January 17, 2006

The Honorable Henry F. Floyd
United States District Court for
the District of South Carolina
Donald S. Russell Federal Building
201 Magnolia Street
Spartanburg, South Carolina 29301

Re: Long John Silver's Restaurants, Inc. v. Cole, et al., No. 6:05-CV-3039

Dear Judge Floyd:

The Secretary of Labor ("Secretary"), United States Department of Labor, submits this reply to the Respondents' response in opposition to the Secretary's request to file a letter brief as *amicus curiae* in the above-captioned case. The Secretary's letter brief supports the Petitioners' motion to vacate the September 19, 2005 Class Determination Partial Final Award ("Class Determination Award") entered in the arbitration proceeding Cole v. Long John Silver's Restaurants, Inc., et al., American Arbitration Association Case No. 11-160-00194-04.

1. The Secretary does not argue that the arbitrator merely incorrectly interpreted section 16(b) of the Fair Labor Standards Act ("FLSA"). Rather, it is the Secretary's position that section 16(b) unambiguously requires that employees cannot be made party plaintiffs to FLSA actions unless they first give their written consent, and that the arbitrator was fully aware of this requirement but nevertheless refused to apply it. See Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998) (To vacate an award on the basis of a manifest disregard of the law, "a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." (citation omitted)), cert. denied, 526 U.S. 1034 (1999). For this reason, the "manifest disregard of law" standard is met.

Respondents contend (Respondents' Brief at 3-4) that section 16(b)'s requirement is ambiguous because there is no case law that expressly requires application of section 16(b)'s written consent requirement to arbitration proceedings. The absence of interpretive case law, however, is entirely beside the point. Section 16(b) unambiguously commands that "[n]o employee shall be a party plaintiff to any [FLSA] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." No interpretation is necessary to conclude that, on its face, section 16(b) does not permit employees to be made party plaintiffs to collective actions without their written consent. There are no exceptions in the provision indicating that the requirement does not apply when FLSA claims are adjudicated in fora other than federal district courts. Indeed, the absence of case law interpreting section 16(b)'s applicability to arbitration is probably a testament to its clarity; so far as the Secretary is aware, no arbitrator had ever disregarded section 16(b)'s written consent requirement prior to the instant case.

The arbitrator clearly understood that section 16(b) requires an employee's written consent, see Class Determination Award at 4 ("Defendants emphasize the 'law' [section 16(b)'s written consent requirement] to be considered."), but deliberately chose to disregard that requirement. In enacting the Portal-to-Portal Act Amendments, § 5, 61 Stat. 84, 87-88 (1947), Congress determined that the policy goals of the FLSA are best fostered by requiring an employee's written consent to becoming a party plaintiff to an FLSA action.[1] The arbitrator openly substituted his own judgment for that of Congress, however determining – in direct contravention of the statute – that the policy goals of the FLSA would better be fostered by setting section 16(b)'s written consent requirement aside and allowing Respondents' FLSA claims to proceed as an opt-out class action. See Class Determination Award at 8 ("The salutary objective[s] of the

[1] As the Secretary demonstrated in her initial letter brief (pp. 2-4), the express terms of section 16(b) and its legislative history make it clear that Congress intended to protect employees from having actions brought on their behalf without their full knowledge and actual consent, and to ensure that collective actions not consist of plaintiffs who have "no real involvement in, or knowledge of, the lawsuit." Cameron-Grant v. Maxim Healthcare Services, Inc., 347 F.3d 1240, 1248 (11th Cir. 2003), cert. denied, 541 U.S. 1030 (2004).

FLSA are advanced by the opt-out procedure."). Respondents essentially concede as much in arguing that applying the written consent requirement in this case would have draconian consequences, and applauding the arbitrator for "do[ing] something about it." (Respondents' Brief at 12-13).

The Secretary takes no position regarding whether the consequences of applying the written consent requirement are good or bad. Whatever those consequences are, they follow from Congress's decision to enact section 16(b) in its present form. Whatever powers the arbitrator may have had to ameliorate those consequences, those powers do not extend to setting aside the unambiguous written consent requirement of section 16(b).

The Supreme Court has long recognized that the role of judicial review of arbitral decisions involving statutory claims is "'to ensure that arbitrators comply with the requirements of the statute at issue.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991), quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987); see Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880 (4th Cir.) (paraphrasing Gilmer), cert. denied, 519 U.S. 980 (1996).[2] The arbitrator's decision should be vacated because it disregards a clear requirement of the FLSA.

2. Respondents advance two arguments that the written consent requirement is merely procedural and therefore does

[2] At least one appellate court has reversed a district court's affirmance of an FLSA arbitral decision on the ground that the decision was in manifest disregard of the FLSA. In Montes v. Shearson Lehman Brothers, Inc., 128 F.3d 1456 (10th Cir. 1997), the plaintiff-employee appealed the district court's denial of her petition to vacate an arbitration decision denying her FLSA claims for overtime pay. She argued that the arbitrator had disregarded the FLSA at the urging of counsel for the defendant-employer. The Tenth Circuit agreed. The court emphasized that while "parties can establish the parameters of arbitration explicitly in their agreement[,] [w]hen a claim arises under specific laws, however, arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so." Id. at 1459 (footnote omitted); see also Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 824 (8th Cir. 2003) ("When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply." (footnote omitted)).

not apply in arbitration. First, Respondents contend that section 16(b)'s written consent requirement is merely a rule of procedure instructing federal courts how to handle FLSA claims, and that it therefore confers no substantive rights on employees. Second, Respondents argue that the Supreme Court's decision in Gilmer, 500 U.S. at 32, "conclusively established that ... the 'opt-in' provision of §16(b) containing the collective action right ... is procedural in nature, and therefore waivable in arbitration." (Respondents' Brief at 9). Both of these arguments are incorrect.

A. By its plain language, section 16(b) vests employees with the substantive right not to be made party plaintiffs to FLSA actions without their express written consent. Respondents contend that because the written consent requirement affects the availability of certain procedural mechanisms – in this case, the availability of an opt-out class action – the requirement itself must also be procedural. That is wrong.

Section 16(b) does not merely specify the procedures that federal courts must follow to make employees party plaintiffs to FLSA actions. Rather, it confers on employees the substantive right not to be bound by judgments in FLSA actions unless they have consented in writing to becoming parties to those actions. If a federal court were to ignore this requirement and adjudicate an FLSA claim using an opt-out class action procedure, there can be no question that an employee who did not wish to be bound by the judgment could escape from it by invoking the written consent requirement of section 16(b). The court's failure to follow section 16(b) would not be considered a mere procedural error; rather, the court's use of an opt-out class action procedure would be found to have violated the employee's substantive right under section 16(b) not to be made a party plaintiff without his or her written consent.

The same result would obtain if an employee asserted his or her right not to be bound by a judgment in an arbitral proceeding to which he or she had not consented in writing. The right enumerated in section 16(b) inheres in all actions brought under the FLSA, not just those that are adjudicated by federal courts. This is clear from the text of section 16(b), its purpose, and its legislative history. (See Secretary's initial letter brief at 2-3).

B. Respondents argue that the Supreme Court's decision in Gilmer, 500 U.S. at 32, "conclusively established" that an employee's right to bring a collective action under section 16(b) "is procedural and therefore waivable in arbitration"," and that section 16(b)'s written consent requirement therefore must be procedural also. Respondents misread Gilmer. Gilmer did not hold that an employee's right to bring a collective action under section 16(b) is "procedural," or even that the right is "waivable." Rather, Gilmer held that while section 16(b) clearly permits employees to proceed collectively, it does not thereby prohibit them from choosing to proceed individually. See id. ("the fact that [a statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred"). Thus, arbitrating FLSA claims on an individual basis does not run afoul of any of the requirements of section 16(b). The same cannot be said of making employees party plaintiffs to collective actions without their written consent.

The sentence of section 16(b) providing that FLSA claims may be brought as collective actions is permissive. It states: "An action to recover the liability . . . may be maintained . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b) (emphasis added). Thus, Congress permits employees the choice of suing individually or collectively. The collective action option is not prescriptive or mandatory, and thus, like an employee's right to choose a jury trial, may be forfeited in arbitration. See Kuehner v. Dickinson & Co., 84 F. 2d 316, 320 (9th Cir. 1996) (right to a jury trial of FLSA claims is not substantive, and therefore may be forfeited in arbitration).

In contrast to the sentence that permits collective actions, the sentence that provides the opt-in right is mandatory. That sentence states: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. 216(b) (emphasis added). Thus, Congress unequivocally directed that no employee may participate in a collective action without his written consent. In sum, the language of section 16(b) clearly reflects that Congress intended that employees may elect to pursue their claims individually, but that in any collective adjudication of FLSA claims the written consent requirement must be followed.

Moreover, the written consent provision was added to section 16(b) as part of an enactment that added a number of other, related substantive provisions to the FLSA. The Portal-to-Portal Act Amendments of 1947 included a statute of limitations requiring any FLSA action to be commenced within two years after the action accrued, or within three years, in the case of willful violations. See § 6, 61 Stat. 87, codified at 29 U.S.C. 255. More importantly for this case, the Portal-to-Portal Act defined when an action is commenced for purposes of both an individual and collective FLSA action. § 7, 61 Stat. 88, codified at 29 U.S.C. 256. This provision mandates that in the case of an individual action, the action is commenced by the filing of the complaint, while, in the case of a collective action, the filing of the individual claimant's written consent commences the action.

The FLSA's statute of limitations is substantive, and thus cannot be superseded by the limitations period contained in an arbitration agreement. See Louis v. Geneva Enterprises, Inc., 128 F. Supp.2d 912, 917 n.2 (E.D. Va. 2000), citing Sokolowski v. Flanzer, 769 F.2d 975 (4th Cir. 1985). The provision of a substantive statute of limitations tied expressly to the consent requirement indicates that the consent requirement itself is substantive.[3]

4. As the Secretary stated in her opening letter brief (letter brief at 6), she holds open the possibility that an employee might be able to consent in writing in the arbitration agreement itself to being made a party plaintiff to future collective actions.[4] An employee's mere agreement to abide by the rules of the particular arbitral forum, however, cannot constitute the written consent that is required by section 16(b). In light of the binding effect of class arbitrations, and the mandatory nature of

[3] Respondents' argument (Respondents' Brief at 11-13) that the written consent requirement should not apply because the statute of limitations is not tolled until a putative plaintiff files his written consent disregards this clear congressional intent. Neither the arbitrator nor Respondents may substitute their own judgment for that of Congress.

[4] A written statement of this nature could be characterized either as "waiving" the requirements of section 16(b) or as satisfying those requirements. However it is characterized, the essential point is that Congress has established that the appropriate means for protecting employees' rights under section 16(b) is to require their written consent.

the right established by Congress in section 16(b), nothing less than the employee's express and knowing written consent would be required.

For the foregoing reasons and those stated in the Secretary's letter brief, the Court should vacate the Class Determination Award with respect to the conclusion that the class arbitration must proceed in accordance with the Rule 23-type provisions of the AAA Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 17h day of January 2006, copies of the Secretary of Labor's reply to the Respondents' response in opposition were served by first class mail postage prepaid on the following counsel of record:

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