UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MURPHY OIL USA, INC.
Employer

and **CASE 10-CA-38804**

SHEILA M. HOBSON, An Individual
Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF TO THE BOARD

Submitted by:
Kerstin I. Meyers
Counsel for the Acting General Counsel
National Labor Relations Board
Region 10
233 Peachtree Street, NE
Suite 1000, Harris Tower
Atlanta, GA 30303

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On February 11, 2013, the Board issued an Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board pursuant to a joint motion filed by Respondent Murphy Oil USA, Inc. (Respondent), Charging Party Sheila M. Hobson (Charging Party), and Counsel for the Acting General Counsel to waive a hearing and transfer the proceedings to the Board for a decision based on the stipulated record. Pursuant to that Order and the Board's February 25, 2013, Order, granting Counsel for the Acting General Counsel's request for an extension of time to file briefs, Counsel for the Acting General Counsel hereby submits this brief.

I. PROCEDURAL STATEMENT

The Regional Director for the Tenth Region issued and served a Complaint and Notice of Hearing and an Amended Complaint and Notice of Hearing in Case 10-CA-38804, on March 31,

2011, and October 25, 2012, respectively. (Jt. Ex. E; Jt. Ex. L).[1] The original Complaint alleged that Respondent violated the Act by maintaining and enforcing a Binding Arbitration Agreement and Waiver of Jury Trial (Arbitration Agreement) that includes provisions that prohibit employees from pursuing class or collective claims in any forum, and that the Arbitration Agreement leads employees to reasonably believe that they are prohibited from filing charges with the National Labor Relations Board (Board). The Amended Complaint includes an additional allegation that the Respondent violated the Act by enforcing its Arbitration Agreement in litigation brought against Respondents in the U.S. District Court, Northern District of Alabama, and moving the District Court to compel plaintiffs, employees of Respondent, to individually arbitrate their wage and hour claims.

II. STATEMENT OF ISSUES

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?

[1] References to page numbers in the stipulated record shall appear as SR __, and to paragraph numbers therein as ¶__ or ¶¶s __ - __. References to joint exhibits shall be referred to as Jt.Ex. __, p. __.

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

III. STATEMENT OF FACTS

A. The Charges

The original charge in this matter was filed on January 28, 2011, and served on January 31, 2011, and alleged, *inter alia*, that the Respondent maintained an unlawful mandatory arbitration agreement. (Jt. Ex. A and B) On April 11, 2012, an amended charge was filed and served . (Jt. Ex. C & D) The amended charge included a new allegation regarding the Respondent's unlawful enforcement of the Arbitration Agreements based on Respondent's maintenance and prosecution of a July 26, 2010 Motion to Compel Arbitration filed in the United States District Court, Northern District of Alabama, discussed at III.C, below. (Jt. Ex. C & D)

B. Respondent's Mandatory Arbitration Agreements

Respondent is a retail fuel provider, with over 1000 facilities in 21 states.[2] (SR 4, ¶ 3) Respondent's employees are not represented by a labor organization. (SR 4, ¶ 4). Since early 2008, the Respondent has required applicants to sign its "Binding Arbitration Agreement and Waiver of Jury Trial (Applicant)" (Arbitration Agreement). (SR 4-6, ¶ 5-10)

Around November 5, 2008, Charging Party Sheila Hobson, applied for employment at Respondent's facility located in Calera, Alabama. As part of Hobson's application, Respondent required Hobson to sign the Arbitration Agreement. (SR 6-7, ¶¶ 7, 8 and 10)

The Arbitration Agreement provides, in relevant part:

> This Agreement is entered into between Murphy Oil USA. Inc. ("Company") and the undersigned applicant (hereinafter "individual',). Excluding claims which must, by statute or other law, be resolved in other forums, Company and Individual agree to

[2] Respondent stipulated to the Board's jurisdiction and its status as an employer within the meaning of the Act. (SR 4, ¶¶ 2 and 3)

> resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual'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,). Disputes related to employment include, but are not limited to, claims or charges based upon federal or state statutes, including, but not limited to, the Age Discrimination in Employment Act . . . claims based upon tort or contract laws or common law or any other federal or state or local law affecting employment in any manner whatsoever.
>
> . . .
>
> 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. (Jt. Ex. E, Attachment A; see also, Exhibit O, Pp. 14-15)[3]

Around March 6, 2012, Respondent adopted a revised Agreement (Revised Agreement). (Jt. Ex. N) The only material difference between the Arbitration Agreement and the Revised Agreement is the inclusion of 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

[3] In the Exhibits submitted with the joint stipulation, Exhibit O, the Plaintiff's Fair Labor Standards Act Complaint, includes four documents at pages 60-70 of the exhibit file that were inadvertently attached to the initial Complaint. These documents are exhibits to Respondent's Motion to Compel, Exhibit P, and would be correctly referenced after page 86 of the exhibit file.

> 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.

Other than the addition of the above language, the Revised Agreement remained the same as the original Arbitration Agreement in all ways material herein. Specifically, the Revised Agreement contains precisely the same language concerning the waiver of the right to concertedly pursue legal claims. (Jt. Ex. E, Att. A & Jt. Ex. N)

It is further undisputed that the Respondent required all employees hired or retained before March 6, 2012, to sign the Arbitration Agreement, and that the Arbitration Agreement has remained in full-force and effect for those employees who were retained before March 6, 2012. (SR 6, ¶ 7) Employees hired after March 6, 2012, were required to sign the Revised Agreement which has been maintained and enforced for all employees hired after March 6, 2012. (SR 6, ¶ 7) All parties agree that applicants were required to sign either the Arbitration Agreement or the Revised Agreement (herein collectively referred to as the Arbitration Agreements) as a condition precedent to employment. (SR 6, ¶ 8) The Arbitration Agreements were a mandatory term and condition of employment. (SR 6, ¶¶ 8 and 10)

C. Civil Litigation

On June 11, 2010, Charging Party and three other employees of Respondent filed a collective action complaint (Complaint) in the United States District Court, Northern District of Alabama. (SR 7, ¶ 11) The Complaint alleged that Respondent had violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., (FLSA) by failing to pay employees' statutory wages

for hours worked. (Jt. Ex. O) The Complaint further requested certification of a collective action and notice to similarly situated current and former employees. (Jt. Ex. O)

On July 26, 2010, Respondent filed a Motion to Compel Arbitration and Dismiss Collective Action (Motion to Compel). (SR 7, ¶ 12; Jt. Ex. P) Respondent's Motion to Compel sought an order compelling the Plaintiffs', including Charging Party, to individually arbitrate their claims, and dismissing the Complaint in its entirety. (Id.) The sole basis for the Respondent's Motion to Compel was its assertion that the named Plaintiffs were bound by its Arbitration Agreement that mandates individual arbitration. (Jt. Ex. P) Since July 31, 2011, the Respondent has engaged in the following activities in furtherance of its Motion to Compel:

a. 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. (Jt. Ex. T)

b. 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. (Jt. Ex. U)

c. On February 3, 2012, Respondent filed a 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. (Jt. Ex. V)

d. On February 10, 2012, Respondent filed its Second Notice of Supplemental Authority. (Jt. Ex. W)

e. 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. (Exhibit X)

On April 26, 2012, the Honorable 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 July 26, 2010, Motion. (SR 9, ¶ 14; Jt. Ex. Z) The magistrate rejected Plaintiffs' claim that *DR Horton* rendered the Arbitration Agreements unenforceable, and instead found that under controlling Supreme Court precedent,

the Agreements were enforceable as written, and that the Plaintiffs waived their right to bring collective claims in court or before an arbitrator. (Jt. Ex. Z, Pp. 18-22) Judge Davis recommended that the Plaintiffs' Complaint be dismissed and that an Order issue compelling the Plaintiffs to arbitrate their FLSA claims individually. (Id.) On September 17, 2012, the Honorable Lynwood Smith, United States District Court Judge of the United States District Court in the Northern District of Alabama, Southern Division, issued an Order adopting the magistrate's recommendation to compel the Plaintiffs to individually arbitrate their claims, and Ordering that the Complaint be stayed, rather than dismissed, and administratively closing the case. (Jt. Ex. Y, pp. 2-4)

In sum, during the material time period, Respondent has filed five legal pleadings with the District Court in an effort to compel employees to arbitrate their employment-related legal claims on an individual basis. (SR 8, ¶ 13) The primary basis for the Respondent's Motion to Compel and its continued pursuit thereof, was the Plaintiffs acquiescence to the Respondent's Arbitration Agreements, and the purported waiver of the right to pursue class and collective claims contained therein.

IV. ARGUMENT AND CITATION TO AUTHORITY

1. Respondent's Arbitration Agreements violate Section 8(a)(l) of the Act

In *DR Horton,* 357 NLRB No. 184 (2012), the Board held "an employer violates Section 8(a)(l) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions

against the employer." Id., slip op. at 1 (2012). As the Board observed, it "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7," and when an employer requires employees to waive this substantive right under the Act, the agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. Id., slip op. at 2 (2012).

In *DR Horton,* the Board made clear that "the applicable test is that set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004*).* Under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity." 357 NLRB No. 184, slip op. at 7, citing *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

Respondent's Arbitration Agreements require individual arbitration of all claims, and expressly restrict employees from bringing joint claims, as a class or collective action, in any forum -- judicial, arbitral or "any other forum." (Jt. Ex. C, Attachment A, P. 2) The Respondent has thus foreclosed all concerted employment-related litigation or arbitration by employees, effectively stripping employees of their Section 7 right to engage in concerted activities for mutual aid and protection. The Arbitration Agreements therefore explicitly restrict Section 7 activity under *Lutheran Heritage Village-Livonia*. Like the agreement in *DR Horton*, Respondent's Arbitration Agreements plainly limit Section 7 activity and, as a term or condition of employment, violate Section 8(a)(1).

Moreover, under the *Lutheran Heritage Village-Livonia,* test, even if the Arbitration Agreements did not on their face constitute a violation of the Act, they have been applied to

restrict the exercise of Section 7 activity.[4] The record clearly demonstrates that Respondent has used the Arbitration Agreements to compel individual arbitration when employees have attempted to bring employment-related class actions against Respondent. (Jt. Ex. P through X) Thus, for both reasons, Respondent's Arbitration Agreements violate the Act as alleged.

In Respondent's position statement submitted with the Joint Motion and Stipulation of Facts, Respondent asserts that the Board's decision in *DR Horton* is in conflict with the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and controlling Supreme Court precedent including *AT & T Mobility v. Concepcion,* 563 U.S. _____, 131 S.Ct. 1740 (2011) and, *Compucredit Corp. v. Greenwood,* ____ U.S. ____, 132 S.Ct. 665, (January 10, 2012). However, the Board addressed these same arguments in *DR Horton* and found them unavailing.

The instant case, like *DR Horton*, does not present a conflict between the FAA and the Act. As the Board in *DR Horton* explained, "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." 357 NLRB No. 184, slip. op. at 12. This is because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id*., slip. op. at 11. Inasmuch as the Arbitration Agreements are inconsistent with the NLRA, they are not enforceable under the FAA.

The Board also emphasized that finding an arbitration agreement unlawful, such as those presented herein, does not conflict with the FAA because "the intent of the FAA was to leave

[4] If the challenged rule does not expressly restrict Section 7 activity, the rule will nevertheless violate the Act if it "has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

substantive rights undisturbed." *Id.* Although Respondent will argue that the waiver is not of substantive rights but, rather, of procedural rights, the Arbitration Agreements clearly require employees to forego substantive rights under the NLRA — namely, employees' right to pursue employment-related claims in a collective or class action — and the Board has plainly held that such agreements require the waiver of substantive rights under the Act.[5] *Id.*, slip. op. at 10-11. Thus, the Arbitration Agreements at issue herein are unlawful not because they involve arbitration or specify particular litigation procedures, but instead because they prohibit employees from exercising their Section 7 right to engage in concerted legal activity in any forum.

Respondent's position statement further argues that finding the Arbitration Agreements unlawful would run afoul of the Supreme Court's decisions requiring the enforcement of arbitration agreements, including class action waivers, according to their terms. (SR 17) *Concepcion*, 131 S.Ct. 1740, and *Compucredit Corp*, 132 S.Ct. 665. However, in *DR Horton*, the Board specifically rejected arguments that the Court's *Concepcion* decision required the Board to find that the arbitration agreement was enforceable as written, or that the Court had sanctioned class and collective action waivers in all categories of arbitration. As the Board noted, the Supreme Court has not heretofore addressed whether an employer can infringe upon employees' substantive Section 7 rights to concertedly pursue employment-related claims, as *Concepcion* arose in the context of a commercial arbitration agreement and did not raise the issue of employees' Section 7 rights.

Similarly, the Respondent's argument that the Supreme Court's decision in *Compucredit Corp.*, 132 S.Ct. 665, requires that its Arbitration Agreements be found lawful is equally

[5] See eg., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005) (employee's collective FLSA claim was arbitrable and waiver of class and collective actions in MAA not unconscionable under Georgia law).

unpersuasive. (SR 17-18) Respondent asserts that the Court held that no federal statute will be interpreted to override the FAA absent a specific "Congressional command" in the statutory text. (SR 17) *Id.* at 671. Respondent essentially argues that that, as collective legal activity is generally considered a "procedural device" under other statutes, employees' preference for that procedure should not be allowed to impede the Respondent's substantive right to enforce its arbitration policy. However, this argument misapplies the "substantive/procedural" dichotomy and ignores the Board's central holding in *DR Horton* that, unlike under the Credit Repair Organization Act at issue in *Compucredit*, the right of employees under the NLRA to bring class and collective claims is itself a *substantive* right. Thus, any claimed infringement on the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

Respondent also asserts that various federal courts have issued decisions upholding class action waivers in mandatory arbitration policies.[6] However, the interpretation and enforcement of the substantive rights protected by the Act is, in the first instance, accorded to the Board—not to the federal courts—and it is the Board law that controls herein. Further, the Board's Petition for Enforcement in *DR Horton* is pending before the Fifth Circuit, and the employer has filed a

[6] See eg., *Owen v. Bristol Care, Inc.*, 702 F. 3d 1050 (8th Cir. 2013) (*DR Horton* entitled to no deference in Eighth Circuit); see also, . *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210 (E.D. Tenn., Feb. 7, 2013); *Long v. BDP Int'l, Inc.*, 2013 U.S. Dist. LEXIS 9104, 46-47 (S.D. Tex. Jan. 22, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, Civil Action No. H-10-3009, 2012 U.S. Dist. LEXIS 143879, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); *Tenet Healthsystem Phila., Inc. v. Rooney*, No. 12-mc-58, 2012 U.S. Dist. LEXIS 116280, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Serv., USA, Inc.*, 4:11-cv-520-DPM (ED Ark. March 29, 2012) 2012 WL 1066378 (declining to consider applicability of *DR Horton* under facts of case); *De Oliveira v. Citicorp. N. Am., Inc.*, No. 812-cv-251 (M.D. Fla. May 18, 2012) 2012 WL 1831230; *Coleman v. Jenny Craig, Inc.*, No. 3:11–cv–1301–MMA–DHB (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11–cv–05405–YGR, 2012 WL 1604851, at *9 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express*, No. 11–CV–5500 YGR (N.D. Cal. April 13, 2012) 2012 WL 1309171 at * 9; *Palmer v. Convergys Corp.*, No. 7:10–cv145(HL), 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11–civ–230(BSJ) (JLC), 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012). Compare, *Herrington v. Waterstone Mortgage Corp.*, No. 11–cv–779–bbc (W.D. Wis. Mar.16, 2012) 2012 WL 1242318, at *6 (ordering arbitration but requiring joinder of claims in arbitration).

cross-petition. See, Court of Appeals, 5th Cir., Case 12-60031, filed May 31, 2012. 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 (1997).

Finally, with regard to Respondent's anticipated argument that its Revised Agreement is immune from prosecution as it comports with the June 2010 General Counsel Memorandum 10-06 (GC 10-06), such evidence is irrelevant. The construction of the Act suggested by GC 10-06, was specifically rejected by the Board in *DR Horton, Inc.*, 357 NLRB No. 184, slip op. at 8. Moreover, General Counsel memoranda are not binding upon the Board. *Id.* at fn. 15.

2. Respondent's Arbitration Agreement was Overly Broad and Violates Section 8(a)(1) of the Act

An arbitration agreement that implicitly leads employees to reasonably believe that they are prohibited from filing charges with the Board violates Section 8(a)(1) of the Act. *Id. at* fn. 2; see also, *2 Sisters Food Group, Inc.* 357 NLRB No. 168 (2011); *U-Haul*, 347 NLRB 375 (2006), *enfd. 255 Fed Appx. 527 (D.C. Cir. 2007)*; *Bill's Electric*, 350 NLRB 292, 296 (2007). Respondent's Arbitration Agreement is at least as ambiguous as those previously considered by the Board, and would lead employees to believe that they must arbitrate claims rather than file charges with the Board.[7]

Respondent asserts that the Arbitration Agreement "expressly excluded [Board charges] in the preface . . .." (SR 16) In fact, similar to the agreements considered by the Board in *2 Sisters* and *U-Haul*, the Arbitration Agreement excludes "claims which must, by statute or other law, be resolved in other forums." 357 NLRB No. 168; 347 NLRB at 377-378. In addition to the brief and general exclusionary language, the Agreement proceeds to list a veritable laundry list of federal and state employment law claims that *are required to be arbitrated*, including

[7] Respondent cured this violation in its Revised Agreement, by specifically referencing employees' rights to file and pursue charges before the Board.

"claims based upon tort or contract or common law or any other federal or state or local law affecting employment in any manner whatsoever." As in the prior Board cases, the Arbitration Agreement "does not by its terms specifically exclude NLRB proceedings, and 'most nonlawyer employees' would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration for the language to be effective." *2 Sisters*, 357 NLRB No. 168, citing *U-Haul*, 347 NLRB at 378. Under extant Board law, the Respondent's exclusionary language is insufficient to clarify the inherent ambiguity created by the terms of the Arbitration Agreement, terms which would cause employees to reasonably believe that they were prevented from pursuing Board charges, and therefore violates the Act. The Arbitration Agreements therefore would reasonably cause an employee to believe that they are prohibited from filing charges with the NLRB, and thus violate Section 8(a)(1) of the Act.

3. Respondent's Enforcement of its Arbitration Agreements through its Motions to Compel Individual Arbitration violates Section 8(a)(l) of the Act.

Since the Arbitration Agreements are unlawful, Respondent's Motion to Compel Individual Arbitration and subsequent pleadings filed in support thereof are also unlawful as further interference with the employees' Section 7 right to engage in collective legal activity. It is axiomatic that the enforcement of an unlawful rule violates the Act. The Board has held that if the objective of the lawsuit in question is "unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice." *Teamsters Local 776 (Rite-Aid)*, 305 NLRB 832, 834 (1991). As the sole objective of the Respondent's Motion is enforcement of a contractual provision prohibiting employees from engaging in Section 7 activity, it is unnecessary to determine whether the Motion was retaliatory or baseless.

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), does not preclude proceeding

against the Respondent's motion to compel arbitration. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Id*. at 737, fn.5. In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd., 973 F.2d 230 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993).

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999, enfd. 200 F.3d 1162 (8th Cir. 2000); see also, *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not). Accordingly, a footnote 5 analysis is properly applied to the Respondent's motion here, despite it constituting a defense in the course of a lawful employee lawsuit and arbitration claims.[8]

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB at 297. In particular, an illegal objective may be found for two reasons relevant here. The first reason is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category

[8]Counsel for the Acting General Counsel notes that legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), rev. denied, 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem., 127 F.3d 34 (5th Cir. 1997).

includes the illegal union fine cases cited by the Court in footnote 5 itself. *Granite State Joint Board, Textile Workers Union,* 187 NLRB 636, 637 (1970), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers,* 185 NLRB 380, 383 (1970), enf'd. in rel. pt., 459 F.2d 1143 (D.C. Cir. 1972), aff'd, 412 U.S. 84 (1973). In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were the mechanism to enforce and collect the unlawful fines.

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

Here, both reasons apply. First, the Respondent's Motion to Compel in the instant case seeks to enforce an arbitration agreement that is itself unlawful as it expressly prohibits employees' collective legal activity, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the motion is simply an attempt to enforce the underlying act. Second, the Respondent's Motion to Compel also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of the Respondent's motion is to prohibit employees from engaging in Section 7 activity. The Respondent's motion would impose individual arbitration, which specifically attempts to prevent employees' protected concerted legal activity. Therefore, the Respondent's motion has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act.

4. No Allegations of the Complaint are Time Barred by Section 10(b)

Respondent argues that the allegations of the Amended Complaint based on Respondent's pursuit of its Motion to Compel are barred by Section 10(b) of the Act. (SR 20-21) However, it is well-established that Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the 10(b) period, even if the rule was promulgated earlier. See *Control Services*, 305 NLRB 435, fn. 2 & 442 (1991), enfd. mem., 961 F.2d 1568 (3d Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, fn.2 (2007).

In the instant case, while the Respondent's July 26, 2010, filing of its motion to compel arbitration was outside the 10(b) period, the further maintenance of that motion to enforce the unlawful agreement was within the 10(b) period, including all of Respondent's subsequent legal pleadings in support of its Motion. The Respondent's continuing maintenance of that motion not only directly interferes with the Section 7 rights of the current and former employees involved in that particular FLSA case, but also sends a clear message to all other employees that they are prohibited from exercising their Section 7 rights because of the unlawful arbitration agreement.

5. The Amended Complaint in Not Barred by Res Judicata or Collateral Estoppel

The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984). It is well established that three elements must be satisfied in order for collateral estoppel to apply: (1) the issue at stake must be

identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom., *Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied, 509 U.S. 904 (1993). The Board has long held that "if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Field Bridge Associates*, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 fn.4 (1984), enfd., 766 F.2d 812 (3d Cir. 1985), cert denied, 474 U.S. 1081 (1986); see e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), enfd., 118 F.3d 585 (8th Cir.1997), cert. denied, 523 U.S. 1020 (1998). As the Board has stated, "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief," and the Board is "the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

Counsel for the Acting General Counsel recognizes that two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in

unfair labor practice cases that turned on the existence of a contract. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized that: (1) it was not unusual for a court to determine whether there was a valid contract; and (2) the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id*. at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack's of majority status. The Ninth Circuit found that "[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations." 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case – whether there was a contract or not – was the same issue as the one that had been decided in the court proceeding. See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

In the instant case, the Board was not a party to any of the private court actions at issue. Therefore, under established Board law, it is clear that the Board is not precluded from proceeding against the Respondent's unlawful motions at issue here. Moreover, the issue at stake is not identical to any decided in any prior litigation – this case deals with whether Respondent's Arbitration Agreements unlawfully interfere with employees' Section 7 rights under the NLRA, while the District Court considered whether to compel individual arbitration pursuant to the Respondent's Arbitration Agreements under the FAA. Finally, the issue here

does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether Respondent's enforcement of its Arbitration Agreement violates employees' Section 7 rights – an issue regarding a public right that is within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear,* the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by moving to compel individual arbitration, even after a state or federal court has granted such a motion.

Similarly, the doctrine of res judicata is inapplicable herein. "Claim preclusion," or the doctrine of res judicata, applies only when identical claims were raised against the same party, or their privy, and there has been a final judgment on the merits in the original action. See *Lawlor v. National Screen Service Corp.*, 349 US 322, 326 (1955).[9] Respondent failed to present any evidence that the Acting General Counsel was a party to any litigation resulting in a final judgment. As discussed above, Acting General Counsel was not a participant in the FLSA lawsuit, nor were the same issues presented in that case. See, *Fallon-Williams, Inc.*, 336 NLRB 602, 604 (2001). Thus, Respondent's claim that the doctrines of collateral estoppel and res judicata apply are without merit.

[9] As the District Court Ordered the FLSA Complaint stayed, the case at bar arguably raises issues of collateral estoppel, not res judicata, as no final judgment has issued in the prior case. The Supreme Court explained: under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." *Lawlor*, 349 US at 326.

6. The Amended Complaint is not rendered Moot by Resolution of the Motion to Compel Arbitration in the United States District Court

Respondent has asserted that the allegation concerning its enforcement of its unlawful Arbitration Agreements is "moot" because the District Court has issued an Order. (SR 21) According to Black's Law Dictionary, a "moot case" is defined as "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." Black's Law Dictionary (9th Ed., 2009). Nothing in the Amended Complaint's allegations concerning the Respondent's enforcement of its unlawful agreement in District Court has been rendered moot merely because Respondent was successful before the court.

The District Court did not resolve the issues presented herein. The court merely resolved issues related to the alleged contractual agreement to arbitrate, but did not resolve the issue of whether the Respondent's prosecution of its Motion independently violated the NLRA. As the Board has the exclusive authority to determine whether conduct violates the Act, and to fashion a remedy for such violations, this matter is properly considered initially by the Board, and was not and should not be first resolved by the District Court.

This is not an abstract question of law, it is a question of whether Respondent's enforcement of the Arbitration Agreements in court interferes with employees' Section 7 rights. As discussed above, not only did the Respondent's Motion foreclose the named Plaintiffs from exercising their Section 7 rights, it sent a message to other employees that they, too, would be prevented from engaging in any concerted legal actions. Furthermore, while the Respondent was successful in arguing that the Plaintiffs' claims should be individually arbitrated, it was the act of prosecuting this motion that violates Section 8(a)(1). Nothing in the District Court's Order will

prevent the Respondent from using the same legal tactic in the future absent the Board's remedial Order. Thus, the Respondent's Motion, whether granted or not, has the continuing effect of interfering with employees' Section 7 rights, and Respondent is not, at present, prohibited from future misconduct. Moreover, as discussed below, despite the District Court's September 17, 2012, Order, the Board can still, consistent with the Act, fashion a remedial Order that would reinstate the *status quo* and prevent future violations. Therefore, the Respondent's assertion that the issue is "moot" is not legally or factually viable.

7. The Amended Complaint is not barred based on Respondent's arguments that the Board lacked a quorum at the time it issued *DR Horton.*

It is not appropriate for the Board to suspend its activities in response to a claim that Presidential appointments to the Board are not valid. Although the Respondent correctly points out that on January 25, 2013, the D.C. Circuit held that the President's appointments to the Board were not valid, the Board has publicly stated that it disagrees with that decision. In addition, Counsel for the Acting General Counsel notes that in *Noel Canning*, the D.C. Circuit Court itself noted that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Moreover, even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by individual courts of appeal in subsequent proceedings involving different parties. See Letter of Acting Solicitor, National Labor Relations Board, *Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4th Cir. 1997) (Nos. 96-1783 & 96-1926) (explaining that "the Board, for more than 50 years, has taken the position that it is not obliged to

follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties," and discussing the grounds for that position).

Furthermore, it is not an infirmity that in *DR Horton* the three-member Board issued the decision with two-members participating and one member recused. See, e.g., *Plaza Healthcare and Rehabilitation LLC*, 2011 WL 6950504, at *1 n.1 (2011) ("In *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum of a panel when one of the panel members has recused himself. Under the Court's reading of the Act, 'the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.' . . . The same is true here, where one of the three Members of the full Board deciding the case is recused."). In other words, where the Board has only three members, it may follow the delegation to a panel practice noted with approval in *New Process*. See, e.g., *Route 22 West Operating Co*., 357 NLRB No. 153, slip op. at 1 fn. 1 (Dec. 30, 2011), petition for review pending (3d Cir. Nos. 12-1031 & 12-1505); *G. Heileman Brewing Co.*, 290 NLRB 991, fn. 1 (1988), enfd., 879 F.2d 1526 (7th Cir. 1989). But, as in the past, the full Board may also decide the case with two Board members where the third Board member is recused. See, e.g., *Wisconsin Bell, Inc*., 346 NLRB 62, fn. 2 (2005); *Iron Workers Local 1 (Advance Cast Stone Co.)*, 338 NLRB 43, fn. 2 (2002); *Carpenters Local 20 (A. F. Underhill, Inc.)*, 323 NLRB 521, fn. 1 (1997).

V. CONCLUSIONS AND REQUESTED RELIEF

As part of the remedy sought in this matter, Counsel for the Acting General Counsel seeks an order precluding Respondent from maintaining those portions of its Arbitration Agreements found to be unlawful. This would include not only cease-and-desist relief, but also notification to employees that it is rescinding the unlawful provisions.

Additionally, Counsel for the Acting General Counsel seeks an order precluding Respondent from enforcing those portions of its Arbitration Agreements found to be unlawful. This would include not only cease-and-desist relief, but also an order requiring Respondent to notify all judicial and arbitral forums wherein the Agreements have been enforced that it "no longer opposes the seeking of collective or class action type relief." (Jt. Ex. L) In particular, to remedy the legal consequences of the employer's unlawful motion, and return employees to the *status quo ante*, Respondent should be required to move the appropriate court to vacate its order for individual arbitration, as Respondent's motion has already been granted if a motion to vacate can still be timely filed.[10] Any such motion to vacate should be made jointly with the affected employees, if they so request.[11] Nothing in the requested order would preclude Respondent

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[10] It is noted that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) ("the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1) have also determined that. . . the moving party must make his or her motion within the time limits for appeal"), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

[11] In this regard, it is noted that the Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See, e.g., *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in

from amending its motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.[12]

In addition, consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing the Respondent's unlawful motions to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

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petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

[12] As those cases were based on federal-law preemption, rather than a *Bill Johnson's* "illegal objective," the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption and, as noted above, Respondent's motions were unlawful *ab initio*.

Based on the foregoing, Counsel for the Acting General Counsel submits that, as alleged in the Complaint and as demonstrated above, Respondent violated Section 8(a)(1) of the Act. General Counsel urges the Board to so find in every respect alleged, and order a full, comprehensive and appropriate remedy.

Respectfully submitted,

Kerstin I. Meyers
Counsel for the General Counsel
Region 10, National Labor Relations Board
233 Peachtree Street, NE, Suite 1000
Atlanta, GA 30303
Phone: (404) 331-4600

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing Counsel for the Acting General Counsel's Brief to the Board on the following, via electronic mail and by U.S. Mail, postage prepaid, on March 25, 2013

Jeffrey A. Schwartz
JSchwartz@jacksonlewis.com
Brandon M. Cordell
CordellB@jacksonlewis.com
Counsel for Respondent
Jackson Lewis, LLP
1155 Peachtree Street
Suite 1000
Atlanta, Georgia 30309

Glenn M. Conner
GConnor@qcwdr.com
Richard P. Rouco
Rrouco@qcwdr.com
Counsel for Charging Party
Quinn Conner Davies Weaver and Rouco
2700 Highway 280 East, Suite 380
Birmingham, AL 35223

Kerstin Meyers
National Labor Relations Board
Region 10
233 Peachtree Street
Harris Tower, Suite 1000
Atlanta, Georgia 30303
(404) 331-4600
(404) 331-2858 (Fax)
Kerstin.Meyers@nlrb.gov