UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC. and MICHAEL CUDA, an individual	NLRB Case No. 12-CA-25764

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, P.C., NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, *ET AL.*, IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS

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INTRODUCTION

Amici curiae submit this brief to urge the Board to hold that an employer's imposition of a contractual term prohibiting its employees from pursuing workplace-related claims by way of a joint, class, or collective action in any forum – whether in court or in arbitration – violates section 7 and section 8(a)(1) of the National Labor Relations Act of 1937 ("NLRA"). *Amici* are 27 organizations dedicated to representing poor and powerless individuals who often cannot safeguard their fundamental labor and anti-discrimination protections in the workplace without class or collective actions. They represent some of the most vulnerable and exploited low-wage and immigrant worker populations – for example, in the building maintenance, car wash, construction, landscaping, food processing, food service, hospitality, light manufacturing, warehousing and shipping, child care and nursing home industries – all across this country. While the workers represented by *amici* continue to confront widespread poor working conditions, wage and hour and civil rights violations, as well as retaliation for asserting their rights, they lack the financial and legal resources necessary to enforce their rights through individual lawsuits. For them, meaningful enforcement of broad, remedial statutes intended to protect workers depends upon the availability of joint, class, and collective actions.

Amici increasingly encounter workers whose ability to pursue effective relief is curtailed by forced arbitration agreements that prohibit the pursuit of a joint, class, or collective actions. In 2007 (before the recent pro-arbitration decisions by the U.S. Supreme Court) an expert estimated that 15-20 percent of American employers had adopted forced arbitration policies. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?,* 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007). Those figures represent over 30 million employees, or one-fourth of non-union workers. FAIR ARBITRATION NOW,

Employment Arbitration, http://www.fairarbitrationnow.org/content/employment-arbitration (last visited July 15, 2011). *Amici curiae*'s interest in this matter is to preserve access to the joint, class, and collective action devices for low-wage workers who too often face insurmountable barriers to enforcing their rights individually. More specific statements of interest of *amici* are attached as Appendix I to this brief.

This brief is intended to complement the *amicus* brief filed by the Service Employees International Union in this matter on March 25, 2011, and the *amicus* brief that Change to Win filed on or about July 27, 2011.

SUMMARY OF ARGUMENT

The question in this case is:

> Did the Respondent violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration further provides that arbitrators will have no authority to consolidate or to fashion a proceeding as a class or collective action?

The answer is resoundingly "yes."

D.R. Horton's Mutual Arbitration Agreement strips its workers of their well-established rights under section 7 of the NLRA to bring joint, collective, and class legal actions for their mutual aid and protection. An employer's requirement that its employees prospectively waive their rights to engage in concerted legal activity about their conditions of employment is as much a violation of section 8(a)(1) as a "yellow dog contract" prohibiting unionization altogether.

The Federal Arbitration Act of 1925 ("FAA") does not save D.R. Horton's blatant violation of the NLRA simply because the instrument of the illegality is an arbitration agreement. The United States Supreme Court has repeatedly held that an arbitration agreement that deprives employees of their substantive federal statutory rights is unenforceable. Because

D.R. Horton's so-called "Mutual Arbitration Agreement" deprives its employees of their substantive rights under section 7 of the NLRA to engage in concerted legal action, the FAA does not spare it from invalidation under section 8(a)(1).

ARGUMENT

I. EMPLOYEE CLASS, COLLECTIVE, AND JOINT LEGAL ACTIONS EPITOMIZE THE SUBSTANTIVE RIGHTS THAT SECTION 7 PROTECTS.

Section 7 of the NLRA plainly protects the rights of workers to improve the terms and conditions of their employment "through resort to administrative and judicial forums." *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Employees may engage in concerted activities for their mutual aid or protection without the existence of a union. *Brady v. NFL*, ____F.3d ____, 2011 WL 2652323 at *10 (8th Cir. July 8, 2011). "[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 under the National Labor Relations Act." *Id.* (emphasis in original) (citing *Mohave Elec. Co-op Inc. v. NLRB*, 206 F.3d 1183, 1189 & n.8 (D.C. Cir. 2000); *Altex Ready Mixed Concrete v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973)).

The Board has repeatedly held that the filing of a civil action by or on behalf of a group of employees constitutes protected activity under section 7. *E.g., Harco Trucking, LLC*, 344 NLRB 478, 481 (2005) (class action filed by one employee); *In re 127 Restaurant Corp.*, 331 NLRB 269, 275-76 (1996) (joint action by 17 employees); *52 Street Hotel Assoc.*, 321 NLRB 624, 633-636 (2000) (collective action); *Host International*, 290 NLRB 442, 443 (1988) (joint action by seven employees); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018 (1980) (class action filed by one employee); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1978) (civil action by three employees). Thus, the NLRA provides employees with a substantive legal

right to bring collective and class actions to redress the conditions of their employment.

Class, collective, and joint employee actions epitomize concerted activity within the meaning of section 7. Cases involving workplace discrimination often by their nature involve classwide wrongs. *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977). By definition any individual who brings a class action does so only as a "representative" party on behalf of all other members of the class. *See* Fed. R. Civ. P. 23(a). A class action requires the worker or workers who have filed the case to have claims that are typical of the claims of the other employees in the class and to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(3)-(4). Likewise, a collective action brought under the Fair Labor Standards Act ("FLSA"), the Equal Pay Act ("EPA"), or the Age Discrimination in Employment Act ("ADEA") requires the participation of more than one employee in order to constitute "a collective action." *See* 29 U.S.C. § 216(b) (collective action is one brought by employee(s) "in behalf of . . . other employees similarly situated").

Employees bring class, collective, and joint actions rather than individual cases for the same reason they engage in any other form of section 7 activity: When it comes to employer retaliation, there is (some) safety in numbers. The risk of retaliation is especially poignant for the low-wage and immigrant workers *amici* represent, due to their dependence on each pay check and their tendency to work in low-skilled jobs where employers too frequently consider them expendable. Class actions protect employees who wish to challenge and improve their working conditions from the retaliation that often follows from pursuit of an individual action. Conte & Newburg, *Newburg on Class Actions,* § 24.61 (4th Ed. 2002). Courts have repeatedly recognized that employees who bring individual actions against their employers run a greater risk of retaliation than those who participate in class actions. *See, e.g., Ansoumana v. Gristede's*

Operating Corp., 201 F.R.D. 81, 85-86 (S.D.N.Y 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001); *Adames v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423-24 (W.D. Pa. 1984). This is because a class must be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). The breadth of employee participation in a class action affords each individual worker a degree of anonymity and cover. An employee who brings an individual claim against his or her employer (either in court or in arbitration) makes a visible target. Class and collective actions are thus truly a form of "mutual aid and protection" under section 7.

Class actions educate and empower workers in the same way as other section 7 activities. Some individual workers may not be aware of their legal rights or understand their employer has violated those rights. *See, e.g., Gentry v. Superior Court*, 42 Cal. 4th 443, 461, 165 P.3d 556 (2007). A class action may reveal a pattern of unlawful discrimination that is not evident to a single employee. Wage and hour laws have complex rules regarding the classification of exempt and nonexempt employees that are difficult for many employees to understand. Indeed, an employer may falsely tell its workers that they are not entitled to overtime pay. *See Gentry*, 42 Cal. 4th at 461. Low-wage workers, in particular, may be unfamiliar with their rights because they lack higher education or have limited comprehension of English. *See Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005). A concerted employee legal action can be just as effective an organizing tool as a traditional unionization campaign.

Class actions also allow employees to pool their claims and resources for the greater collective good. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985). "[T]he class action is the only economically rational alternative when a large group of individuals . . . has suffered an alleged wrong but the damages due to any single individual . . . are too small to justify

bringing an individual action." *In re American Express Merchants Litigation*, 634 F.3d 187, 194 (2nd Cir. 2011). The potential recovery in an individual employment case, particularly one involving low-wage workers, may be so small that no rational person would be willing or able to pursue it unless as part of a larger class or collective action. *See, e.g., Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005); *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002). Thus, group participation in class and collective actions regarding conditions of employment is an essential method of workplace organization and a core section 7 activity.

While class actions often involve multiple named plaintiffs asserting claims on behalf of a group of employees, a class action initiated by a single worker is no less *per se* protected activity under section 7. The Board and the courts have long recognized that concerted activity includes the actions of one individual if undertaken on behalf of a group of employees or in preparation for subsequent group action. *See, e.g., International Transp. Sev., Inc. v. NLRB*, 449 F.3d 160, 166 (D.C. Cir. 2006); *Citizens Inv. Servs. Corp. v. N.L.R.B.*, 430 F.3d 1195, 1199 (D.C. Cir. 2005); *Phillips Petroleum Co.*, 339 NLRB 916, 918 (2003). Indeed, the Board has repeatedly recognized that a single plaintiff class action constitutes concerted activity within the meaning of section 7. *Harco*, 344 NLRB at 441; *UPS*, 252 NLRB at 1018. The filing of a class action by a single employee is necessarily *on behalf of* a group of employees and *in preparation for* a subsequent group action intended to be certified by the court under Rule 23. Such a class action therefore is by definition concerted action within the meaning of section 7.

For this reason, the Board should hold that an employee's participation in a workplace class, collective, or joint legal action is *per se* concerted activity under section 7. When an employee files an individual legal action claiming an employer has violated his or her rights under a statute enacted for the protections of employees generally, that act may or may not be

protected concerted activity under section 7, depending on the circumstances. *Meyers Indus. Inc.*, 281 NLRB 882, 887-888 (1986) (*Meyers II*). This is because "at some point the relationship between some kinds of individual conduct and collective employee action may be 'so attenuated' as not to mandate inclusion in the 'concerted activity clause.'" *Id.* at 888. However, a class, collective, or joint legal action to enforce the rights of a group of employees under a federal or state statute is by definition "collective employee action." As the Eighth Circuit recently held, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is *ipso facto* 'concerted activity' within the meaning of the NLRA. *Brady v. NFL*,, WL 2652323 at *10. Moreover, the numerosity, commonality, typicality, and adequacy of representation requirements of Fed. R. Civ. P. 23(a) (and its state law analogues) guarantee that an employee who brings a class action cannot do so for purely individual claims or for purely personal reasons.

An employer policy that requires a promise by an NLRA-covered employee to refrain from section 7 activity is per se unlawful under section (8)(a)(1). *See, e.g., Martin Luther Memorial Home*, 343 NLRB 646 (2004); *Barrow Utilities & Electric*, 308 NLRB 4, 11 n. 5 (1992). A class (or collective) action ban inevitably chills the effective protection of interests common to employees as a group. *Ingle v. Circuit City*, 328 F.3d 1165, 1176 n.13 (9th Cir. 2003). An employer prohibition on joining a class or collective action is no more lawful than an employer prohibition against joining a union. "The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law." *Barrow Utilities,* 308 NLRB at 11 n.5. *See also* 29 U.S.C. §§ 102-103 (contracts barring concerted activity are unenforceable under the Norris LaGuardia Act). D.R. Horton's no class, collective, or joint action employment contract is of the same pedigree.

In sum, an employee's ability to file or participate in a class, collective, or joint legal action regarding the terms and conditions of employment is a substantive legal right guaranteed by section 7. It is not just a "procedural device." The Board should rule D.R. Horton violated section 8(a)(1) by prohibiting its employees from exercising core section 7 rights.

II. D.R. HORTON'S INCLUSION OF ITS PROHIBITION ON EMPLOYEE CLASS AND COLLECTIVE ACTIONS IN AN ARBITRATION AGREEMENT DOES NOT SAVE IT FROM INVALIDITY.

The Board should reject any contention that the FAA requires the agency to uphold D. R. Horton's arbitration policy despite its blatant invalidity under the NLRA. Neither the U.S. Supreme Court nor any other federal court has suggested that an employer can use the vehicle of a forced arbitration agreement to impose a total ban on workplace class or collective actions in violation of sections 7 and 8(a)(1) of the NLRA. To the contrary, the Supreme Court has repeatedly held that an employee who signs an agreement to arbitrate a statutory claim does not thereby agree to forego any of his or her federal substantive statutory rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 1474 (2009); *accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 628 (1985); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000); *Vimar Seguros y Reaseguros SA v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (Kennedy, J.).

Applying these Supreme Court precedents, numerous federal circuit courts have struck down workplace arbitration provisions that limit an employee's substantive statutory rights, despite the pro-arbitration policy of the FAA. *E.g., Spinetti v. Service Corp. Intern.*, 324 F.3d 212, 216 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (en banc); *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002). *Accord In re*

American Express Merchants Litigation, 634 F.3d 187, 199 (2d Cir. 2011) ("Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.")

Nothing in the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), alters this well-established law. In *Concepcion* the Court held that the FAA preempted application of California unconscionability law to invalidate an arbitration agreement that prohibited consumers from pursing their claims as a class action. *Concepcion* was not an employment case. The consumer plaintiffs had no right under federal law to engage in concerted legal activity for their mutual aid and protection. *Cf.* 29 U.S.C. § 157. Therefore, the *Concepcion* Court had no reason to apply the settled rule that nothing in the FAA permits an employer to use a forced arbitration agreement to deprive its workers of their substantive federal statutory rights.

Recognizing this, the United States District Court for the Southern District of New York recently held that *Concepcion* has no application to an arbitration challenge based on the deprivation of a substantive federal workplace right. *Chen-Oster v. Goldman Sachs & Co.,* No. 1:CV-10-cv6950-LBS-JCF (July 7, 2011), attached as Appendix II hereto. In that case, the defendant argued that *Concepcion* nullified the court's prior refusal to enforce an arbitration agreement that would have prevented the plaintiff from vindicating the federal right to be free from a "pattern or practice" of discrimination under Title VII. *See Chen-Oster v. Goldman Sachs & Co.,* --- F. Supp. 2d --, 2011 WL 1795297 (S.D.N.Y. Apr. 28, 2011). The court disagreed with the employer's contention. Slip op. (July 7, 2011) at 3-4. The court persuasively reasoned that *Concepion*'s state law preemption analysis with regard to the FAA had no bearing on whether an arbitration agreement is void under the federal common law of arbitration where it

deprives employees of a substantive federal statutory right. *Id.* at 6-9.

In *Chen-Oster*, the substantive right at issue was the right of employees to bring pattern or practice claims under Title VII, which under Second Circuit law must be brought as a class action rather than as individual claims. *See* 2011 WL 1795297 at *11. Here the substantive right to concerted legal activity arises under the NLRA rather than Title VII, but the analysis is the same: The FAA does not allow enforcement of a forced arbitration agreement that, by requiring employees to arbitrate their workplace claims on an individual basis, deprives them of a federal right to engage in statutorily protected activity that by definition can be undertaken only on a collective basis or not at all.

This principle was in no way implicated by the challenge to the workplace arbitration clause that the Supreme Court rejected in *Gilmer v. Interstate/Johnson Lane Corp.* The plaintiff there argued that arbitration of his individual claim was inconsistent with the statutory purposes of the ADEA because arbitration would not allow for class or collective actions. 500 U.S. at 32. In rejecting this contention, the Court noted the arbitration rules applicable to Mr. Gilmer's claim provided for collective proceedings. *Id.* The Court went on to state "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l Inc.,* 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J. dissenting)).

Gilmer and the case it cited, *Nicholson*, both involved individual employee lawsuits. The argument the Court rejected in *Gilmer* was one asserting the ADEA precluded the arbitration of *individual* claims of discrimination because the statute permits collective actions by way of 29

U.S.C. § 216(b).[1] Neither Mr. Gilmer nor Mr. Nicholson attempted to bring a collective action, and neither engaged in statutorily protected concerted activity under section 7 of the NLRA. Neither case involved an employer's outright bar of class or collective actions. *See Nicholson*, 877 F.2d at 241 n.12. Indeed, *Gilmer* specifically instructs that the FAA does not allow enforcement of employment arbitration clauses that deprive workers of their substantive federal statutory rights. 500 U.S. at 26. Therefore, nothing in the FAA saves D.R. Horton's arbitration agreement from invalidation under the NLRA.

CONCLUSION

An arbitration agreement requiring employees to give up their section 7 rights to bring a class or collective action regarding working conditions deprives the employees of a substantive statutory right and is unenforceable under both the FAA and the NLRA. The Board should reverse the determination of the ALJ and hold that D.R. Horton's "Mutual Arbitration Agreement" violates section 8(a)(1).

RESPECTFULLY SUBMITTED THIS 27th DAY OF JULY 2011.

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[1] Although some courts have held that the right to bring an FLSA, EPA, or ADEA collective action under 29 U.S.C. § 216(b) is procedural rather than substantive, *see e.g., Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298-299 (5th Cir. 2004), neither the Board nor any court has suggested section 7 rights are anything but substantive.

APPENDIX I

APPENDIX I

INTERESTS OF THE *AMICI*

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation designed to enhance consumers' and workers' rights, environmental protection and safety, civil rights and civil liberties, America's civil justice system, and the protection of the poor and powerless. Public Justice regularly represents both workers and consumers in class actions, and its experience is that aggregate litigation often affords the only way to redress corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims. As part of its Class Action Preservation Project, Public Justice has for years challenged class and collective action bans throughout the country where they would effectively immunize the corporate drafter from liability or prevent individuals from vindicating important rights.

The **National Employment Lawyers Association ("NELA")** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **Employee Rights Advocacy Institute for Law & Policy ("The Institute")** is a charitable nonprofit organization whose mission is to advocate for employee rights by advancing equality and justice in the American workplace. The Institute achieves its mission through a multi-disciplinary approach combining innovative legal strategies, policy development, grassroots advocacy, and public education. In particular, The Institute has sought to eliminate mandatory pre-dispute arbitration of employment claims through its public education work.

The **Asian American Justice Center ("AAJC")**, member of Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, and community education and outreach on a range of civil rights issues, including fairness and non-discrimination in the workplace. Workers from immigrant and other underserved communities such as those for whom AAJC advocates are particularly vulnerable to unfair employment practices, and AAJC's interest in the effective vindication of their rights has resulted in the organization's participation in numerous *amicus curiae* briefs supporting access to the class or collective action mechanism.

The **Asian American Legal Defense and Education Fund ("AALDEF")**, founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The issues presented in this matter will severely undermine the rights of workers to act collectively.

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Founded in 1972, the **Asian Law Caucus ("ALC")** is the nation's oldest legal organization dedicated to advancing the civil rights of Asian American and Pacific Islander communities. ALC is a member of the Asian American Center for Advancing Justice, whose other members include the Asian American Institute, Asian American Justice Center and Asian Pacific American Legal Center. ALC has a long history of advocating on behalf of low-wage immigrant workers through direct legal services, impact litigation, community education and policy work. ALC's clients include vulnerable workers in service industries where wage theft and other violations of state and federal employment law are widespread. ALC has depended on class and collective actions to vindicate its clients' rights.

Asian Pacific American Legal Center ("APALC"), member of Asian American Center for Advancing Justice, is the largest legal organization in the country serving the Asian and Pacific Islander communities. Founded in 1983 and based in Los Angeles, APALC is a unique organization that combines traditional legal services with civil rights advocacy and leadership development. APALC is committed to challenging discrimination and safeguarding the constitutional and civil rights of the Asian Pacific American communities and other communities of color. APALC has a long history of challenging workplace exploitation and abuse in low-wage industries, including protecting the rights of immigrant workers to bring collective or class actions. Accordingly, APALC has a strong interest in the outcome of this case.

CASA de Maryland, Inc., founded in 1985, is a community organization working to improve the quality of life of low-income immigrants in Maryland. CASA was established by a coalition of Central American refugees and North Americans in response to the needs of thousands of Central Americans arriving in the metropolitan Washington area after fleeing wars and civil strife in their homelands. Today, CASA has over 10,000 members from countries around the world. Key to CASA's achievements on behalf of immigrant workers are campaigns for equal treatment and full access to resources and opportunities for low-income workers and their families. Low-income immigrant workers normally cannot afford skilled legal services for individual claims. Accordingly, they need to preserve their rights to organize collective and class actions for their mutual aid and protection.

El Comité de Apoyo a Los Trabajadores Agrícolas **("CATA"), the Farmworker Support Committee**, is a farmworker and low-wage worker membership organization which for over 30 years has assisted farmworkers and low-wage workers in education, organization, and action on work and other issues. CATA has offices in New Jersey and Pennsylvania. CATA assists farmworkers and low-wage workers who are subject to systematic problems of unpaid wages and poor working conditions. Retaliation has been a significant problem, and being able to act in a group manner has been important. Specifically, CATA has been working with groups of NLRA-covered packing house workers who would have their rights substantially diminished if they could not file class or collective actions. For such immigrant workers, these rights have been an important method of obtaining redress for wage violations.

The **D.C. Employment Justice Center ("DC-EJC")** is a nonprofit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. DC-EJC provides legal assistance on employment law matters to the working poor and supports a local

workers' rights movement, bringing together low-wage workers and advocates for the poor. DC-EJC also represents low-income workers in state and federal court, including several class and/or collective actions. Class and collective actions provide low-wage workers with a practical and economical means by which to pursue their rights; indeed, many of the workers whom DC-EJC represents would be precluded from vindicating their workplace rights at all if their only option was to proceed on an individual basis. In addition, such legal means are necessary to avoid piecemeal litigation of similar claims that would otherwise be too onerous for workers to pursue on their own and too costly for nonprofit organizations to litigate.

The **Equal Justice Center ("EJC")** is a nonprofit employment justice organization specializing in promoting workplace fairness for low-income working men and women. From its offices in Austin and San Antonio, the EJC provides legal services and employment rights assistance to help low-wage construction laborers, janitors, dishwashers, housekeepers, and similar low-paid working people throughout Texas in their efforts to recover unpaid wages and protect their rights under the Fair Labor Standards Act and related wage-hour laws. EJC's constituents and clients are the very people the wage-hour laws were intended to protect: those whose livelihood is dependent on finding employment in the business of others and who have very limited bargaining power over their terms and conditions of employment. The EJC and its constituents and clients have a vital interest this case because these employees' ability to minimally support themselves and their families through their own low-wage labor is gravely undermined if they are prohibited from joining together to address wage violations in class or collective actions – in many cases effectively precluding any chance of enforcing their wage rights at all.

Equal Rights Advocates ("ERA") is a San Francisco-based human and civil rights organization dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation and advocacy. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has undertaken difficult impact litigation that has resulted in establishing new law and provided significant benefits to large groups of women, particularly lower income and immigrant workers. ERA has litigated important gender-based discrimination cases, including collective and class actions at the state, federal, and United States Supreme Court levels. ERA also advises hundreds of women each year through its Advice and Counseling line.

Friends of Farmworkers, Inc. is a Pennsylvania nonprofit legal services organization founded in 1975 whose purpose is to improve the living and working conditions of workers from immigrant and migrant communities. Friends of Farmworkers has represented significant numbers of workers in food processing and landscaping industries subject to NLRB jurisdiction, and has represented worker organization clients as well. Friends of Farmworkers has undertaken nationwide representation of non-immigrant temporary non-agricultural workers under the H-2B program, and such workers are particularly vulnerable to employers who establish pre-employment arbitration agreements which would restrict their ability to collectively enforce workplace rights. The right to pursue collective actions is critical for low-wage immigrant workers who face severe fears of employer and labor contractor retaliation and who often have claims of limited individual economic damages.

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The **Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities, and other disadvantaged populations. Since the 1960s the Lawyers' Committee has relied on the class action mechanism and all available remedies under the Civil Rights Act of 1964 and other federal statutes as essential tools for combating unlawful discrimination in the workplace. The Lawyers' Committee, through its Employment Discrimination Project, has been involved in cases before the United States Supreme Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR")** is affiliated with the national Lawyers' Committee for Civil Rights Under Law. LCCR was formed to support the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating cases on behalf of the traditionally under-represented, often as class actions. In addition, LCCR frequently files *amicus* briefs in cases raising important civil rights issues. Class and other collective actions are integral to LCCR's civil rights agenda, and practices that inhibit the ability of individuals to bring such actions harm LCCR's ability to advance the interests of its client communities.

The Legal Aid Society ("The Society") is one of the oldest and largest providers of legal assistance to low-income people in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City providing comprehensive legal assistance in employment, housing, public assistance, and other civil areas of primary concern to New Yorkers with low incomes. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for unpaid wages, claims of discrimination, and unemployment insurance hearings. The Unit develops litigation, outreach, and advocacy projects designed to assist the most vulnerable workers in New York City, among them, immigrant workers who are afraid to raise claims of illegal exploitation on their own and whose only hope for legal redress is through collective action initiated by co-workers.

The **Low Wage Workers Legal Network** is an affiliation of over 195 advocates from over 69 organizations in 23 states, the District of Columbia and Mexico City that are engaged in legal advocacy on behalf of low-wage workers in employment matters. Clients of these advocates will be seriously impacted by the decision in this matter, in that their rights to engage in collective action to enforce statutory rights could be impaired.

The **National Employment Law Project ("NELP")** is a nonprofit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all workers, and especially the most vulnerable, receive the basic workplace protections guaranteed in our nation's labor and employment laws. The availability of class and

collective actions is vital for effective enforcement of these workplace rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act as well as other federal and state workplace laws.

The **National Lawyers Guild (the "Guild") Labor and Employment Committee** has a long record of action on behalf of workers, both as *amicus* and through strategic coordination, scholarship, and advocacy. The National Lawyers Guild is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for the protection of rights granted by the United States Constitution and fundamental principles of human and civil rights. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles. The members of the Guild's Labor and Employment Committee provide direct representation to individual and organized workers in a variety of local, state, federal, and international forums, including the NLRB. The Committee has a particular interest in ensuring that the NLRA is properly interpreted to vindicate workers' ability to act in concert to protect their rights engage in concerted protected activity.

The **National Partnership for Women & Families** ("**National Partnership**," formerly the Women's Legal Defense Fund) is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination. The National Partnership has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The **National Whistleblowers Center ("NWC")** is a nonprofit tax-exempt public interest organization. Since 1988, NWC has assisted corporate employees who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC provides assistance to whistleblowers, helps them obtain legal counsel, provides representation for important precedent-setting cases and urges Congress and administrative agencies to enact laws, rules, and regulations that will assist in helping employees report fraud both within their corporate compliance programs and directly to government agencies. The NWC does not have the resources to provide legal representation to all the whistleblowers who apply for assistance. The courageous employees who risk their careers to raise concerns about frauds, pollution, transportation dangers and other violations of law must often depend on unions, private arbitration and other forms of concerted activity for their aid and protection. In this sense, the availability of collective and class actions is important in the protection of whistleblowers.

The **National Women's Law Center ("NWLC")** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace. This includes not only the right to a workplace that is free from all forms of discrimination and exploitation, but also access to effective means of enforcing that right and remedying discrimination and exploitation.

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The **North Carolina Justice Center ("Justice Center")** is a nonprofit legal advocacy organization whose mission is to secure economic justice for disadvantaged persons and communities. The Justice Center provides legal assistance in civil matters to poor people, including cases involving labor and employment issues. The Justice Center's goal is to ensure justice and fair treatment for all, particularly those whose poverty renders them powerless to demand accountability from the economic marketplace and their employers. The Justice Center has represented thousands of working people in North Carolina through collective actions under the Fair Labor Standards Act and class actions under North Carolina's wage and hour law who would not have been able to bring individual lawsuits because the cost of litigation would far exceed each individual amount of unpaid minimum wage, overtime or other wage claims.

Northwest Workers' Justice Project ("NWJP") is a nonprofit law firm in Portland, Oregon, that represents low-wage workers and their organizations in the Pacific Northwest in employment matters, including organizing rights, wage and discrimination claims. *See* www.nwjp.org. In a number of cases clients of NWJP have encountered difficulty in asserting statutory employment rights in court due to language in an arbitration agreement forbidding collective action. They will be seriously impacted by the decision in this matter.

The **Public Justice Center ("PJC")** is a nonprofit legal services organization founded in 1985 that seeks to enforce and expand the rights of people who are denied justice because of their economic status or because of discrimination. Its Workplace Justice Project has a long-standing commitment to advocating on behalf of workers in class and collective actions. In particular, the PJC frequently relies on the class action as a vehicle to promote justice on behalf of groups of employees whose individual claims are too small to enable them to find private counsel. The PJC has represented thousands of workers in both trial and appellate courts nationwide, including poultry processing employees seeking to enforce fair labor standards and women fighting gender discrimination in pay and promotions. Further, the PJC has represented employees before the NLRB and has an interest in ensuring that the National Labor Relations Act is properly interpreted to protect workers' rights to engage in concerted protected activity.

The Maurice & Jane **Sugar Law Center** for Economic & Social Justice **("Sugar Law Center")** is a national nonprofit law center extensively engaged in employment law litigation and advocacy in support of labor rights. Its work includes class and collective actions to assure low income workers' right to obtain full and fair wages for their labor. The Sugar Law Center is deeply interested in this case because its outcome could affect the right of most workers to act together to obtain a remedy for violations of the minimum wage and overtime pay provisions of federal and state law. Without the availability of class and collective actions in a time when contractual bans on such actions are routinely inserted into employment agreements of all kinds, low-wage workers will be effectively barred from pursuing meaningful remedies for violations of their rights. The judgment of the Sugar Law Center is based on over 15 years of experience in advocacy and representation on behalf of thousands of workers before federal and state trial and appellate courts throughout the country.

The **University of Texas Law School-Transnational Worker Rights Clinic ("Worker Rights Clinic")** is a formal clinical education program of the University of Texas School of Law in Austin, Texas. The Worker Rights Clinic's clients include low-wage employees in construction,

hotel and restaurant work, landscaping, janitorial services, domestic work, health care services, and similar low-paid service and production jobs, who seek to recover unpaid wages and protect their rights under the Fair Labor Standards Act and related wage-hour laws. The Worker Rights Clinic's clients are the very people the wage-hour laws and the NLRA were intended to protect: those whose livelihood is dependent on finding employment in the business of others and who have very limited bargaining power over their terms and conditions of employment. The Worker Rights Clinic and its clients have a vital interest this case because these employees' ability to minimally support themselves and their families through their own low-wage labor is gravely undermined if they are prohibited from joining together to address wage violations in class or collective actions – in many cases effectively precluding any chance of enforcing their wage rights at all.

APPENDIX II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(ECF)

H. CRISTINA CHEN-OSTER; LISA PARISI; and SHANNA ORLICH,	10 Civ. 6950 (LBS) (JCF)
Plaintiffs,	MEMORANDUM AND ORDER
- against -	
GOLDMAN, SACHS & CO. and THE GOLDMAN SACHS GROUP, INC.,	
Defendants.	

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

This is a putative class action in which the plaintiffs allege that their employer, Goldman, Sachs & Co. and The Goldman Sachs Group, Inc. (collectively, "Goldman Sachs"), has engaged in a pattern of gender discrimination against its female professional employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 et seq. On November 22, 2010, Goldman Sachs moved to stay the action with respect to one representative plaintiff, Lisa Parisi (the "plaintiff"), and to compel arbitration of her individual claims. On April 27, 2011, the Supreme Court issued an opinion related to the enforcement of arbitration clauses, AT&T Mobility LLC v. Concepcion, 563 U.S. __, 131 S. Ct. 1740 (2011). The next day, I issued a Memorandum and Order denying the defendants' motion. Chen-Oster v. Goldman, Sachs & Co., ___ F. Supp. 2d ___, No. 10 Civ. 6950, 2011 WL 1795297 (S.D.N.Y. April 28, 2011) (the "April 28 Order"). The defendants have filed a motion for reconsideration of that Order in light of

the Supreme Court's holding in Concepcion. For the reasons that follow, the motion for reconsideration is denied.

Background

In the April 28 Order, after finding that this Court was the proper forum to determine the arbitrability of the plaintiff's claims, Chen-Oster, 2011 WL 1795297, at *3, I held that the plaintiff's employment contract included a binding arbitration agreement that encompassed her claims of gender discrimination pursuant to Title VII. Id. at *4-6. I further found that, under the Supreme Court's holding in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. __, 130 S. Ct. 1758 (2010), the arbitration clause's silence with respect to class arbitration rendered class arbitration unavailable to the plaintiff. Chen-Oster, 2011 WL 1795297, at *6-7. Nonetheless, I held that under Second Circuit precedent as set forth in In re American Express Merchants' Litigation, 634 F.3d 187 (2d Cir. 2011) ("American Express II"), the federal common law of arbitrability precludes enforcement of an arbitration clause when doing so would interfere with a substantive federal statutory right. Chen-Oster, 2011 WL 1795297, at *8-10. Upon review of cases in which the plaintiff asserted that the defendant had engaged in a "pattern or practice" of employment discrimination in violation of Title VII, I determined that federal law creates a substantive right to be free from a "pattern or practice" of discrimination by an employer; I further concluded that, absent the ability to arbitrate on a class basis, mandating arbitration would preclude the plaintiff from

enforcing this right. Id. at *10-12. I therefore denied the defendants' motion to stay the case and compel arbitration. Id. at *12-13.

On May 12, 2011, the defendants filed the instant motion for reconsideration. They contend that the April 28 Order is "fundamentally incompatible" with the Supreme Court's ruling in Concepcion, which established that "it is contrary to the intent of Congress to decline to enforce per se arbitration agreements that preclude class arbitration." (Defendants' Memorandum of Law in Support of Motion for Reconsideration of Order Denying Motion to Stay Plaintiff Parisi's Claims and Compel Individual Arbitration ("Def. Memo.") at 1). Although recognizing that "the standard for granting a motion for reconsideration in this Court is strict," the defendants note that the decision in Concepcion was issued very shortly before the April 28 Order, which makes no mention of Concepcion, and they therefore suggest that it is a "'controlling decision[] . . . that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court.'" (Def. Memo. at 1-2 (quoting Shrader v. CSX Transportation, Inc., 70 F.3d 255, 257 (2d Cir. 1995)). They argue that Concepcion is controlling even though it "dealt with state law and federal preemption issues, [while] the present case deals with the application of two federal statutes" because it reinforces the broad and consistent commitment of the Supreme Court, under the Federal Arbitration Act (the "FAA"), to allowing enforcement of arbitration agreements, even where enforcement prevents plaintiffs

from proceeding as a class. (Def. Memo. at 3-4). They go on to argue that Ms. Parisi has no substantive right to assert a pattern or practice claim, and that the conclusion that she does is incorrect, "[p]articularly in the wake of Concepcion." (Def. Memo. at 3, 5-9).

Discussion

A. Reconsideration

"'Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" Anderson News, L.L.C. v. American Media, Inc., 732 F. Supp. 2d 389, 406 (S.D.N.Y. 2010) (quoting Hinds County, Miss. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 407 (S.D.N.Y. 2010)). To prevail, a party "'must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.'" Eisemann v. Greene, 204 F.3d 393, 395 n.2 (2d Cir. 2000) (quoting Shamis v. Ambassador Factors Corp., 187 F.R.D. 148, 151 (S.D.N.Y. 1999)); accord Local Civil Rule 6.3 (authorizing motion for reconsideration when there are "matters or controlling decisions which . . . the court has overlooked"); Lesch v. United States, 372 Fed. Appx. 182, 183 (2d Cir. 2010). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atlantic Airways, Ltd. v. National Mediation Board, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted). "A motion for

reconsideration is not an 'opportunity for making new arguments that could have been previously advanced,' nor is it a substitute for appeal." Nieves v. New York City Police Department, 716 F. Supp. 2d 299, 303 (S.D.N.Y. 2010) (quoting Associated Press v. United States Department of Defense, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005)). Local Civil Rule 6.3, which provides for reconsideration, "'must be narrowly construed and strictly applied.'" John Wiley & Sons, Inc. v. Swancoat, No. 08 Civ. 5672, 2011 WL 165420, at *1 (S.D.N.Y. Jan. 15, 2011) (quoting Newton v. City of New York, 07 Civ. 6211, 2010 WL 329891, at *1 (S.D.N.Y. Jan. 27, 2010)).

B. Concepcion

The plaintiff surmises that I examined the Supreme Court's decision in Concepcion prior to issuing the April 28 Order "and found it inapplicable." (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration ("Pl. Memo.") at 1). She is correct. Nevertheless, the impact of that decision on the already fluid law of arbitrability in the Second Circuit merits further discussion.

The Supreme Court in Concepcion considered "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 563 U.S. at __, 131 S. Ct. at 1744. Under the California common law contract rule at issue, arbitration clauses that contained class action waivers were frequently found to be unconscionable, provided that they met certain other requirements,

including that the waiver operated in practice to exempt one party from liability for particular wrongs. Id. at __, 131 S. Ct. at 1746. Writing for the Court, Justice Scalia noted that, pursuant to the "'liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,'" id. at __, 131 S. Ct. at 1749 (emphasis added) (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983)), the FAA preempts any state law that "prohibits outright the arbitration of a particular type of claim," id. at __, 131 S. Ct. at 1747. Although the state law at issue in Concepcion was a law of unconscionability "normally thought to be generally applicable," id. at __, 131 S. Ct. at 1747, Justice Scalia held that the rule, which "[r]equir[ed] the availability of classwide arbitration[,] interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA," id. at __, 131 S. Ct. at 1748. Justice Scalia determined that nonconsensual class arbitration was contrary to the goals of the FAA, id. at __, 131 S. Ct. at 1751-53, and held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons," id. at __, 131 S. Ct. at 1753 (emphasis added). Thus, the California unconscionability rule was preempted as incompatible with both the "'enforcement of private agreements and encouragement of efficient and speedy dispute resolution.'" Id. at __, 131 S. Ct. at 1749, 1753 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

But, Concepcion involved the preemption of state contract law

by a federal preference for arbitration embodied in a federal statute, the FAA. The Court's analysis focused on the FAA's savings clause (allowing "arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract,'" id. at __, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2)), emphasizing that it did not save the state contract law at issue in the case because "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Concepcion, 563 U.S. at __, 131 S. Ct. at 1748. This case demands consideration of a separate issue: whether the FAA's objectives are also paramount when, as here, rights created by a competing federal statute are infringed by an agreement to arbitrate.[12] The Court's analysis in

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[1] The defendants note that "it has long been held that the underlying purposes of Title VII and the FAA are consistent," (Def. Memo. at 4 (citing Desiderio v. National Association of Securities Dealers, Inc., 191 F.3d 198, 205 (2d Cir. 1999)), and that Title VII itself provides for the use of arbitration "'to resolve disputes arising under'" the statute (Def. Memo. at 4 (quoting Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991)). However, the Civil Rights Act provides for arbitration "where appropriate," and the case law establishing the compatibility of the FAA and Title VII -- as laid out in the April 28 Order, Chen-Oster, 2011 WL 1795297, at *8 -- does not consider that compatibility in the context of pattern or practice claims. Furthermore, it is disingenuous for the defendants to assert that the plaintiff's admission that "it is 'widely accepted' that arbitration of Title VII claims does not diminish 'substantive rights found in the statute'" is dispositive, when the plaintiff only did so in the context of pointing out that such holdings have only come outside of the pattern or practice context. (Defendants' Reply Memorandum of Law in Support of Motion for Reconsideration ("Def. Reply Memo.") at 1-2; Pl. Memo. at 4).

[2] The defendants contend that focusing on this distinction "misses the point" because "[f]ederal courts routinely look to preemption cases, and in particular to the federal policies identified in them, for guidance in harmonizing federal statutes."

Concepcion relied in part on the idea that, because class arbitration is an awkward procedure that cannot be read into arbitration contracts, "class arbitration, to the extent it is manufactured by [state common law] rather than consensual, is inconsistent with the FAA," and therefore preempted by it. 563 U.S. at __, 131 S. Ct. at 1750-51 (citing Stolt-Nielsen S.A., 559 U.S. at __, 129 S. Ct. at 1773-76)). In this case, as discussed in the April 28 Order, what is at issue is not a right to proceed, procedurally, as a class, but rather the right, guaranteed by Title VII, to be free from discriminatory employment practices. Chen-Oster, 2011 WL 1795297, at *12. Because arbitrators will apply the same substantive law of Title VII as would be applied by a federal court, see Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 27 (2d Cir. 2000), and the substantive law of Title VII as applied by the federal courts prohibits individuals from bringing pattern or practice claims, Chen-Oster, 2011 WL 1795297, at *11, *12 n.6, this

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(Def. Reply Memo. at 3). However, even the authorities the defendants cite for this proposition acknowledge that "preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other." Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 608 (6th Cir. 2004). Further, both cases cited by the defendants apply a sui generis Supreme Court decision controlling the field of labor relations. See Adkins v. Mireles, 526 F.3d 531, 542 (9th Cir. 2008); Trollinger, 370 F.3d at 607-12. Existing Supreme Court precedent in the field of arbitration, to the extent that it considers the intersection of the FAA with federal statutory rights, suggests that the FAA may be subjugated to competing federal statutory rights, see Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985), and existing Second Circuit precedent holds the same, as will be discussed below. Concepcion does not countermand this rule.

case implicates federal statutory (Congressionally-created) rights, not the "judicially-created obstacle[] to the enforcement of agreements to arbitrate" that was at issue in Concepcion. (See Def. Reply Memo. at 4). In other words, the discussion in Concepcion is more analogous to the discussion in the April 28 Order of the plaintiff's desire to proceed as class representative under Rule 23, Chen-Oster, 2011 WL 1795297, at *12 -- which does not create a federal statutory right to proceed on a class basis -- than to the determination of her substantive right under Title VII to bring a pattern or practice claim under Title VII, id. at *10-12. Although the defendants note that the April 28 Order, like the result that was overturned in Concepcion, "invalidat[ed] [] an arbitration agreement because it does not allow for class arbitration," the right at the center of this case is not the right to proceed on a class basis but rather the right to vindicate a claim that an employer has engaged in a pattern or practice of discrimination. (Def. Memo. at 3). Under the law as it currently stands, the plaintiff may not do so individually. Chen-Oster, 2011 WL 1795297, at *11.

Certainly, the Court's opinion in Concepcion raises a question as to whether the Supreme Court, faced squarely with the issue presented here, would protect the full robustness of a federal right -- particularly when that right requires proceeding on a class basis -- or would mandate arbitration provided that some equivalent, individual right would be protected in that sphere. Nonetheless, the Supreme Court has not been presented with that

question, and it has indicated in the past that "statutory claims may be the subject of an arbitration agreement" only because "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" Gilmer, 500 U.S. at 26 (alteration in original) (quoting Mitsubishi Motors Corp., 473 U.S. at 628). Indeed,

> [j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corp., 473 U.S. at 627.

Furthermore, it remains the law of the Second Circuit that an arbitration provision which "precludes plaintiffs from enforcing their statutory rights" is unenforceable. American Express II, 634 F.3d at 199; accord Ragone v. Atlantic Video at Manhattan Center, 595 F.3d 115, 125 (2d Cir. 2010). This case law is clear, and I remain obligated to follow it. See D'Antuono v. Service Road Corp., __ F. Supp. 2d __, __, No. 3:11 CV 33, 2011 WL 2175932, at *27, *29 (D. Conn. May 25, 2011) (noting "doubts about the continuing validity" of American Express II and Ragone in light of Concepcion but holding that "[u]nless and until either the Second Circuit or the United States Supreme Court disavows [their holdings], this Court will continue to follow" them). Indeed, the plaintiff's claims present an even stronger case for application of the federal common law of arbitrability than did the arbitration

clause at issue in American Express II. In that case, the class action waiver "effectively" interfered with the vindication of statutory rights because it was unlikely that plaintiffs would bring their "negative-value" claims under the statute except as a class. 634 F.3d at 194-99. In this case, the plaintiff would be foreclosed from bringing her pattern or practice claim not only by the practicality of economic pressures limiting the value of her claim compared with the cost of prosecuting it, but also by the actuality of federal case law interpreting Title VII. To the extent that she has a substantive right under Title VII to bring a pattern or practice claim rather than an individual disparate impact claim, she would be precluded from enforcing that right by the arbitration clause in her employment contract.

The Second Circuit may ultimately determine that Concepcion warrants a further modification in the law of arbitrability in this Circuit; however, no change relevant to this case is clearly mandated.[3] For that reason, Concepcion does not constitute a "controlling decision" that justifies reconsideration. See Lesch,

[3] I take note that the Supreme Court has vacated and remanded the Second Circuit's decision in Fensterstock v. Education Finance Partners, 611 F.3d 124 (2010), in light of Concepcion. See Affiliated Computer Services v. Fensterstock, __ S. Ct. __, No. 10-987, 2011 WL 338870 (June 13, 2011). Fensterstock applied the same California rule of unconscionability that was found to be preempted in Concepcion and did not consider the federal common law of arbitrability, nor the intersection between the FAA and federal statutory rights. See Fensterstock, 611 F.3d at 132-38. Therefore, for the same reasons that Concepcion does not dictate a contrary result in this case, the vacatur of Fensterstock also does not.

372 Fed. Appx. at 183.[4]

C. Substantive Nature of Pattern or Practice Claims

In arguing this motion, the parties have thoroughly briefed the question of whether the plaintiff has a substantive right to bring a pattern or practice claim under Title VII, rather than solely pursuing an individual disparate impact claim. (Def. Memo. at 5-9; Pl. Memo. at 5-10).[5] However, this issue was raised by the parties in their initial briefs (Plaintiffs' Memorandum of Law in Support of Opposition to Defendants' Motion to Compel Arbitration at 3-10; Defendants' Reply Memorandum in Support of Motion to Stay Plaintiff Parisi's Claims and Compel Individual Arbitration at 3-8). I then addressed it fully in the April 28 Order. Chen-Oster, 2011 WL 1795297, at *10-12. "[A] motion to reconsider should not

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[4] On June 28, 2011, the defendants submitted a Notice of Supplemental Authority attaching a copy of the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, No. 10-277, 2011 WL 2437013 (June 20, 2011). They contend that "the Supreme Court's articulation in Dukes of the standards applicable to class certification under Fed. R. Civ. P. 23(a) and 23(b)(2) is directly relevant to this Court's analysis of whether Plaintiff Parisi has a substantive statutory right to bring claims on behalf of putative class members." (Notice of Supplemental Authority in Support of Defendants' Motion for Reconsideration of Order Denying Defendants' Motion to Stay Plaintiff Parisi's Claims and Compel Individual Arbitration at 1). This authority may be relevant to the substance of the plaintiff's pattern or practice claim and her ability to obtain certification of a class under Rule 23, but it is not pertinent to her ability or right to bring a pattern or practice claim to the court. See Dukes, __ U.S. at __, 2011 WL 2437013, at *9-10.

[5] The related question raised by the defendants in this motion of whether an arbitrator is the proper authority to decide whether or not the plaintiff may utilize the "pattern-or-practice method of proof" is subsumed in the question of whether Title VII and related case law create a substantive pattern or practice claim, or merely a procedural pattern or practice "method of proof."

be granted where the moving party seeks solely to relitigate an issue already decided." Shrader, 70 F.3d at 257; accord Hinds County, Miss., 700 F. Supp. 2d at 407. The defendants have not pointed to authority that was overlooked upon initial consideration of the issue, nor am I persuaded that my determination was erroneous. See Anderson News, L.L.C., 732 F. Supp. 2d at 406. The defendants' arguments therefore do not merit employing the "extraordinary remedy" of reconsideration. See Hinds County, Miss., 700 F. Supp. 2d at 407.

Conclusion

For the reasons discussed above, the defendants' motion for reconsideration is denied.

SO ORDERED.

James C. Francis IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
July 7, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, I caused to be served a copy of the foregoing BRIEF OF AMICI CURIAE PUBLIC JUSTICE, P.C., NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, ET AL., IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS by electronic mail on the following:

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