UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MURPHY OIL USA, INC.

and **CASE 10-CA-38804**

SHEILA M. HOBSON, An Individual

BRIEF OF CHARGING PARTY

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I. Introduction.

The employer in this case compelled its employees, as a condition of employment, to waive the right to collectively pursue wages if the employer failed to pay its employees the minimum wages or overtime wages mandated by the Fair Labor Standards Act. It is axiomatic that conduct which limits the right to initiate, encourage, or participate in collective action regarding the terms and conditions of employment violates the Act. Because initiation or participation in a FLSA collective action is by definition concerted action regarding the terms and conditions of employment, it is protected activity and the right to participate in a collective action may not be waived in an employment agreement.

II. Facts.

The facts of this case are set forth succinctly in the Joint Motion and Stipulation of Facts. Briefly stated, the charging party was employed by Murphy Oil. (Jt. Stip.,¶ 9) As a part of the condition of her employment, she was required to sign an agreement which purported to waive the right file a collective action of any type in any forum under the FLSA. (Jt. Stip. ¶ 10) She was a clerk in a convenience store which sold, among other things, fuel for automobiles. While she was employed, a condition of her employment included performing a "fuel survey" at competing stores. She was not compensated for the time she spent performing the "fuel survey." Ultimately, she filed suit under the FLSA to obtain compensation for fuel survey time as well as other uncompensated time. (Jt. Stip. ¶ 11) The Respondent moved to enforce the class or collective action waiver contained in its

employment agreement. (Jt. Stip. ¶ 12) The charge which gave rise to this case was then filed. (Jt. Stip. Ex. A and C). The Complaint in this case was then issued.

III. Argument

1. The Respondent violated the Act by maintaining and enforcing a policy that required employees to refrain from engaging in protected concerted activity in violation of 8(a)(1) of the Act.

The resolution of this case is controlled by *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012). The facts are substantially similar. This charge grew out the employer's imposition of a mandatory arbitration agreement that forces employees to waive the right to participate in a "collective action" as condition of employment. Four employees, including Ms. Hobson, filed a lawsuit seeking compensation for all hours worked. The four employees are and were not represented by a labor union. They alleged that the employer was violating the Fair Labor Standards Act (FLSA) by requiring them to work off the clock without pay. Among one of the challenged practices was the written policy that required employees to perform a "fuel survey" of competitors before clocking in at work. The survey typically takes an employee about 15 to 20 minutes to complete. Employees were also routinely asked to clock out and perform other work activities. The complaint asked the court to allow the dispute to proceed as a "collective action" under Section 216 of the FLSA.

The employer moved to compel arbitration and/or dismiss the lawsuit on the grounds that the employees had signed an arbitration agreement. The Employer seeks to compel arbitration of each claim on an individual basis. The arbitration agreement itself is not challenged. The Charge only challenges the claim that the arbitration must be on an individual basis and may not include other similarly situated employees. It is undisputed that (1) the arbitration agreement was a condition of employment and (2) it contains a collective action waiver.

Based upon the Board's decision in *D.R. Horton, Inc.,* the actions of the Employer prohibiting collective actions violates the Act. 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. Though a forum selection agreement could be enforceable if it allowed for joint or collective prosecution of a claim, an agreement that bars such joint or collective action in every forum is unlawful. Thus, the entire Agreement Respondent compelled the charging party to execute as a condition of employment is void.

This result is compelled by the nature of an FLSA claim. The right to bring a collective action is a distinct statutory right under Section 216 of the FLSA. Unlike class actions, a "collective action" requires employees to affirmatively join in the litigation. Once a case is conditionally certified, the Court authorizes notice to similarly situated employees about a dispute over pay and provides them an opportunity to join the litigation. *See generally, Hoffmann-La Rouche Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482 (1989)(noting that courts can oversee the notice process as part of its inherent authority to manage a case). If an employee does not affirmatively elect to join the case, then they are not included. Thus, the collective action promotes "concerted activity" in that it requires employees to affirmatively elect

participation. There can be no question that a waiver of "collective action" directly prohibits employees from reaching out to co-workers and collectively asserting rights over pay issues.

The legislative history of the FLSA further supports the contention that "collective actions" promote "concerted protected" activity. The FLSA was enacted in 1938 as part of New Deal era legislation that included the Wagner Act of 1935. Both theses statutes are "important charters of rights of working people." *See generally, Pam Am World Airways v. United Broth. Of Carpenters and Joiners,* 324 F. 2d 217, 223 (9th Cir. 1963). The FLSA and NLRA are parts of harmonious legislation designed to provide employees with minimum labor standards and rights to collective bargaining; a fact buttressed by the FLSA's specific mention and sanction of collective bargaining agreements. *See generally, National Labor Relations Board v. Stewart*, 207 F. 2d 8, 10 (5th Cir. 1953).

As Justice Felix Frankfurter noted in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 483 (1948)(Dissenting Opinion), the Fair Labor Standards Act was 'intended to aid and not supplant the efforts of American workers to improve their own position by self-organization and collective bargaining.' (quoting H.Rep.No. 1452, 75th Cong., 1st Sess., p. 9). Citing the legislative record of the FLSA, Justice Frankfurter noted that the FLSA recognized and encouraged "individual or collective employees" to bargain with their employers over wages and hours. *See* the Joint Hearings before the Senate Committee on Labor and Education and the House Committee on Labor, 75th Cong., 1st Sess., pp. 46-47 (Asst. Atty. Gen. Jackson); id. pp. 181-83 (Secy. Perkins and Sen. Walsh); 81 Cong.Rec. 7650, 7651, 7808 (Sen. Black); 7652, 7799, 7800, 7885-86, 7937 (Sen. Walsh); 7813 (Sen. Pepper); 82 Cong.Rec. 1390 (Rep. Norton); 1395 (Rep. Randolph); 83 Cong.Rec. 7291 (Rep. Allen); 7310 (Rep. Fitzgerald); 9258 (Rep. Randolph)." *Id*. at n. 6.

Congress recognized that collective activity by employees (as opposed to individual actions) counter balances the often asymmetrical bargaining relationship between the employer and employee. Like a collective approach to bargaining, a collective action to enforce labor standards has a greater likelihood of success at changing and improving workplace conditions. Indeed, it would be anomalous to allow an employer to force employees to waive rights of collective action where they could not force employees to abandon their rights to bargain collectively under Section 7 of the National Labor Relations Act. Both statutes recognize collective action not merely as a procedural device but as an important substantive right that aids the efforts of employees to improve their working conditions.

2. Respondents' Employment Agreement is so overly broad that reasonable employees could believe that they were prohibited from filing charges with the Board.

The employment agreement purported to extend to "any and all disputes or claims each may have against the other which relate in any manner whatsoever as to Individual's employment. . ." The agreement went on to provide that any "charges based upon federal or state statutes" were covered under the provisions of the agreement. (Jt. Stip. Ex. E, attachment A). A reasonable individual could conclude that this language extended to claims under the National Labor Relations act as well as any other claim. The fact that the language is ambiguous at best is demonstrated by the subsequent revision of the agreement by which the company attempted to make it clear that recourse to the Board was not precluded. (Jt. Stip. Ex. N).

3. Judicial Action to enforce a policy that violates the Act is itself a violation of the Act.

The enforcement of the prohibition on collective action by the employer by judicial action is as much a violation of the act as the maintenance of the prohibition itself. By attempting to enforce the agreement in District Court, the Employer is directly violating the rights of the employees to act collectively. By acting to prohibit collective actions, the employer is directly contravening the Board's holding in *D.R. Horton*. The suggestion that there is somehow a distinction between compelling employees to sign an agreement that violates the Act and enforcing that same agreement is a distinction without a difference.

The Respondent's reliance on *AT&T Mobility v. Concepcion* and *CompuCredit v. Greenwood* is misplaced. Neither of these decisions requires that the Board ignore its prior decisions that collective litigation constitutes protected activity and that individual contracts requiring waiver of Section 7 rights as a condition of employment also violate the Act and are unenforceable.

Unlike *D.R. Horton*, *AT&T Mobility v. Concepcion* arose from a ***consumer*** class action, based on the defendant's practice of promising "free phones" to new California customers and then charging those customers sales tax based on the phone's retail value. 131 S. Ct. at 1744. Plaintiffs filed suit in federal district court for fraud and false-advertising, and the defendant quickly moved to compel arbitration, based on a sale and service agreement plaintiffs had all signed at the time they enrolled as customers. *Id.* The district court, however, rejected defendant's motion, based on a California doctrine — the *Discover Bank* Rule[1] — that

[1] This doctrine was named for the California Supreme Court decision *Discover Bank v. Superior Court*, 113 P.3d 1100 (Ca. 2005).

established a strong presumption that individual arbitration agreements in consumer contracts of adhesion are unconscionable. *Id.* at 1745.

The Ninth Circuit affirmed, based largely on the FAA's "saving clause," which establishes that arbitration agreements are "binding and enforceable ***save upon such grounds as exist at law or in equity*** for the revocation of any contract." *Laster v. AT&T Mobility*, 584 F.3d 849, 856-57 (9th Cir. 2009) (citing 9 U.S.C. § 2) (emphasis supplied). Specifically, the court concluded that "[t]he rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applicable to contracts generally in California." *Id.* at 857 (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 978 (9th Cir. 2007)).

The Supreme Court, however, disagreed. In a 5-4 decision, *AT&T Mobility v. Concepcion* reversed the lower courts, holding that the *Discover Bank* rule improperly interfered with the FAA's principal purpose — ensuring that "private arbitration agreements are enforced according to their terms" — and that the FAA therefore preempted the California rule. *Id.* at 1748 (quoting *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Turning specifically to the "saving clause" argument, the Court explained that while the clause "preserves ***generally applicable*** contract defenses, nothing in it suggests an intent to preserve ***state-law rules*** that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* (emphasis supplied).

One obvious difference between *Concepcion* and the issue of whether a collective action waiver violates Section 7 is that *Concepcion* involved the relationship between federal and state law. The Court found that the FAA pre-empted California law with respect to enforcement of arbitration agreements that contained class action waivers. Of course, the question of pre-emption does not arise when the conflicting statutes are both federal statutes. Unlike the fact

pattern in *Concepcion*, the Charging Party contends that Respondent's Arbitration Agreement runs afoul of Section 216 of the Fair Labor Standards Act and § 8(a)(1) of the NLRA.

Furthermore, *D.R. Horton* would not be displaced by *Concepcion* because the Board's ruling did not treat arbitration agreements differently from any other type of contract that compelled waiver of statutory rights. 2012 WL 36274, 357 NLRB 184, at *17 (NLRB, Jan. 3, 2012) ("Nor does our holding rest on any form of hostility or suspicion of arbitration."). Instead, it simply clarifies the Supreme Court's holding that Section 7 employee rights — including the right to pursue grievances collectively in either court or in arbitration — are "fundamental," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), and that employers cannot just ask their employees to contract such rights away. *See, e.g., J. I. Case Co. v. NLRB,* 321 U.S. 332, 336 (1944) ("[I]ndividual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees."); *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (invalidating individual contracts between an employer and its employees because those contracts "imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the Act").

In light of the distinction between common law and federal statute, *Concepcion* has no bearing on this case, as it says nothing about the interplay between the FAA and NLRA. District courts that have analyzed and applied *D.R. Horton* have reached this same conclusion, specifically noting that *Concepcion* does not apply in cases like this because "the class action waiver in that case did not conflict with the substantive right of a federal statute." *Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318, at *6 (W.D. Wis. Mar. 16, 2012).

Nor does the Supreme Court's decision in *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), change this analysis. In *CompuCredit* — a follow-up case to *Concepcion* — the

Supreme Court stated that arbitration agreements "should be enforced according to their terms . . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "'overridden by a contrary congressional command.'" *Id.* at 669 (internal quotations omitted). Unlike the statutory language at issue in *CompuCredit*, the two statutes at issue in this case protected the right to engage in collective action. First, as noted above, the Fair Labor Standards Act specifically references the right of an employee to bring a collective action individually or on behalf of other employees similarly situated and for employees to join such action. 29 U.S.C. § 216 (b). The statute states in relevant part that "[t]he right provided under this subsection to bring an action by or on behalf of any employee and the right of any employee to become a party plaintiff to any such action" terminates only if the Secretary of Labor brings an action under Section 217 for injunctive relief. *Id.* Significantly, Section 216 of the FLSA was enacted several years *after* passage of the FAA and yet the only event terminating the right to bring a collective action and, equally important, the right to join such collective action is an action by the Secretary of Labor. Thus, there is a clear congressional command expressed in the FLSA that protects the substantive right **to bring and/or join** collective actions and which overrides enforcement of an arbitration agreement that deprives employees of such right.

Second, contrary to the Respondent's likely assertion, NLRA ***does*** contain a congressional command that overrides the FAA's general mandate. By its very terms, the NLRA (like its predecessor the Norris Laguardia Act) protects the right of employees to act collectively for the purpose of "mutual aid or protection." 29 U.S.C. § 157. The Supreme Court and the Board have both interpreted mutual aid and protection to extend to collective litigation and arbitration. *E.g.*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978); *see*, *Grant v. Convergys Corp.*, 2013 WL 781898 * 3 (W.D. Mo. March 1, 2013). And Congress' express recognition

that employees possess no "actual liberty of contract," 29 U.S.C § 151, clearly establishes Congress's intent that employers be prohibited from circumventing their employees' statutory rights through individual employment contracts — which is precisely what Murphy Oil has tried to do in this case. *J. I. Case Co. v. NLRB,* 321 U.S. 332, 336 (1944)(noting that "individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees.") The fact that this particular contract concerns arbitration, and thus implicates the Federal Arbitration Act, does alter Defendant's substantive obligations under the NLRA. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 84 (1982) (noting that federal courts cannot enforce illegal contracts).[2]

Indeed, the NLRA and the predecessor Norris LaGuardia Act were both enacted several years after the passage of the FAA. In both the NLRA and the Norris LaGuardia Act, Congress clearly expressed its intent to override contracts that compelled the waiver of or impeded employees' collective activity and both statutes sought to encourage employees to participate in concerted activity with the goal of improving the terms and conditions of employment. (*See*, 29 U.S.C. §§ 102, 151).[3] Likewise, FLSA's legislative history indicates that the right of collective action built on the Wagner Act's protection of concerted activities. Thus, a reading of the FAA that requires enforcement of arbitration agreements with collective action waivers contravenes

[2] As Plaintiffs have previously noted, Plaintiffs are not opposed to arbitration *per se*, and would not oppose a motion from the Defendant to submit this dispute to arbitration ***on a collective basis***.

[3] Both 29 U.S.C. § 102 and § 151 both expressly recognize the "inequality of bargaining power" between an individual employee and an employer. Section 102 declares that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. . ." In this case, the stipulated record makes clear that Ms. Hobson's choice was to sign the arbitration agreement or seek employment elsewhere; a paradigm case of a Hobson's choice.

the express Congressional policy of eliminating obstacles that impede employee efforts to collectively join with other employees for mutual aid or protection.[4]

While there is no question that the FAA establishes a strong preference for the enforceability of arbitration agreements, this preference must yield before the independent, statutory rights of employees. Indeed, a more limited reading of Section 7 would "place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

4. The Amended Charge was timely filed because it relates back the original charge which was filed within 180 days of the wrongful conduct.

The amended charge is not barred by the 180 day time period of 10(b) because the original charge and the amended charge are closely related and the legal theory underlying the original charge and the Amended Charge are identical. The only substantive difference between the original charge and the amended charge is that the amended charge alleges that the Employer actually attempted to enforce the arbitration agreement in violation of the Act in court. (*Cf.* Jt. Stip Ex. A and Ex. C). Amended charges which are closely related to earlier filed charges relate back to the filing date of the original charge. The charge merely sets in motion the NLRB's inquiry; it need not be a specific as a judicial pleading. The General Counsel's complaint can therefore deal with any unfair labor practice related to those alleged in the charge and which

[4] Section 3 of the Norris LaGuardia Act (29 U.S.C. § 103) specifically states that any agreement that conflicts with the public policy declared in Section 102 is unenforceable in any court of the United States. The public policy declared in Section 102 encompasses an employee's freedom from restraint or coercion in engaging in "concerted activities" for the purpose of "mutual aid or protection." Thus, to the extent that an FAA covered arbitration agreement restrains the right of employees to engage in concerted activities for the purpose of mutual aid or protection, such agreement not only violates Section 7 of the NLRA but is unenforceable under Section 3 of the Norris LaGuardia Act.

grow out of the allegations in the charge while the proceeding is pending before the Board. *Fant Milling Co.*, 360 U.S. 301, 307-308 (1959). The *Fant Milling* criteria are met if the amended charge involves the same legal theory as that contained in a pending timely charge, arises from the same factual circumstances or sequence of events as a timely charge, and if a respondent would raise similar defenses. *Redd-I, Inc.*, 290 NLRB 1115 (1988); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), The Board reinforced this holding in *Carney Hospital,* 350 NLRB 627, 628 (2007). In *Carney* the Board held that "where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan" then the actions in the amended charge relate back to the date of filing of the first charge. *Carney Hospital,* supra, at 630.

The legal theory for the enforcement and maintenance of the agreement is identical. Both charges rely upon the theory that conditioning employment on execution of a waiver of the right to collective action violates Section 8 (a)(1) of the Act if that waiver either deprives an employee of the right to commence, be a party to, or even a "class member" in any court action related to employment issues and waives the right to commence, be a party to any group, class or collective action claim in arbitration or any other forum. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

The facts here could not be more closely related or have a more significant causal nexus. The gravamen of both charges is the existence of the agreement. The maintenance of the agreement and the enforcement of the agreement are part of the same chain or progression of events. The maintenance of the agreement without its enforcement is nonsensical; the enforcement of the agreement without its maintenance is not possible. The maintenance of the

agreement and the enforcement of the agreement target the same employees, occur at the same point in time, and are part of the same scheme or plan to prevent collective actions to redress statutory rights. Thus, there is a causal nexus between the allegations. As such, the actions arise from the same factual situation or sequence of events and are therefore closely related. *Redd-I.* 290 NLRB at 1118.

5. This matter is not barred by any equitable principles.

This matter is not are barred by either res judicata, collateral estoppel, or other equitable principle. The apparent basis for Respondents argument is the order of the US District Court which addresses some of the issues which are raised by the charge. It is, axiomatic to the application of either res judicata or collateral estoppel that there be a final judgment. The District Court's order is not a final order. On the contrary, the District Court specifically stated that the case is merely "stayed" and retained future jurisdiction. (Jt. Stip. Ex. Y) Accordingly, there is not a final order which would support application of res judicata, collateral estoppel or other equitable principle. *See, e.g. Johnson v. Alabama Dept. of Human Resources,* 2013 WL 363125 (11th Cir. 2013); *In re Bilzerian,* 100 F.3d 886 (11th Cir. 1996).

In fact, the decision of the District court to enter a stay of the matter and retain jurisdiction would deprive the Circuit Court of jurisdiction. To establish appellate jurisdiction, the district court must make a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563 (11th Circ. 1995) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)) (string cite omitted). The district court order must "dispose of all of the plaintiff's prayers for relief" in order to be final and appealable under 28 U.S.C § 1291. *Shannon*, 55 F. 3d at 563. Because the matter was not fully resolved, the decision of the district court is not final.

6. The Argument that the Board lacked a quorum at any time is with merit.

The Argument that the Board lacked a quorum at any time is without merit. The Board is and has been properly constituted. The Counsel for General Counsel is more fully informed regarding the issue and has fully briefed this issue, and Charging Party relies upon that argument.

IV. Conclusion

For the reasons given above, the Respondent has violated the Act and an appropriate remedy should be issued. Without waiving her right to an appropriate remedy or to any other relief the General Counsel may seek to remedy the violations alleged in the Amended Complaint, the Charging Party requests that (1) the Board declare unlawful the provisions of the Arbitration Agreement requiring Ms. Hobson and other similarly situated employees to waive the right to initiate, prosecute and/or join a collective action and (2) Order the Respondent to cease and desist from enforcing such unlawful provisions. The Charging Party further requests that the Board order the Respondent to notify any and all Courts where it has sought to enforce the Arbitration Agreement that it no longer seeks to enforce the collective action waivers and that such provisions have been declared unlawful by the National Labor Relations Board. In cases where the Respondent has successfully obtained an arbitration order, the Charging Party requests that the Board order the Respondent to file a motion to vacate the Order and to inform the arbitrator (if the Respondent desires to do so) that it will not seek to preclude arbitration on collective action basis or to enforce the waiver of collective actions.

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2013, I filed a true and correct copy of the foregoing using the NLRB's Electronic Filing System and served a copy on the following counsel via electronic mail:

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