UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MURPHY OIL USA, INC.

and CASE 10-CA-38804

SHEILA M. HOBSON, An Individual

JOINT MOTION
AND STIPULATION OF FACTS

This is a joint motion by the parties to this case, Murphy Oil USA, Inc., Respondent; Sheila M. Hobson, Charging Party, and Counsel for the Acting General Counsel, to waive a trial and submit this case to the Board, on a stipulated record for issuance of a decision pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations.[1] The transfer of the case to the Board based upon a stipulated record will effectuate the purposes of the Act and avoid unnecessary costs and delay.

If this motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, the Amended Charge, the Complaint, the Order Postponing Hearing Indefinitely, the Answer, the first Amended Answer, the second Amended Answer, the Order Rescheduling Hearing, the (Second) Order Postponing Hearing Indefinitely, the Amended Complaint and Notice of Hearing, the Answer to Amended Complaint, the Stipulation of Facts, the Statement of Issues Presented, and each party's Statement of Position.

[1] By so stipulating, Respondent is in no way waiving or otherwise limiting its ability to challenge the Board's authority to either hear this case or to render a decision on the grounds it lacks or lacked a legally sufficient quorum.

2. This case is submitted directly to the Board for issuance of findings of fact, conclusions of law, and an Order.

3. The parties waive an evidentiary hearing, findings of fact, conclusions of law, and recommended Order by an Administrative Law Judge.

4. The Board should set a time for the filing of briefs.

5. This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.

I. STIPULATION OF FACTS

The Parties herein stipulate as follows:

(a) The charge in this proceeding was filed by the Charging Party on January 28, 2011, and a copy was served by regular mail on Respondent on January 31, 2011. (A copy of the charge and affidavit of service are attached as Exhibits A and B, respectively.)

(b) The amended charge in this proceeding was filed by the Charging Party on April 11, 2012, and a copy was served by regular mail on Respondent on April 11, 2012. (A copy of the amended charge and affidavit of service are attached as Exhibits C and D, respectively.)

(c) On March 31, 2011, the Regional Director for Region 10 of the Board issued a Complaint and Notice of Hearing alleging that Respondent violated the National Labor Relations Act. (A copy of the Complaint is attached hereto as Exhibit E.)

(d) On April 14, 2011, the Respondent filed a timely Answer to the Complaint denying that it had committed any violation of the Act and asserting several affirmative defenses. (A copy of the Answer is attached hereto as Exhibit F.)

(e) On April 26, 2011, the Regional Director for Region 10 of the Board issued an Order Postponing Hearing Indefinitely. (A copy of the Order is attached hereto as Exhibit G.)

(f) On January 30, 2012, the Respondent filed a timely Amended Answer to the Complaint denying that it had committed any violation of the Act and asserting several affirmative defenses. (A copy of the Amended Answer is attached hereto as Exhibit H.)

(g) On February 24, 2012, the Respondent filed a timely Second Amended Answer to the Complaint denying that it had committed any violation of the Act and asserting several affirmative defenses. (A copy of the Second Amended Answer is attached hereto as Exhibit I.)

(h) On February 28, 2012, the Acting Regional Director for Region 10 of the Board issued an Order Rescheduling Hearing. (A copy of the Order Rescheduling is attached hereto as Exhibit J.)

(i) On April 11, 2012, the Regional Director for Region 10 of the Board issued an Order Postponing Hearing Indefinitely. (A copy of the Order Postponing is attached as Exhibit K.)

(j) On October 25, 2012, the Regional Director for Region 10 of the Board issued an Amended Complaint and Notice of Hearing. (A copy of the Amended Complaint is attached hereto as Exhibit L.)

(k) On October 31, 2012, the Respondent filed a timely Answer to Amended Complaint denying that it had committed any violation of the Act and asserting several affirmative defenses. (A copy of the Answer to Amended Complaint is attached hereto as Exhibit M.)

2. Respondent, a Delaware corporation with a place of business in Calera, Alabama, herein called Respondent's facility, has been engaged in the operation of retail gasoline and diesel fueling stations. During the past 12 months, Respondent, in conducting its business, purchased and received at its Calera, Alabama, facility goods valued in excess of $50,000 directly from points outside the State of Alabama. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Respondent operates retail fueling stations in 21 states, with over 1,000 locations.

4. Respondent's employees are not represented by a labor organization at any of its locations.

5. At all material times until March 6, 2012, Respondent required employment applicants at its various retail facilities, including its Calera, Alabama, facility, to sign a document titled "Binding Arbitration Agreement and

Waiver of Jury Trial (Applicant)" (herein called "Agreement"). The Agreement requires employees to waive the right to pursue class and collective actions before an arbitrator and mandates that certain employment-related disputes be arbitrated rather than litigated in a court of law. (A copy of the Agreement is attached hereto Exhibit E, Attachment A.) The Agreement states, in part:

> Excluding claims which must, by statute or other law, be resolved in other forums, Company and Employee agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Employee's employment, including but not limited to, all claims beginning from the period of application through cessation of employment at Company and any post-termination claims and all related claims against managers, by binding arbitration pursuant to the National Rules for the Resolution of Employment Disputes ("Rules") of the American Arbitration Association (hereinafter "AAA").
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> . . .
>
> By signing this Agreement, Individual and the Company waive their right to commence, be a party to, or class member or collective action in any court action against the other party relating to employment issues. Further, the parties waive their right to commence or be a party to any group, class or collective action claim in arbitration or any other forum. The parties agree that any claim by or against Individual or the Company shall be heard without consolidation of such claim with any other person or entity's claim.
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> (Exhibit E, Attachment A, at 2.)

6. On or about March 6, 2012, Respondent implemented a revised Agreement for all applicants and employees hired thereafter (herein called "Revised Agreement.") (A copy of the revised Agreement is attached as Exhibit N.) The revised version of the Agreement includes the following language:

> Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and

> Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act ("NLRA") to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims. Both parties further agree that nothing in this Agreement precludes Individual or the Company from participating in proceedings to adjudicate unfair labor practices charges before the National Labor Relations Board ("NLRB"), including, but not limited to, charges addressing the enforcement of the group, class or collective action waiver set forth in the preceding paragraph.

7. The Revised Agreement has been distributed, implemented, maintained and enforced only for employees hired after March 6, 2012. Employees and other applicants hired before March 6, 2012, are subject to the Agreement described in paragraph 5, above.

8. Applicants for employment at Respondent's various retail facilities, including Calera, Alabama, are required to complete and submit an application form. The Agreement and the Revised Agreement described in paragraphs 5 and 6, above, must be executed and submitted before an applicant is considered for employment. No applicant for employment may be hired and no employee may retain employment without signing the Agreement.

9. Sheila Hobson (herein called "Charging Party") was employed by Respondent from about November 15, 2008, until September 17, 2010.

10. On or about November 5, 2008, at the time of her application and before Charging Party was employed by Respondent, Respondent required Charging Party to sign the Agreement described in paragraph 5, above.

11. On June 11, 2010, Charging Party and employees Christine Pinckney, Susan Ellington, and Santressa Lovelace filed a collective action in United States District Court, Northern District of Alabama, 2:10-CV-01486, seeking compensation for alleged violations of the Fair Labor Standards Act. (A copy of the Collective Action Complaint is attached as Exhibit O.)

12. On July 26, 2010, Respondent filed a Motion and Memorandum to Compel Arbitration and Dismiss Collective Action (herein "Motion to Compel") that sought enforcement of the mandatory arbitration Agreement set forth in paragraph 5, above. Respondent's Motion sought a court order compelling the employees, including Charging Party, to individually arbitrate their claims and further sought an order dismissing the collective action in its entirety, on the basis that employees had signed the Agreement to arbitrate all claims individually and had thereby waived the right to bring any collective claims or suits pertaining to their wages, hours, and terms and conditions of employment. (A copy of the Defendant's Motion to Compel is attached as Exhibit P.)

13. At all material times the Respondent has taken affirmative actions to maintain the Motion to Compel, and has been enforcing the mandatory arbitration Agreement described in paragraph 5, above. Specifically, the Respondent has filed the following pleadings in support of its Motion to Compel:

a. On September 3, 2010, Respondent filed a Reply Memorandum in support of its Motion to Compel Arbitration and Dismiss Collective Action. (A copy of the Reply Memorandum is attached as Exhibit Q.)

b. On June 17, 2011, Respondent filed a Motion to Allow Supplemental Briefs in Support of its Motion to Compel Arbitration and Dismiss Action. On that same date, June 17, 2011, the Respondent filed its Supplemental Brief in Support of its Motion to Compel Arbitration and Dismiss Action. (A copy of the Motion to Allow Supplemental Briefs is attached as Exhibit R, and a copy of the Supplemental Brief is attached as Exhibit S.)

c. On July 25, 2011, Respondent filed a Response in Opposition to Plaintiff's Motion to Defer Ruling and Reply to Plaintiff's Response to Defendant's Supplemental Brief. (A copy of the Response in Opposition is attached as Exhibit T.)

d. On August 4, 2011, Respondent filed a Notice of Clarification Regarding its Response in Opposition to the Motion to Defer Ruling and Reply to Plaintiff's Response to Defendant's Supplemental Brief. (A copy of the Notice of Clarification is attached hereto as Exhibit U.)

e. On February 3, 2012, Respondent filed its Response to Plaintiff's Notice of Filing in Support of their Response in Opposition to Defendant's Motion to Compel Arbitration and Dismiss Collective Action. (A copy of the Response to Plaintiff's Notice is attached as Exhibit V.)

f. On February 10, 2012, Respondent filed its Second Notice of Supplemental Authority. (A copy of Second Notice is attached as Exhibit W.)

g. On February 22, 2012, Respondent filed its Opposition to Plaintiff's Supplemental Brief in Response to Defendant's Second Notice of Supplemental Authority and in Reply to Defendant's Response in Opposition. (A copy of the Opposition to Plaintiff's Supplemental Brief is attached as Exhibit X.)

14. On April 26, 2012, the Hon. Harwell G. Davis, III, United States Magistrate Judge of the United States District Court in the Northern District of Alabama, Southern Division, issued his Report and Recommendation granting Respondent's Motion to Compel Arbitration and Dismiss Collective Action. (A copy of the Report is attached as Exhibit Y.)

15. On September 18, 2012, the Hon. Lynwood Smith, United States District Court Judge for the Northern District of Alabama, Southern Division, issued an Order adopting and approving the magistrate's recommendation to compel arbitration of the dispute and further ordering that the civil action be stayed pending arbitration. (A copy of the Order is attached as Exhibit Z.)

16. Plaintiffs in civil action CV-10-HGD-1486, including Charging Party, have not appealed Judge Smith's decision compelling arbitration.

17. The Respondent has refused to arbitrate the Plaintiffs' claims on a collective action basis.

II. **ISSUES PRESENTED**

1. Whether the Respondent maintained and enforced an unlawful policy requiring employees to refrain from engaging in concerted employment litigation and arbitration of employment disputes in violation of Section 8(a)(1) of the Act?

2. Whether Respondent's Agreement was so overly broad that employees could reasonably believe that they were prohibited from filing charges with the National Labor Relations Board in violation of Section 8(a)(1) of the Act?

3. Whether Respondent's maintenance of a Motion to Compel Arbitration and Dismiss Collective Action, enforcing its allegedly unlawful policy requiring employees to waive the right to pursue class or collective claims, independently violates Section 8(a)(1) of the Act?

4. Whether the Amended Complaint is barred, in whole or in part, because the Board failed to timely initiate administrative remedies pursuant to Section 10(b) of the Act?

5. Whether the Amended Complaint is barred, in whole or in part, based on the doctrine(s) of res judicata or collateral estoppell?

6. Whether the Amended Complaint is barred, in whole or in part, because some or all of the claims therein are rendered moot by resolution of the Motion to Compel Arbitration in the United States District Court?

7. Whether the Amended Complaint is barred, in whole or in part, because the Board lacked a quorum at the time of issuance of *D.R. Horton*, 357 NLRB 184 (2012)?

III. PARTIES' POSITIONS

A. ACTING GENERAL COUNSEL'S POSITION

It is axiomatic that employees have a Section 7 right to pursue and participate in concerted employment-related collective and class action claims. Concerted legal action concerning wages, hours and working conditions is a well established form of concerted activity

undertaken for employees' mutual aid and protection. It is equally well-established that an employer can not mandate that its employees waive their Section 7 rights.

Respondent requires all of its employees to sign a mandatory arbitration agreement (herein "Agreement") as a condition of employment. The Agreement provides that all employment-related disputes will be subject to arbitration, and requires that employees waive the right to pursue most employment-related disputes in court. The Agreement expressly specifies that all disputes will be arbitrated individually, and it waives any right to file or participate in any collective or class legal action in both judicial and arbitral forums.

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the Board established the appropriate legal framework for evaluating the legality of an employer's mandatory arbitration policy in non-union workplaces. The Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both arbitral and judicial forums unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. *Id.*, at slip op. at 6-7. It is undisputed that the Respondent's Agreement, and its March 6, 2012, Revised Agreement, effectively require employees to waive their right to file or participate in collective or class legal actions in both judicial and arbitral forums. Therefore, the Respondent's maintenance of an unlawful rule prohibiting collective or class legal actions violates Section 8(a)(1) of the Act. Notwithstanding Respondent's arguments regarding the validity of the Board's decision in *D.R. Horton, Inc.*, it is well-established that the Board is entitled to rely on its own decisions even while they are pending on review before a court of appeals. *Horizons Hotel Corp.*, 323 NLRB 591, 591 (1997). In accord with the extant Board law, the Respondent's Agreement and Revised Agreement

interfere with employees' Section 7 rights and the maintenance and enforcement thereof violate Section 8(a)(1) of the Act.

The Agreement interferes with employee access to the Board's processes. An employee would reasonably interpret Respondent's Agreement as a prohibition against pursuing charges under the National Labor Relations Act. The Board has held that the Act is violated where a rule which does not explicitly restrict Section 7 activities would, nonetheless, cause "reasonable employees [to] construe the language to prohibit Section 7 activity." *U-Haul Company*, 347 NLRB 375, 377 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Respondent's Agreement herein mandates binding arbitration of all "disputes related to employment," for "claims or charges based upon federal or state statutes, including but not limited to, the ADEA, Title VII, . . . ***or any other federal or state or local law affecting employment in any manner whatsoever."*** (emphasis supplied). In an analogous case, the Board found a violation where an employer's mandatory arbitration agreement required arbitration of all employment disputes including, "causes of action recognized by local, state or federal law or regulations." *U-haul Company*, 347 NLRB at 377. Similarly, Respondent's Agreement provides a blanket prohibition on pursuing federal claims outside the arbitration process. Under these circumstances, the Respondent has violated Section 8(a)(1) by interfering with employee access to the Board's processes.[2]

Finally, if the Respondent has unlawfully maintained and enforced an arbitration Agreement that interferes with employees' Section 7 rights, as alleged herein, then Respondent's enforcement of the unlawful policy independently violates Section 8(a)(1) of the Act.

[2] While Respondent's Revised Agreement would arguably remedy this violation, Respondent has not modified its original Agreement, which remains in full force and effect for all current and former employees employed prior to March 6, 2012. Thus, Respondent continues to maintain an unlawfully overbroad Agreement.

Respondent's Motion to Compel has an express objective, enforcement of the unlawful waiver of the right to pursue class and collective actions, unlawful under extant Board law. It is well established that enforcement of an unlawful rule or policy violates Section 8(a)(1), and the Respondent's enforcement herein interferes with employees' Section 7 rights.

Respondent's affirmative defense that the Board is acting in the "absence of a lawfully constituted quorum" is unsupported by Board law and should be rejected. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown,* 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926).

Accordingly, in the absence of any valid affirmative defenses, the Board should find that the Respondent has maintained an unlawful policy which interferes with Section 7 rights. The Respondent's mandatory arbitration Agreement is so overly broad that an employee would reasonably interpret it to prohibit employee access to the Board's processes, in violation of Section 8(a)(1) of the Act. In addition, the Agreement requires employees to waive their right to participate in collective and class pursuit of all employment-related claims. Based thereon, the Agreement and the March 6, 2012, Revised Agreement, interfere with employees' Section 7 rights in violation of Section 8(a)(1). Based on the foregoing, Counsel for the Acting General Counsel submits that the Respondent maintained an unlawful Agreement in violation of the Act.

B. **CHARGING PARTY'S POSITION**

Ms. Hobson (along with three other individuals) filed suit challenging the Respondent's alleged practice of requiring employees to perform work "off the clock." Ms. Hobson alleged that she was required to perform work without receiving compensation. For example, she alleges that Respondent required employees to conduct a "fuel survey" before clocking in for work and that they were not paid for time spent performing a "fuel survey". The Plaintiffs filed suit seeking to change this practice and to collect unpaid wages. The Respondent moved to compel arbitration of the claims on the basis of its mandatory arbitration agreement. The Respondent's mandatory arbitration agreement contains a collective action waiver that prohibits employees such as the charging party from collectively challenging the Respondent's wage and hour practices in **any forum**. Ms. Hobson had no input regarding the wording of the arbitration agreement and the agreement was presented to her as a condition of employment. She had to choose between employment and waiver of substantive rights; a choice which cannot be reasonably characterized as voluntary.

The resolution of this case is controlled by D.R. Horton, Inc., Case 12-CA-25764. Conditioning employment on execution of a waiver that deprives an employee of (1) the right to commence, be a party to, or even a "class member" in any court action related to employment issues and (2) the right to commence, be a party to any group, class or collective action claim in arbitration or any other forum clearly violates Section 8 (a)(1) of the Act under the *D.R. Horton* decision. Just like the agreement at issue in *D.R. Horton*, the Respondent's agreement precludes concerted or collective action over employment related matters in any forum. The Board found that such a broad waiver violated Section 8(a)(1) of the Act, given the long standing Board and judicial precedent that employees have a Section 7 right to jointly or collectively seek redress of

grievances through litigation. An employer may not directly or indirectly deprive an employee of the right to collectively prosecute a wage dispute. The Respondent's mandatory arbitration agreement (which contains a "collective action" waiver) and its decision to enforce this agreement in its entirety violate the Charging Party's Section 7 rights. The fact that the Respondent persuaded the Hon. Judge Smith (United States District Court Judge for the Northern District of Alabama) to stay the case (thereby retaining jurisdiction) and require the parties to arbitrate the FLSA dispute does not render Ms. Hobson's charge moot. The Respondent has refused to arbitrate the wage and hour claims under the FLSA's collective action provision. Thus, it continues to insist on a waiver of Section 7 rights.

Moreover, Respondent may not deprive employees of the right to proceed collectively simply by insisting that arbitration occur on an individual basis, regardless of the collective action waiver. Such an approach is no different than an express waiver of collective action rights. An employee's Section 7 rights are not subject to the Respondent's consent (i.e. an implicit veto). If an employer's consent to proceed collectively in an arbitration proceeding is required, then the arbitration agreement is unenforceable absent such consent.

The recent Supreme Court cases *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011) and *Compucredit v. Greenwood*, 132 S. Ct. 665 (2012) do not require enforcement of an arbitration agreement containing a collective action waiver that violates federal law. *Concepcion* concerned California's state law prohibition against class action waivers in arbitration agreements. The Court held that the Federal Arbitration Act pre-empted California's rule invalidating arbitration agreements that contained class action waivers. Thus, the case turned on the relationship between state law and federal law. Nothing in *Concepcion* stands for the proposition that the Federal Arbitration Act "eviscerates" federal substantive rights, such as the right of an employee

under the National Labor Relations Act to collectively initiate, encourage or pursue wage and hour grievances or claims against their employers. *See, Owen v. Bristol Care,* 2012 WL 1192005 * 4 (W.D. Mo. Feb. 28, 2012)(noting the *Concepcion* did not apply to a wage and hour claim and holding that the right to bring a collective action is a substantive right under the FLSA); *see also*, *Rainiere v. Citigroup, Inc*., 827 F. Supp. 2d 294 (S.D.N.Y. 2011)(holding that right to bring a collective action is a substantive right under the FLSA). Likewise, the decision in *Compucredit v. Greenwood,* 132 S. Ct. 665 (2012) simply stands for the proposition that the Federal Arbitration Act (FAA) requires enforcement of an arbitration agreement if such enforcement does not violate another federal statutory right. *See*, *Davis v. Nordstrom, Inc.*, 2012 WL 4478297, n.1 (N.D. Cal. Sept. 27, 2012). However, if enforcement of an arbitration agreement results in the waiver of federal substantive rights, then even under *Compucredit* the FAA does not compel enforcement of such an agreement to arbitrate.

C. RESPONDENT'S POSITION

Respondent contends the Complaint is without merit. The Murphy Arbitration and Jury Waiver Agreement ("Agreement") does not violate the Act by prohibiting employees from engaging in protected concerted activity or filing charges with the Board. Nothing about the Agreement, either in its original or revised form, purports to suggest that employees are prohibited from filing an action to challenge the enforceability of the Agreement or prohibited from filing charges with the Board. In fact, such statutory claims, which must be filed with the Board, were expressly excluded in the preface of the original Agreement. (Exhibit E, Attachment A at 1.) Moreover, claims under the Act are not even mentioned in the list of laws to which the Agreements applies. (*Id*.) Rather, the Agreement simply indicates that employment disputes are broadly subject to mandatory arbitration. Moreover, the revised Agreement

expressly informs employees they are permitted to file charges with the Board and/or challenge the enforceability of the Agreement in Court or before the Board. (Exhibit N at 2.) Accordingly, the terms of the Agreement, both in its original and revised form, contradicts the allegations of the Complaint and Amended Complaint in this matter.

Moreover, any finding that the class and collective action waiver in the Agreement is unenforceable as an infringement on employees' rights to engage in protected activity under § 7 of the NLRA, in violation of § 8(a)(1) of that Act, would violate the mandate of the FAA to enforce arbitration agreements, including those containing class action waivers, according to their terms. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In fact, the Supreme Court's decision in *Concepcion* precludes any finding that a collective action requirement can be consistent with the FAA. In *Concepcion*, the Supreme Court addressed an arbitration agreement that precluded class proceedings **in both court and arbitration**. *Id*. at 1744.[3] In finding such an agreement fully enforceable, the Court held 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. Accordingly, *Concepcion* eviscerates Plaintiffs' argument that an absolute right exists to participate in a collective action. Indeed, any such requirement would run afoul of the FAA's "overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* Moreover, in a post-*D.R. Horton* decision, the Supreme Court reaffirmed *Concepcion* by holding a federal statute will not be interpreted to override the FAA absent a specific "Congressional command" in the statutory text. *Compucredit Corp. v. Greenwood*, 2012 U.S.

[3] AT&T subsequently amended the agreement to allow a claimant to bring an individual action in small claims court in lieu of arbitration. Nonetheless, the agreement was not amended to provide a class action remedy in a judicial forum. *Id*.

LEXIS 575, * 17, 132 S. Ct. 665, 671 (Sup. Ct. Jan. 10, 2012). The NLRA contains no such express Congressional command.

In the wake of *Concepcion* and *Compucredit*, the vast majority of federal courts to have addressed the enforceability of class action waivers in employment arbitration agreements (or similar documents) have squarely rejected the Board's decision in *D.R. Horton* as inconsistent with *Concepcion's* and *Compucredit's* tenets. *See Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 U.S. Dist. LEXIS 63985 (N.D. Cal. May 7, 2012); *Oliveira v. CitiCorp N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573, ** 6-8 (M.D. Fla. May 18, 2012) (declining to follow *D.R. Horton* and enforcing collective action waiver in the FLSA context); *Jasso v. Money Market Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, ** 24-26 (N.D. Cal. Apr. 13, 2012) (rejecting application of *D.R. Horton* to bar enforcement of class action waiver, noting *Concepcion* requires "compelling arbitration on an individual basis in the absence of a clear agreement to proceed on a class basis"); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, * 8 (M.D. Ga. Feb. 9, 2012) (enforcing class waiver in employment application and rejecting *D.R. Horton*, stating the Board's decision "does not meaningfully apply" to the issue of compelling arbitration); *Sanders v. Swift Transportation Co.*, 2012 U.S. Dist. LEXIS 24234, * 7 (N.D. Cal. Jan. 17, 2012) (finding *D.R. Horton* "inapposite" and declining to follow it); *Lavoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277, * 19-20 (S.D.N.Y. Jan. 13, 2012) (enforcing employment arbitration agreement that prohibited class and collective proceedings in a judicial or arbitral forum, and declining to rely on *D.R. Horton* as inconsistent with the holding in *Concepcion)*; *see also, Grabowski v. C.H. Robinson Co.*, 2011 U.S. Dist. LEXIS 105680, * 17-20 (S.D. Cal. Sept, 19, 2011) (enforcing employment arbitration agreement that precluded class or collective arbitration or litigation, and finding that "the NLRA does not operate to invalidate or otherwise render

unenforceable" a class and collective action waiver in such an agreement). Federal district courts have further rejected *D.R. Horton* on the grounds that the Board "has no special competence or experience interpreting the FAA." *Tenet v. Philadelphia Healthsystem, Inc.*, 2012 U.S. Dist. LEXIS 116280, *4 (E.D. Pa. Aug. 17, 2012); *see also DeLock v. Securitas Security Servs. USA, Inc.*, 2012 U.S. Dist. LEXIS 107117, *3 (E.D. Ark. Aug. 1, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, 4-5 (S.D. Tex. Oct. 4, 2012).

In addition, numerous federal courts, including the Eleventh Circuit, have determined the right to proceed collectively under 29 U.S.C. 216(b) is a procedural right – not a substantive one – that is fully waivable. *Caley v. Gulfstream Aerospace Corp.*, 438 F.3d 1359, 1364 (11th Cir 2005) (enforcing collective action waiver in FLSA case and rejecting argument Section 216(b) provides a substantive right); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiffs' argument such a clause deprived them of a substantive right under the FLSA); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (stating "while [the] FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the *procedural* right to join a collective action") (emphasis in original); *Hawkins v. Hooters of Amer., Inc.*, 2011 U.S. Dist. LEXIS 72024, * 4 (D.D.C. July 4, 2011) (noting "the ability to proceed as a class is not a substantive right guaranteed by the FLSA"); *Lu v. AT&T Servs.*, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011) (stating "[t]he right to bring a collective action under the FLSA is a procedural [right] -- not a substantive one"). *See also, Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing arbitration agreement containing a collective action waiver provision and rejecting the plaintiffs' argument such a clause deprived them of a

substantive right under the FLSA); *Copello v. Boehringer Ingelheim Pharms., Inc.*, 2011 U.S. Dist. LEXIS 84912, * 21 (N.D. Ill. Aug. 2, 2011) (stating "while [the] FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the *procedural* right to join a collective action") (emphasis in original); *Hawkins v. Hooters of Amer., Inc.*, 2011 U.S. Dist. LEXIS 72024, * 4 (D.D.C. July 4, 2011) (noting "the ability to proceed as a class is not a substantive right guaranteed by the FLSA"); *Lu v. AT&T Servs.*, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011) (stating "[t]he right to bring a collective action under the FLSA is a procedural [right] -- not a substantive one").

The Board's recent decision in *D.R. Horton* allows employers to preclude arbitration on a class or collective basis and to insist that proceedings be conducted on an individual basis. *D.R. Horton*, 2012 NLRB LEXIS 11, * 54-55 (N.L.R.B. Jan. 3, 2012). It is beyond dispute that Charging Party entered into an enforceable agreement to arbitrate her individual FLSA claims. Likewise, it is beyond dispute that the Agreement expressly precludes arbitration or collective or class claims. In the parallel federal action, Charging Party conceded that, under the Agreement, she must arbitrate her individual FLSA claims. Consequently, she lacks standing to either bring or participate in a collective action in a judicial forum under 29 U.S.C. § 216(b). Therefore, because the Charging Party has conceded her individual FLSA claims are subject to arbitration, the enforceability of the class or collective action waiver as to the Charging Party is moot.

Even if the collective and class action waiver in the Agreement does violate the Act, by the terms of the Agreement itself, the balance of the agreement (including the agreement to arbitrate individual FLSA claims) remains enforceable based on the severability clause.

In addition, to the extent the Amended Complaint is based on Murphy's Motion to Compel, it is barred on timeliness grounds. Murphy filed its Motion to Compel on July 26,

2010. Charging Party did not file her Amended Charge raising the Motion to Compel as a basis for relief until April 11, 2012, well outside the six (6) month limitations period for initiating administrative action before the Board. *See* 29 U.S.C. § 160(b). Further, the subsequent ruling of the United States District Court granting the Motion to Compel, coupled with Charging Party's failure to appeal that decision, renders moot any further dispute regarding Murphy's filing or prosecution of the Motion to Compel.

Finally, the Complaint is barred, in whole or in part, because the Board lacks a quorum. Specifically, under the Act, all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's recess appointments are constitutionally invalid. Therefore, the Board's agents or delegates lack authority to act on behalf of the Board, as a quorum does not exist in fact and in-law. Murphy

reserves the right to challenge the authority of the Board and its agents or delegates if they continue to act in the absence of a lawfully constituted quorum.

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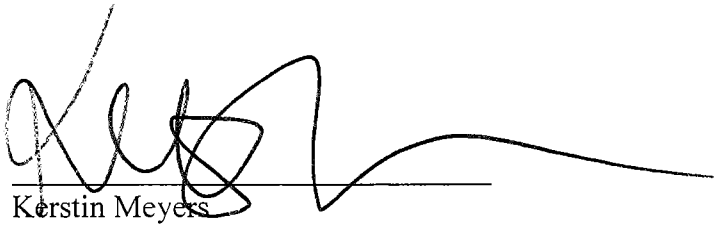
CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she served a copy of the foregoing Joint Motion to Transfer This Case to the Board and Stipulated Record to the following via electronic mail and by U.S. Mail, postage prepaid, on November 29th, 2012.



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