaged in the sale and servicing of automobiles.

During the 12-month period ending December 31, 2014, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received at its Sunnyvale, California facility goods or services valued in excess of $5000 which originated outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least April 2, 2014, the Respondent has required its current and former employees to sign the Agreement as a condition of employment. The Agreement contains the following language:

> In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Thus, the Compa-

[3] We disagree with our dissenting colleague's argument that mandatory arbitration agreements do not violate the Act for the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 1–21 (2014), and reiterated in *Bristol Farms*, ___ NLRB ___ (2015).

ny has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration (collectively "class claims").

On October 1, 2014, the Respondent sought to enforce the Agreement described above by filing a motion to compel individual arbitration and stay judicial proceedings to compel individual arbitration rather than class-wide litigation of claims in a class action wage and hour complaint filed against the Respondent by the Charging Party in *Richard Vogel v. Price-Simms, Inc.*, Case No. 1–14–CV–261268 (Superior Court of California, Santa Clara County). On October 24, 2014, the court granted the Respondent's motion.

CONCLUSIONS OF LAW

1. The Respondent, Price-Simms Inc., doing business as Toyota Sunnyvale, is an employer within the meaning of Section 2(6) of the Act.

2. By maintaining and enforcing a mandatory and binding arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. The Respondent has not violated the Act in any other respect.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, and the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse Richard Vogelfor all reasonable expenses and legal fees, with interest, that Vogel may have incurred in opposing the Respondent's unlawful motion to stay his wage and hour class action and compel individual arbitration. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992). We shall also order the Respondent to rescind or revise the Agreement, notify employees and the Superior Court of California, Santa Clara County that it has done so, and inform the court that it no longer opposes the lawsuit on the basis of the Agreement.[4]

ORDER

The Respondent, Price-Simms, Inc., d/b/a Toyota, Sunnyvale, Sunnyvale, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Binding Arbitration Agreement and Toyota Sunnyvale Employee Handbook Employment Acknowledgment Agreement ("Agreement") in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign the Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the Superior Court of California, Santa Clara County, that it has rescinded or revised the arbitration agreement upon which it based its motion to compel individual arbitration and stay judicial proceedings in the wage and hour class action brought by Richard Vogel, and inform the court that it no longer opposes the lawsuit on the basis of the Agreement.

(d) In the manner set forth in the remedy section of this decision, reimburse Richard Vogel for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to stay the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Sunnyvale, California facility copies of the attached

[4] We need not address the Respondent's argument that the General Counsel's proposed remedy for this violation—ordering that the Respondent move the Superior Court of California, Santa Clara County, to vacate its order for individual arbitration—violates the Respondent's due process rights and separation of powers, because, consistent with *Murphy Oil*, supra, 361 NLRB slip op. at 21, we shall order only the remedies described above.

notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since April 2, 2014, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since April 2, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 30, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Binding Arbitration Agreement and Toyota Sunnyvale Handbook Employee Acknowledgement Agreement (the "Agreement") violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Richard Vogel signed the Agreement, and later he filed a class action lawsuit against the Respondent in the Superior Court of California alleging wage-hour violations. In reliance on the Agreement, the Respondent filed a motion to compel individual arbitration, which was granted.[1] My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Richard Vogel v. Price-Simms, Inc.*, Case No. 1–14–CV–261268 (Superior Court of California, Santa Clara County Oct. 24, 2014).

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity

9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[6] and (iii) enforcement of a class action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce the Agreement. It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.[8] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[9] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party for its attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 30, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34, 36 fn. 5 (Member Miscimarra, dissenting in part); (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, No. 14–CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,*, No. 1:12–CV–00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[7] Even if a conflict existed between the NLRA and an arbitration agreement's class waiver provisions, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[8] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[9] *Murphy Oil USA, Inc. v. NLRB*, above, slip op. at 6.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Binding Arbitration Agreement and Toyota Sunnyvale Employee Handbook Employment Acknowledgment Agreement ("Agreement") in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign the Agreement in any of its forms that the Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL notify the Superior Court of California, Santa Clara County that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to compel individual arbitration and stay judicial proceedings in the wage and hour class action brought by Richard Vogel, and WE WILL inform the court that we no longer oppose the lawsuit on the basis of the arbitration agreement.

WE WILL reimburse Richard Vogel for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the sour motion to stay the collective lawsuit and compel individual arbitration.

PRICE-SIMMS, INC. D/B/A TOYOTA SUNNYVALE

The Board's decision can be found at www.nlrb.gov/case/32–CA–138015 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.