UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

MASTEC SERVICES COMPANY, INC. **Respondent,** **and** **NOBLE HOBBS, an Individual,** **Charging Party.**	**Case No. 16-CA-086102**

RESPONDENT MASTEC SERVICES COMPANY, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

Respectfully submitted,

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I. INTRODUCTION AND SUMMARY

Pursuant to 29 C.F.R. § 102.46(c), MasTec Services Company, Inc. ("MasTec," "Company," or "Employer") submits this Brief in Support of its Exceptions to the Decision of Administrative Law Judge ("ALJ") Joel P. Biblowitz, dated June 3, 2013 ("Decision").[1]

Prior to the issuance of Complaint, Charging Party Noble Hobbs ("Hobbs") and MasTec settled their labor dispute and Hobbs sought to withdraw his unfair labor practice charge. The AGC has refused to approve Hobb's request. In its brief to the ALJ, MasTec argued the ALJ should approve the settlement over the objections of the AGC because the settlement satisfies the standards set forth by the Board in *Independent Stave*, 287 NLRB 740, 743 (1987). The ALJ failed to address, or even acknowledge, MasTec's argument in this regard.

The substantive issue presented in this case is whether a bilateral, voluntary arbitration policy with a class action wavier violates Sections 7 and 8(a)(1) of the NLRA. As explained in detail below, the Company's Dispute Resolution Policy ("Arbitration Agreement" or "Policy") is distinguishable from *D.R. Horton*, 357 NLRB No. 184 (January 3, 2012) because employees have the right to opt out of the Policy within thirty days of receipt of the Employee Handbook and, thereby, can maintain the right to pursue claims in court – whether as an individual litigant or as a participant in a class or collective action – if they so chose. *D.R. Horton*, by contrast, considered a mandatory arbitration program imposed as a condition of employment.

Here, Hobbs voluntarily entered into the Arbitration Agreement without the "implicit threat" that the Board found had existed in *D.R. Horton* and with the express assurance from the Company that he would not be retaliated against if he decided to reject the Agreement. To be

[1] References to Joint Exhibits will be referred to as "Jt. Exh ___." References to the ALJ's Decision will be referred to as "Dec. ____."

sure, there is no evidence of any interference, restraint, or coercion that prevented Hobbs from opting out of the Arbitration Agreement if he wished to do so.

MasTec seeks review of the ALJ's decision that the Arbitration Agreement voluntarily entered into by and between MasTec and Hobs (and all MasTec employees), which precludes class actions, but permits employees to join claims in a single proceeding and preserves all substantive legal rights, violated the NLRA. Notably, despite the Acting General Counsel's insistence in its brief to the ALJ that MasTec's Dispute Resolution Policy – with its opt-out provision – is "not distinguishable from *D.R. Horton*," the ALJ expressly and correctly disagreed. (Dec. 5:15-18). In that regard, the ALJ held "*Horton* is clearly distinguishable" for two reasons. *Id*. First, the ALJ held "the policy there included the prohibition precluding employees from filing joint, class or collective claims against the employer addressing wages, hours or working conditions in any forum, arbitral or judicial, including the Board." *Id*. Second, the ALJ noted, "the *Horton* policy did not contain an opt out provision." *Id*.

Despite finding MasTec's Arbitration Agreement "clearly distinguishable" from the agreement at-issue in *D.R. Horton*, the ALJ held that, "since the Board's decision in *D.R. Horton*," the issue of upholding the class action waiver agreements "is for the Board to decide, not the administrative law judge." (Dec. 6:24-27). Thus, the ALJ chose not to address the principal issue before him, to wit, whether a Dispute Resolution Policy, with a class action waiver and 30-day opt-out period, violated the Act.

Significantly, however, Administrative Law Judge Jeffrey D. Wedekind recently held a similar arbitration agreement, with a class action waiver and 30-day opt-out period, was lawful under the NLRA. *Bloomindale's, Inc.*, Case No. 31-CA-071281 at pp. 7-11 (June 25, 2013). ALJ Wedekind reasoned that the 30-day opt-out period is not an "insubstantial or unjustifiable

period of time" and that the FAA contains an "emphatic federal policy" in favor of arbitration. *Id*. at 7, 10 – 11.

Nonetheless, here, ALJ Biblowitz, found the Policy unlawful for three other reasons. First, the ALJ held an "employer may not lawfully require its employees to affirmatively act in order to obtain or maintain" rights granted by the NLRA. (Dec. 6:1-5). NLRB precedent, however, provides no direction regarding the extent to which opt-out processes can create voluntary, bilateral agreements between employers and employees to arbitrate disputes.[2] However, there are several federal court decisions that offer guidance on the issue and confirm that opt-out processes are a well-accepted method of facilitating voluntary, bilateral arbitration agreements between employers and employees.

Second, the ALJ found the Policy places employees at a "disadvantage in their attempts to engage in concerted actions" because they cannot discuss the existence or content of prior arbitrations. (Dec. 6: 5-9). The ALJ does not cite a single case to support his conclusion that merely being placed at a "disadvantage" violates the Act and, notably, the AGC did not find that particular clause unlawful or problematic in its Complaint. Moreover, the Policy plainly provides for civil discovery and motions, as provided by the state's forum's civil procedure rules. Therefore, discovery affords employees the opportunity to obtain information from MasTec regarding similar claims brought by other employees against the Company, and the plain language of the Policy in no way restricts employees from otherwise disclosing workplace complaints, disputes, or potential claims they may have against the Company.

Third, the ALJ found that "some" employees "might" be reluctant to opt-out for fear of retaliation, despite MasTec's unambiguous assurances to the contrary. (Dec. 4:16-17; *See* Jt. Ex.

[2] As explained below, ALJ erroneously cites *Ishikawa Gasket America, Inc.*, 337 NLRB 175-176 (2001) for the proposition that an opt-out *provision* is unlawful under the Act. (Dec. 6:4). *Ishikawa* says no such thing. ALJ Wedekind also agreed that *Ishikawa* was inapposite. (Dec.10: 10-19).

2) ("An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision."). The ALJ's finding ignores NLRB precedent which holds "the test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . ." *Miami Systems Corp.*, 320 NLRB 71, n. 4 (1995), *enf'd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997). The anti-retaliation provision, along with other safeguards, objectively demonstrates that Hobbs was free to decline to arbitrate his claims without interference, restraint or coercion by the Company.

To answer the question whether a bilateral, voluntary arbitration policy with a class action wavier violates the Act, the Board must undergo an original analysis of the Act and its relationship to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. As explained in *D.R. Horton*, "the Board must be and is mindful of any conflicts between the terms or policies of the Act and those of other federal statutes, including the FAA." 357 NLRB No. 184, slip op. at p. 8. The Board further acknowledged its duty to "undertake a 'careful accommodation'" of the NLRA and the FAA when the two statutes arguably conflict. *Id*. Given the substantial differences between the arbitration policies in *D.R. Horton* and the instant case, the Board will be required to give appropriate weight to the FAA as it determines the answer to this question.

Moreover, because the NLRA is silent as to arbitral class waivers, bilateral, voluntary arbitral class waiver agreements must be enforced according to their terms, as set forth in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) and *American Express Co. v. Italian Colors Restaurant,* No. 12-133, __ U.S ___. (June 20, 2013). This principle extends to employment-related arbitration agreements with equal force. *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. Jan. 3, 2013) (Relying on *CompuCredit*, the Eighth Circuit held the employer's arbitration agreement with a class action waiver was enforceable under the FAA, and

not a violation of the NLRA.).

Additionally, voluntary class and collective action waivers must be upheld to avoid conflict with the Rules Enabling Act. The ability to pursue class-wide relief on behalf of employees is a procedural right provided under Rule 23 of the Federal Rules of Civil Procedure. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). As such, a voluntary agreement that fully preserves all substantive legal claims but limits their resolution through individual arbitration in no way interferes with any rights protected by the Act. Moreover, the Arbitration Agreement incorporates the forum state's procedural rules, and with them, the right to permissive joinder of claims. Thus, employees may act concertedly and join together in filing claims in a single proceeding.

Under the circumstances before the Board in this case, and in light of the policies reflected in the FAA, the Rules Enabling Act, and recent U.S. Supreme Court precedent, MasTec's Dispute Resolution Policy does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act and the AGC's Complaint must be dismissed.

II. STATEMENT OF FACTS

MasTec's Arbitration Agreement requires that "any dispute arising out of or related to an Employee's employment with the Company or termination of employment" be submitted to final and binding arbitration. (Jt. Ex. 2). The Arbitration Agreement gives both the employer and employee the "right to conduct civil discovery and bring motions, as provided by the forum state's procedural rules." *Id*. Further, the Policy contains an express prohibition against class or collection actions:

> [T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class action or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

Id. The Policy also contains an "opt out" procedure. It provides:

> An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy. The Employee must submit a signed and dated statement on a 'Dispute Resolution Policy Opt Out' form ('Form') that can be obtained from the Company's Legal Department, 800 Douglas Road, 11th Floor, Coral Gables, Florida 33134, by calling 305-406-1875. In order to be effective, the signed and dated Form must be returned to the Legal Department within 30 days of the Employee's receipt of this Policy.
>
> Further, the Policy states:
>
> An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision.
>
> *Id.*

At the time of hire, MasTec provides employees with the Company's Employee Handbook and an "Employee Acknowledgement" for them to sign. (Jt. Ex. 3). The Acknowledgement highlights the Arbitration Agreement, in particular, and it explains the process by which employees could opt out:

> I further acknowledge that the Handbook contains a Dispute Resolution Policy on pages 40-41. The Dispute Resolution Policy provides for final and binding arbitration of designated employment-related disputes. I will review the Dispute Resolution Policy immediately, and I understand I may discuss it with my private legal counsel should I so desire. I acknowledge that I have **thirty (30) days** from the date of my receipt of the Handbook to decide whether I wish to accept the Dispute Resolution Policy or to opt out of being bound by the Policy. If I chose to opt out, I understand that I must return a signed and dated form to that effect to the Company's Legal Department within the 30-day period, as provided in the Dispute Resolution Policy. If I do not return that form within the specified period of time, the Dispute Resolution Policy will apply to both MasTec and me.

Id. (emphasis in original.) Hobbs signed the Employee Acknowledgment on September 12, 2007. *Id*. Also, the Arbitration Agreement does not become effective until the thirty-day opt-out period expires. As the Acknowledgement expressly provided, "if I do not return that form within the specified period of time, the Dispute Policy will apply to both MasTec and me." *Id*. Hobbs elected not to opt out of the Policy's obligations. Accordingly, the Arbitration Agreement became effective for him and the Company on the thirty-first day after his receipt of the

Handbook. Hobbs was also fully aware that he would not be retaliated against if he decided to reject the Arbitration Agreement. There is no evidence that he was subject to any threats, interference, coercion, or pressure that prevented him from opting out of the Policy.

III. ARGUMENT

A. The Board Does Not Currently Have a Quorum to Act.

MasTec respectfully submits that the "recess" appointments of Sharon Block and Richard Griffin to the Board violated the Constitution and are void ab initio. These appointments were not confirmed by the Senate and were not made during the Senate's Recess. Accordingly, because the Board only has one validly appointed member, it did not have authority to assign an ALJ to adjudicate this matter and it does not have authority to rule on these exceptions. Accordingly, the Board must stay these proceedings until a constitutionally valid quorum has been appointed and the Board again has the requisite number of members to act, and then resubmit this case to an ALJ to consider the arguments anew.

The Appointments Clause gives the President power "by and with the Advice and Consent of the Senate to … appoint … Officers of the United States." U.S. Constitution, Art. II, § 2, cl. 2. As a supplement to this procedure, the Recess Appointments Clause authorizes the President to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Constitution, Art. II, § 2, cl. 3. *See also* The Federalist No. 67 (Alexander Hamilton). The framers of the Constitution gave the President this "auxiliary" authority, which allows the President to bypass the Senate only in a limited circumstance, because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and yet "vacancies might happen in their recess, which it might be necessary for the public service to fill without delay." The Federalist No. 67. The need for recess appointments, and consequently the power to make recess

appointments, however, does not exist during periods when the Senate is not in recess.

In *Noel Canning*, the D.C. Circuit made clear that "the Recess" is limited to intersession recesses. 2013 U.S. App. LEXIS at *45. As the Board conceded at oral arguments before the Court, the President's 2012 appointments were not made during the intersession recess. *Id*. Indeed, the President made his three appointments to the Board on January 4, 2012, the day after the Senate met and in the midst of a period when the Senate adjourned for no more than three days between pro forma sessions. Accordingly, the appointments of Members Griffin and Block were invalid and the Board therefore consists of only one validly appointed member: Mark Gaston Pearce. Pursuant to the Supreme Court's Ruling in *New Process Steel*, the Board must have at least three members to constitute a quorum necessary to act. 130 S. Ct. at 2642. As a result, the Board currently lacks a quorum and does not have authority to rule in this matter.

Alternatively, the "Vacancies" to which Block and Griffin were appointed did not "happen" during the Recess of the Senate. U.S. Constitution, Art. II, § 2, cl. 3 (authorizing President to "fill up all Vacancies that may happen during the Recess of the Senate . . .."). Instead, they arose during the session, at a time when the President lacked the authority to make recess appointments. The Board seats at issue here became vacant on August 27, 2010, August 27, 2011, and January 3, 2012. *Noel Canning*, 2013 U.S. App. LEXIS 1659, at *20, 61, citing 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012); 152 Cong. Rec. 17,077 (2006). On August 27, 2010 and August 27, 2011, the Senate was in an intrasession recess, not an intersession recess. Id. at *61. Additionally, the seat formerly held by Member Becker became vacant at the "End" of the Senate's session on January 3, 2012, not during any recess. *Id*. at *61-68. Accordingly, for this alternative reason, the appointments of Block and Griffin were unconstitutional and the Board cannot lawfully take action because it lacks a quorum. *Noel*

Canning, 2013 U.S. App. LEXIS 1659, at *45-68.

B. The ALJ Erred In Finding That The Settlement Agreement Fails To Satisfy The *Independent Stave* Standard.

In its brief to the ALJ, MasTec argued that he should approve the settlement agreement reached between Hobbs (who was represented by counsel at all relevant times) and MasTec because it effectuates the purposes or policies of the NLRA not to continue this matter. (Jt. Ex. 12 (a) – (d)). In particular, MasTec and Hobbs, with the assistance of counsel, settled a claim for wages shortly after Hobbs made a demand for arbitration. *Id*. Thereafter, Hobbs submitted a request to withdraw his unfair labor practice charge and the request was refused. The ALJ failed to address, or even acknowledge, MasTec's argument that the settlement agreement satisfies the standard set forth by the Board in *Independent Stave*.

In *Independent Stave*, 287 NLRB at 743, the Board set out four factors that it uses to evaluate whether approving a settlement agreement will effectuate the purposes and policies of the Act: (1) whether the charging party, the respondent and any of the individual discriminates have agreed to be bound, and the General Counsel's position; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching settlement; and (4) whether the respondent has a history of violating the Act or breaching settlement agreements. The Board should approve the settlement agreement because the parties resolved their labor dispute and there is no evidence of fraud, coercion, or duress in reaching said agreement. Moreover, there is no evidence that MasTec has a history of violating the Act or breaching settlement agreements.

The AGC's opposition to the settlement rests entirely on its belief that MasTec's Dispute Resolution Policy violates the Act. (Jt. Ex. 12(e)). It is well-established that an ALJ or the

Board may enter a settlement agreement over the AGC's objections. *See Int'l Association Of Bridge, Structural, Ornamental, Reinforced Ironworkers And Riggers, Local Union No. 27* (Raymond Max Snyder), Case No. 27-CB-3015, 1993 NLRB LEXIS 774 (1993) (the first factor is "not the decisive factor to be weighed").

In this particular case, the Board should not weigh heavily the fact that MasTec continues to maintain its Dispute Resolution Policy because *D.R. Horton* is currently pending before the Fifth Circuit Court of Appeals and *24-Hour Fitness, Inc*., 2012 NLRB LEXIS 761 (ALJ William Schmidt, Nov. 6, 2012) is presently before the Board and a decision in either or both of those cases will have a significant impact not only on this case, but for all employers with similar bilateral, voluntary arbitration policies with a class action exclusion. MasTec submits that the Board should let that process play out and approve the settlement agreement between Charging Party and Respondent. This is especially so given the ALJ's refusal to even consider the "class action wavier" issue and his holding that the issue must be decided by the Board, and "not the administrative law judge," – despite his express finding that the arbitration agreement at-issue in *D.R. Horton* is "clearly distinguishable." (Dec. 5: 15-18; 6:26-28).

It is important to note that *D.R. Horton* was a case of first impression before the Board and, prior to *D.R. Horton*, there was no precedent finding class action waivers invalid under the Act. In fact, the previous General Counsel of the Board issued a memorandum stating that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06.) As such, prior to January 3, 2012, the date the Board issued *D.R. Horton*, there was no authority remotely suggesting that class action waivers violated the Act per se.

Finally, although *D.R. Horton* itself still remains open, Federal Courts throughout the country have struck the case down repeatedly. Clearly, under these circumstances of this case, the risks that this case too will suffer the same fate are present, and, therefore, resolution of the dispute through settlement would be an appropriate course to follow.

C. The ALJ Erred By Determining That The Dispute Resolution Policy On Its Face Violated The Act.

As explained herein, the ALJ concluded that it was the province of the Board, and not the ALJ, to decide whether a class action waiver provision in an arbitration agreement violates the Act. Nonetheless, the ALJ found MasTec's Arbitration Agreement unlawful for three other reasons. The ALJ's conclusions are incorrect as a matter of law.

1. The ALJ Erred In Finding That The "Opt-Out" Provision Violates The Act.

Through the opt-out process, MasTec's Arbitration Agreement provides for, and promotes, choice among its employees as to how they wish to resolve potential disputes with the Company. It is well understood that when employees are given the choice to participate in the arbitration process through an opt-out provision, the arbitration agreement cannot be considered mandatory, employer-imposed, or coercive. Nonetheless, central to the ALJ's determination that the Arbitration Agreement on its face violates Section 8(a)(1) is his conclusion that an "employer may not lawfully require its employees to affirmatively act in order to obtain or maintain" rights granted by the NLRA. (Dec. 6:1-5). NLRB precedent, however, provides no direction regarding the extent to which opt-out processes can create voluntary, bilateral agreements between employers and employees to arbitrate disputes.

However, there are several federal court decisions that offer guidance on the issue and confirm that opt-out processes are a well-accepted method of facilitating voluntary, bilateral arbitration agreements between employers and employees. *See, e.g.*, *Michalski v. Circuit City*

Stores, Inc., 177 F.3d 634, 636 (7th Cir. 1999) (employee could be required to arbitrate her Title VII claims in part, because by not opting out, she chose to be bound by the enforceable arbitration agreement); *Black v. JP Morgan Chase & Co*., 2011 U.S. Dist. LEXIS 99428, 57-58 (W.D. Pa. 2011) (because an opt-out provision gives a plaintiff "the option to say 'no' to the arbitration provision" and thus "complete control over the terms of the agreement," "it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave it basis"); *Fluke v. Cashcall, Inc*., 2009 U.S. Dist. LEXIS 43231, *18 (E.D. Pa. May 21, 2009) (agreements to arbitrate that contain opt-out provisions "are not unilaterally imposed" but instead give "a meaningful choice as to the contract's terms"); *Clerk v. ACE Cash Express, Inc.,* 2010 U.S. Dist. LEXIS 7978, *8 n. 22 (E.D. Pa. 2010) (the opt-out provision in the arbitration agreement, and plaintiff's failure to exercise it, precluded her argument that the arbitration agreement was presented on a take-it-or-leave-it basis); *Marley v. Macy's South*, 2007 U.S. Dist. LEXIS 43891 *9-10 (S.D. Ga. 2007) (employee not coerced into the arbitration process where plaintiff had the option to opt out).[3]

The ALJ cites *Ishikawa* for the proposition that an "opt-out" provision is unlawful on its

[3] *See also Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable"); *Legair v. Circuit City Stores, Inc.*, 213 Fed. Appx. 436, 439 (6th Cir. 2007) (unpublished) (arbitration agreement providing thirty-day opt-out period not procedurally unconscionable and plaintiff bound to it because he failed to exercise his right to opt out); *Arellano v. T-Mobile USA, Inc.*, 2011 U.S. Dist. LEXIS 41667, *10-13 (N.D. Cal. 2011) (arbitration provision containing class action waiver, but providing for thirty-day opt out period, was not unconscionable); *Hicks v. Macy's Dep't Stores Inc.*, 2006 U.S. Dist. LEXIS 68268, *10-12 (N.D. Cal. 2006) (class action waiver not procedurally unconscionable because plaintiff had a meaningful opportunity to opt out of the arbitration agreement); *Hopkins v. World Acceptance Corp.*, 2011 U.S. Dist. LEXIS 79770, *14 (N.D. Ga. 2011) ("when a party challenges an arbitration agreement that contains an opt-out provision and fails to opt out, her unconscionability argument is diluted because the provision was not offered on a take-it-or-leave-it basis"); *Teah v. Macy's Inc.*, 2011 U.S. Dist. LEXIS 149274, 16-17 (E.D.N.Y. 2011) (arbitration agreement with opt-out provision not provided on a "take it or leave it basis" and not procedurally unconscionable); *Passmore v. Discover Bank*, 2011 U.S. Dist. LEXIS 123918, *20-21 (N.D. Ohio 2011) (arbitration agreement enforceable, in part, because it provided "a readily apparent opt-out arbitration clause, of which the Plaintiff has failed to avail herself").

face because, in his view, "an employer may not lawfully require its employees to affirmatively act . . . in order to obtain or maintain" rights under the Act. (Dec. 6:4). *Ishikawa* says no such thing. *Ishikawa* simply stands for the proposition that employer cannot *force* an employee to "prospectively waive" a right to engage in general union-related activities for some period of time. *Ishikawa*, 337 NLRB at 175-76. Specifically, in *Ishikawa*, the employer entered into a separation agreement with an employee in which the employee agreed not to engage in union-related activities for one year. *Id*. The present matter is readily distinguishable because: (1) MasTec ***does not require*** its employees to be bound by the Arbitration Agreement; and (2) as explained below, the right to participate in class or collective actions is not protected under Section 7 of the Act. Indeed, Hobbs's employment was not conditioned on accepting the terms of the Dispute Resolution Policy because he had the choice to decline coverage, without the threat (implicit or otherwise) of retaliation, and retain the right to engage in a class or collective action.

Moreover, ALJ Wedekind in the *Bloomingdale* case also found *Ishikawa* inapposite. *Bloomindale's, Inc.*, Case No. 31-CA-071281 at p. 10 (June 25, 2013). He aptly noted that if *Ishikawa* supported the AGC's position, the Board's statement in *D.R. Horton* that voluntary agreements present a "more difficult question" would have been gratuitous. *Id.* This is so because the Board was "certainly" aware of *Ishikawa* because a similar issue was pending before the Board. *Id*. Moreover, ALJ acknowledged *Ishikawa* does not involve the FAA which contains an "emphatic federal policy" in favor of arbitration. *Id.*

Accordingly, there is no basis for the ALJ's conclusion that the Arbitration Agreement on its face violates Section 8(a)(1).

2. The ALJ Erred In Determining That Dispute Resolution Policy Was Unlawful On Its Face Because Employees Who Opt Out Cannot Cooperate and Engage in Class Actions With Them.

Second, the ALJ found the Policy places employees at a "disadvantage in their attempts to engage in concerted actions" because "those employees who did not opt out; they cannot engage in class actions with them and, pursuant to the terms of the Policy, they cannot learn of the existence, content or results of prior arbitrations that the non-opt-out employees were involved in." (Dec. 6: 4-9). The ALJ does not cite to a single case to support his conclusion that merely being placed at a "disadvantage" violates the Act and, notably, the AGC did not find that particular clause unlawful in its Complaint. Moreover, the Policy plainly provides for civil discovery and motions, as provided by the state's forum's civil procedure rules. Therefore, discovery affords employees the opportunity to obtain information from MasTec regarding similar claims brought by other employees against the Company, and the plain language of the Policy in no way restricts employees from otherwise disclosing workplace complaints, disputes, or potential claims they may have against the Company.

Furthermore, on its face this provision does not apply to disclosures that "may" be legally protected. In that regard, the ALJ ignores the qualifying phrase: "Except as *may* be permitted or required by law...." (Dec 4:5) (emphasis added). To the extent that discussions about prior arbitration involved protected communications among employees, they would be legally permissible and not subject to the limitation in the Agreement. *See Lutheran Heritage Village,* 343 NLRB 646, 652 n.7 (2004) (Member Liebman noting that "an employer can easily eliminate" the problems that inhere in an arguably impermissible work rule by including a statement that the rule does not apply to legally protected activity under the NLRA) (dissenting in part). The Agreement's use of the term "except as may be required by law" is significant because it broadens the clear exception to the provision. If an employee wishes to disclose

information that the employee reasonably believes in good faith is permissible under the law, the Agreement does not preclude the disclosure even if the employee is wrong about the law. The limited prohibition on issues pertaining to procedural matters pertaining to the arbitration can in no way be construed to limit such discussions. Accordingly, the provision itself is not facially unlawful.

Under this circumstance presented in this case, the minimum obligation on the Acting General Counsel would be to show how the restriction negatively impacted Hobbs or at least one employee. Yet, there is nothing in the record even suggesting that any employee was in anyway impacted by this language. While it might be theoretically possible for an employee to have an adverse consequence from the language, there is absolutely no basis for a ruling that the language lawful on its face can be struck down retroactively. Nor can it be assumed that MasTec is applying this language in an unlawful manner, or has ever disciplined anyone or otherwise enforced this provision for any reason.

3. The ALJ Erred In Determining That Dispute Resolution Policy Was Unlawful On Its Face Because "Some" Employees "Might" Be Reluctant To Opt Out For Fear of Retaliation – Despite MasTec's Clear Assurances To The Contrary.

Third, the ALJ improperly found that "some" employees "might" be reluctant to opt-out for fear of retaliation – despite MasTec's unambiguous assurances to the contrary. (Dec 6:11-24). In that regard, the Policy expressly states: "An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision." (Dec 4:16-17; Jt. Ex. 2). The ALJ's conclusion is incorrect as a matter of law. Notably, the AGC did ***not*** find that portion of the Arbitration Agreement unlawful or problematic under the Act. ALJ Wedekind also did not find a similar process problematic in the decision in *Bloomingdale's*. (Dec. 10: 1-9).

Moreover, it is significant to note that – contrary to the AGC's insistence that the Policy

was not entered into "voluntarily" by employees – the ALJ's decision did not go so far as to hold that the Policy was imposed on employees as a condition of employment. To be sure, there is no finding that Company interfered, restrained, or coerced Hobbs or any employee. Indeed, employees are given a voluntary choice to have disputes decided through arbitration and forgo participation in a class or collective action. As explained above, Hobbs had 30-days to make his decision. He was informed that: (1) his choice would not in any way affect his employment relationship with MasTec; (2) his decision could be made without fear of retaliation; (3) he could consult an attorney; and (4) he could opt out without even having to inform his immediate manager or anyone in human resources. In this regard, the Company had a procedure whereby Hobbs (or any employee) obtains the Opt-Out Form from the Legal Department and then returns it to the same department, rather than his supervisor or a manager. Therefore, supervisors and managers at the Company would not know whether Hobbs had requested an Opt-Out Form, or whether he opted out, because they had no role in the process.

The record reflects that the anti-retaliation provision, along with other safeguards, objectively demonstrates that Hobbs was free to decline to arbitrate his claims without interference, restraint or coercion by the Company. *Miami Systems Corp*., 320 NLRB at n. 4 ("The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one[.]"). Simply put, Hobbs's employment was not conditioned on accepting the terms of MasTec's Arbitration Agreement because, objectively, he had the choice to decline coverage under the Agreement, without threat (implicit or otherwise) of retaliation, and retain the right to engage in a class or collective action.

D. The *D.R. Horton* Decision Is Invalid Because The NLRB Did Not Have A Quorum When The Decision Was Issued.

To the extent this current Board relies upon *D.R. Horton* at all, MasTec submits that it is

invalid because the Board issued the decision without a statutorily-mandated quorum of at least three members. *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). According to the NLRB, Member Craig Becker's term expired on January 3, 2012, the same date that *D.R. Horton* was decided. *See* Board Members Since 1935, Craig Becker, https://www.nlrb.gov/who-we-are/board/board-members-1935. *D.R. Horton* was neither timely nor valid because the Senate convened on January 3, 2012, at noon, the latest point at which Member Becker's recess appointment could have expired. Even assuming Member Becker's appointment continued until January 3, 2012, at noon, *D.R. Horton* must have been issued before that date and time and the NLRB has made no showing that its decision was issued before noon. Consequently, *D.R. Horton* is invalid as the NLRB lacked a quorum once Member Becker's term expired.

Moreover, even if it is found that *D.R. Horton* is valid on this basis, there is compelling evidence demonstrating that Becker's term actually expired on December 30, 2011—more than three days before the issuance of *D.R. Horton*. Thus, the NLRB lacked a quorum when issuing the *D.R. Horton* decision on January 3, 2012. In that regard, the Recess Appointments Clause of the U.S. Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of [the Senate's] next session." U.S. CONST. art. II, § 2, cl. 3. A session ends following either sine die adjournment or the convening of a new session of the Senate on January 3rd. *See* Henry B. Hogue, CONG. RESEARCH SERV., Recess Appointments: Frequently Asked Questions, at 1 (Jan. 9, 2012); see also U.S. CONST. amend. XX, § 2. Because Member Becker was recess appointed on March 27, 2010, his recess appointment expired at the end of the Senate's "next session," which was, in fact, on December 30, 2011 and not January 3, 2012.

Congress did not adjourn sine die through the passing of a concurrent resolution on

December 30th, but it did not need to do so. A sine die adjournment can also occur when the Senate adjourns: (1) "without a specific day on which Congress will return that session"; and (2) "[it] indicates that Congress is not scheduled to meet again until a day established by law (or the Constitution) for the next session or the next Congress." Jack Maskell, CONG. RESEARCH SERV., Beginning and End of the Terms of United States Senators Chosen to Fill Senate Vacancies, at 2 (Jan. 20, 2010). This position is supported by the fact that the Senate has the power "to determine the Rules of its Proceedings," U.S. CONST. art. I., § 5, cl. 2, and determining what constitutes adjournment of the Senate is clearly a rule concerning the Senate's own proceedings.

The Senate convened on December 30, 2011 for a pro forma session, meeting only as a matter of form and not to conduct any official business. 157 CONG. REC. S8793 (daily ed. Dec. 30, 2011). In this session, the Senate, "at 11 and 34 seconds a.m., adjourned until Tuesday, January 3, 2012, at noon." Id. This adjournment on December 30th had each of the hallmarks and requirements of a sine die adjournment because it was without a specific day on which the Senate would return during the current session (the first session of the 112th Senate), and also indicated that the Senate was not scheduled to meet again until January 3, 2012, at noon, the day and time established by the U.S. Constitution for the next session. Both prongs of sine die adjournment were thus satisfied. Therefore, the Senate's December 30th adjournment denoted the end of the first session of the 112th Senate, and marked the expiration date of Member Becker's term. Since *D.R. Horton* was issued well after this date, the decision is invalid as the NLRB lacked a quorum.

E. *D.R. Horton* Is Not Applicable To The Instant Case Because, As The ALJ Held, "*D.R. Horton* Is Clearly Distinguishable."

In 2012, the Board published *D.R. Horton*, in which a panel found that an arbitration

agreement requiring "as a condition of employment" all employees to agree to waive the right to bring class or collective actions in any forum violated Section 8(a)(1) of the Act. As explained by the ALJ, the Arbitration Agreement here is readily distinguishable from the arbitration agreement in *D.R. Horton* because, unlike in *D.R. Horton*, MasTec's Arbitration Agreement does not preclude employees from filing joint, class or collective claims against the employer addressing wages, hours or working conditions in any forum, arbitral or judicial, including the Board, and its Policy contains an opt-out provision. *Id*. (Dec. 5:15-18). It, therefore, requires a different result.

1. *D.R. Horton* Is Limited To Class Action Waivers In Arbitration Policies Imposed As A Mandatory Condition Of Employment.

In *D.R. Horton*, the employer compelled each new and current employee to enter into a "Mutual Arbitration Agreement" ("MAA"), an agreement requiring that an arbitrator hear only an employee's individual claims without any authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding. The Board held that "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by [the NLRA]." *D.R. Horton*, 357 NLRB, slip op., at p. 3. Thus, by requiring employees as a condition of employment to forego their rights to such concerted activity, *D.R. Horton* violated the NLRA. As the Board stated, "When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired." *Id*. at p. 7.

The Board repeatedly specified in *D.R. Horton* that its opinion only addressed the lawfulness of "mandatory" class waivers, "imposed upon" employees and "required" by employers "as a condition of employment." *Id*. at p. 1. Indeed, *D.R. Horton* is suffused with

language that makes clear the decision applies only to arbitration provisions that are forced on employees who have no opportunity to refuse them. *Id*. at p. 1 (noting that under the MAA, all employment-related disputes "must" be resolved through individual arbitration under MAA); *Id*. at p. 4 (noting that the MAA "imposed" on all employees "as a condition of hiring or continued employment" and should be treated as the Board treats other "unilaterally implemented" workplace rules); *Id*. at p. 5 (stating that Section 8 prohibits agreements "imposed on" employees as a means of "requiring" that they waive their right to engage in concerted activity); *Id*. at p. 6 (stating that arbitration agreement "imposed upon" employees "as a condition of employment" may not be held to prohibit employees from engaging in class actions); *Id*. at p. 13 (ruling that D.R. Horton violated Section 8(a)(1) of the Act by "requiring" employees to forego their right to collective litigation). The Board concluded that because the MAA in *D.R. Horton* was "imposed on all employees as a condition of hiring or continued employment," it would treat the MAA, not as it treats bilateral voluntary agreements, but instead "as the Board treats other unilaterally implemented workplace rules." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 4.

Significantly, the Board expressly declined to reach the issue of whether a bilateral arbitration agreement between an employer and an employee that includes a class action waiver, and is not a condition of employment – such as MasTec's Arbitration Agreement – violates the Act:

> [W]e do not reach the more difficult question [] of ... whether, if arbitration is a mutually nebeneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. *Id*. at p. 13, n. 28.

Moreover, in its decision, the Board expressly distinguished D.R. Horton's MAA from the voluntary arbitration agreement in another case, *Webster v. Perales*, 2008 U.S. Dist. LEXIS

7503 (N.D. Tex. 2008). In *Webster*, the Board held "the employer did not threaten to terminate employees who refused to sign the arbitration agreement" at issue and the plaintiffs in Webster "expressly acknowledged that their agreement to arbitrate was made voluntarily and without duress, pressure or coercion." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 8, n. 18 (*citing Webster*, 2008 U.S. Dist. LEXIS 7503 at *13). According to the Board, these differences put *D.R. Horton* "in contrast to [Webster]" because in Webster the agreement was not "a condition of employment." *Id*.

Thus, *D.R. Horton* explicitly does not control an employer's completely voluntary arbitration agreement which includes a class waiver.

2. MasTec's Arbitration Agreement Is Voluntary, And Not A Mandatory Condition Of Employment.

Unlike the MAA at issue in *D.R. Horton*, MasTec's Arbitration Agreement was and is not provided "as a condition of employment." Indeed, Hobbs was able to opt out of the Arbitration Agreement, including the class action waiver, without resulting adverse consequences. As recognized by the Seventh Circuit Court of Appeals, an employee presented with the opportunity to opt out of an arbitration agreement, specifically, is "free not to arbitrate," and in declining the opportunity to opt out, the employee makes the choice to arbitrate his or her potential claims. *Michalski*, 177 F.3d at 636 (employee could be required to arbitrate her Title VII claims in part, because by not signing an opt-out provision, she chose to be bound by the enforceable arbitration agreement).

Also, unlike the circumstances in *D.R. Horton*, here there was no "implicit threat" Hobbs would not be hired if he decided to opt out. Additionally, to ensure that no retaliation would occur against Hobbs (or any employee), the Company had a procedure whereby Hobbs (or any employee) obtains the Opt-Out Form from the Legal Department and then returns it to the same

department, rather than his supervisor or a manager. Therefore, supervisors and managers at the Company would not know whether Hobbs had requested an Opt-Out Form, or whether he opted out, because they had no role in the process. Thus, the anti-retaliation provision, along with other safeguards, objectively demonstrates that Hobbs was free to decline to arbitrate his claims without interference, restraint or coercion by the Company.

3. MasTec's Arbitration Agreement Leaves Open An Avenue For Class Litigation And, Therefore, It Falls Outside Of *D.R. Horton's* Purview And Does Not Violate The NLRA.

In *D.R. Horton*, the Board held that Section 8 was violated when an employer "compels" an employee to waive his or her right to collectively pursue litigation of employment claims "in all forums, arbitral and judicial." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 12 (emphasis in original); *see also id*. (". . . 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. . ."") (emphasis added). If, however, the "employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." *Id*. at p. 12.

Here, MasTec's Dispute Resolution Policy makes explicit an employee's right to decline arbitration as his or her exclusive forum for employment-related disputes. By way of the voluntary opt-out procedure, the Policy necessarily leaves open a judicial forum for class and collective actions. *See Brown v. Trueblue, Inc*., 2012 U.S. Dist. LEXIS 52811, *19 (M.D. Penn. April 16, 2012) (finding that arbitration agreement is enforceable, D.R. Horton notwithstanding, because the agreement "[left] the door open to collective action in other forms").

Moreover, the Arbitration Agreement is also distinguishable from the agreement at issue in *D.R. Horton* because it incorporates the forum's state's procedural rules, and with them, the right to permissive joinder of claims under a state's procedural rules. (Jt. Ex. 2). This means that

employees may engage in protected, concerted action by asking an Arbitrator to join their claims in a single proceeding. For example, in the State of Texas (where Hobbs worked), Rule 40 of the Rules of Civil Procedure provides:

> ***All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action***. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.
>
> Tex. R. Civ. P. 40 (emphasis added).

As the Supreme Court has recognized, "class actions constitute but one of several methods for bringing about aggregation of claims, i.e., they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum." *Sprint Communs. Co., L.P. v. APCC Servs*., 554 U.S. 269, 291 (2008) (emphasis added); *see also Snyder v. Harris*, 394 US 332, 335-337 (1969) (with the amendments to Rule 23, "judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions [of Rule 20]").

Indeed, the class action procedure under Rule 23 of the Federal Rules of Civil Procedure and permissive joinder under a state's civil rules of civil procedure rule share the same objectives of efficiency and expediency. The class action device is merely a "means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). Similarly, the purpose of Rule 20 (and its state counterpart) "is to promote trial convenience and expedite the final determination

of disputes, thereby preventing multiple lawsuits." *Mosley v. General Motors Corp*., 497 F.2d 1330, 1332 (8th Cir. 1974).

Therefore, even if class actions are considered protected, concerted activity, which MasTec denies, permissive joinder serves the same function as class actions. The availability of joinder allows Hobbs to work in concert with other employees in furtherance of these efficiency and expediency principles. In other words, there is no limit on their ability to act in concert. Accordingly, the Arbitration Agreement does not run afoul of the NLRA because it allows employees to join their claims.

4. MasTec's Policy Does Not Violate The NLRA Because An Employee May Voluntarily Exercise A Section 7 Right To "Refrain" From Concerted Activity.

Conversely, the Board has a duty to protect the equally important right not to pursue class and collective legal actions. Section 7 provides that employees "shall have the right to engage in other concerted activities . . . and shall also have the right to refrain from any or all of such activities." 29 U.S.C. § 157. Thus, by its terms, Section 7 expressly allows employees to "refrain from engaging in concerted activities." As the Fourth Circuit explained in a case involving the right of employees to wear union insignia in the workplace:

> Section 7 not only protects employees' right to engage in union activities such as wearing union insignia, it also protects those employees who choose not to participate in union activities. It follows then, that if there is a presumptive right to wear union insignia as part of engaging in union activity under Section 7, there is a reciprocal Section 7 right contained in that section's "right to refrain" language to choose not to wear union insignia.

Lee v. National Labor Relations Board, 393 F.3d 491, 494-95 (4th Cir. 2005) (emphasis added).

Similarly, in the context of an employee's Section 7 right to form and join a labor organization: "The right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union." *BE&K Constr. Co. v. NLRB*, 23 F.3d 1459, 1462 (8th

Cir. 1994) (emphasis added). Applying these same long-standing principles here demonstrates that the Section 8(a)(1) allegation attacking a voluntary arbitration agreement that employees are free to accept or reject fails as a matter of law.

Section 7's only exception to the "right to refrain" is "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment." Section 7 does not limit an individual's right to refrain from class activity, even though in unambiguous language Congress did exclude from that important individual right decisions regarding union membership. Congress therefore created but one exception to the right to refrain, by carving out one but form of concerted activity, union membership. It did not carve out class action activity from the right to refrain.

In that regard, Courts and the Board have long recognized an employee's right to voluntarily waive statutorily protected rights, and the same result is required in this case under the plain language of Sections 7 and 8 of the NLRA. *See Barton Brands, Ltd*., Case No. 9-CA-24511 (General Counsel Memorandum, Oct. 21, 1987) (recognizing that "Section 7 rights can be voluntarily waived by an employee"). As stated in *D.R. Horton*, "[i]n enacting the NLRA, Congress expressly recognized and sought to redress 'the inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association.' Congress vested employees with 'full freedom of association . . . for the purpose of . . . mutual aid and protection,' in order to redress that inequality." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 3 (citing 29 U.S.C. § 151). Thus, in enacting the NLRA, Congress aimed to give employees the meaningful opportunity to determine the conditions of their employment and the "freedom" with which to do it. Allowing employees the opportunity to choose whether or not to enter into an

agreement which would affect their ability to join or associate with other employees in contested legal matters is consistent with these goals and is wholly consistent with the text and underlying purpose of Section 7. An opt-out provision affords employees the power to enter into a class waiver, or to refrain from doing so – or from joining claims in a single proceeding under a state's permissive joinder rules. It also affords employees the freedom to associate with other employees in the judicial forum should they so choose, or the freedom to decline such an option.

Furthermore, employees cannot reasonably argue that the class waiver provision is unfair, oppressive, or that it violates their rights when they could voluntarily decline to opt out of that Policy without fear of retaliation. Indeed, consistent with the policy that employees should be free to determine the conditions of their employment, courts have long recognized the distinction between mandatory arbitration agreements and those which contain an opt-out provision, dismissing arguments that agreements are unconscionable or should otherwise be invalidated where the agreements provide the opportunity to opt out. *See e.g. Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable").[4]

In fact, courts routinely uphold arbitration agreements which contain class action waivers

[4] *See also Legair v. Circuit City Stores, Inc.*, 213 Fed. Appx. 436, 439 (6th Cir. 2007) (unpublished) (arbitration agreement providing 30-day opt-out period not procedurally unconscionable and plaintiff bound to it because he failed to exercise his right to opt out); *Hopkins v. World Acceptance Corp.*, 2011 U.S. Dist. LEXIS 79770, *14 (N.D. Ga. 2011) ("when a party challenges an arbitration agreement that contains an opt-out provision and fails to opt out, her unconscionability argument is diluted because the provision was not offered on a take-it-or-leave-it basis"); *Teah v. Macy's Inc.*, 2011 U.S. Dist. LEXIS 149274, 16-17 (E.D.N.Y. 2011) (arbitration agreement with opt-out provision not provided on a "take it or leave it basis" and not procedurally unconscionable); *see also Passmore v. Discover Bank*, 2011 U.S. Dist. LEXIS 123918, *20-21 (N.D. Ohio 2011) (arbitration agreement enforceable, in part, because it provided "a readily apparent opt-out arbitration clause, of which the Plaintiff has failed to avail herself"); *Zarandi v. Alliance Data Systems Corp.*, 2011 U.S. Dist. LEXIS 54602, *1 (C.D. Cal. 2011) (recognizing that "[a]rbitration agreements may 'be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," but finding that plaintiff did not dispute receiving terms and conditions and she could have opted out of arbitration provision).

where the agreements contain opt-out provisions which would allow the employees to choose to either adopt or decline the provision. *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008) (because "waiver was not presented on a take-it-or-leave-it basis, but gave [plaintiff] sixty days to opt out, it was not unconscionable"); *Tory v. First Premier Bank*, 2011 U.S. Dist. LEXIS 110126, *11 (N.D. Ill. 2011) ("A class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term . . ."); *Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009) (class action waiver in credit card agreement not unconscionable because provision was in same size font as the rest of the agreement and the card holder could opt out of the agreement); *Montgomery*, 2011 U.S. Dist. LEXIS at *12-13 (class action waiver enforceable where plaintiffs "[did] not allege they were misled about the arbitration provisions or the class-action waiver, and . . . the opt-out provision here is significant to determining the existence of both procedural and substantive unconscionability"); *Hicks v. Macy's Dep't Stores Inc*., 2006 U.S. Dist. LEXIS 68268, *10-12 (N.D. Cal. 2006) (class action waiver not procedurally unconscionable because plaintiff had a meaningful opportunity to opt out of the arbitration agreement).[5]

Moreover, the absence of a "class action" exception to the "right to refrain" has legal consequences. The Supreme Court's recent decision in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), a case that was decided a few days after the *D.R. Horton* decision, made clear

[5] *see also Arellano v. T-Mobile USA, Inc.*, 2011 U.S. Dist. LEXIS 41667, *10-13 (N.D. Cal. 2011) (arbitration provision containing class action waiver, but providing for 30-day opt out period, was not unconscionable); *Honig v. Comcast of Georgia I, LLC*, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) (same); *Sanders v. Comcast Cable Holdings, L.L.C.*, 2008 U.S. Dist. LEXIS 2632, *21 (M.D. Fla. 2008) (same); *Meyer v. T-Mobile USA Inc.*, 2011 U.S. Dist. LEXIS 108249 (N.D. Cal. 2011); *Giles v. GE Money Bank*, 2011 U.S. Dist. LEXIS 111018 (D. Nev. 2011); *Day v. Persels & Assocs.*, LLC, 2011 U.S. Dist. LEXIS 49231, *21 (M.D. Fla. 2011); *O'Quinn v. Comcast Corp.*, 2010 U.S. Dist. LEXIS 125879, *13-15 (N.D. Ill. 2010); *Brown v. Luxottica Retail N. Am., Inc.*, 2010 U.S. Dist. LEXIS 104642, *7-12 (N.D. Ill. 2010); *Ambrose v. Comcast Corp.*, 2010 U.S. Dist. LEXIS 31767, *4 (E.D. Tenn. 2010); *Fluke v. Cashcall, Inc.*, 2009 U.S. Dist. LEXIS 43231,*21-22 (E.D.Pa. 2009).

that when legislation contains no express provision evidencing Congress's intent to restrict the enforcement of arbitration agreements as to that statute, or where the statute "is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement be enforced according to its terms." *Id*. at 669. Thus, the Board may not read into Section 7 an exception for arbitral class waivers assented to by employees who could, if they chose, opt out of the arbitration program and bring their class claims in court.

In addition, Section 8(a)(1) of the NLRA requires proof that an employer has "interfere[d] with, restrain[ed], or coerce[ed] employees in the exercise of the rights guaranteed" in Section 7 of the NLRA. 29 U.S.C. § 158 (a)(1) (emphasis added). Section 8(a)(1) is not violated then when employees refrain from exercising their Section 7 rights on their own volition and without any coercion or interference by their employer. *Perkins Machine Co*., 141 NLRB 697, 700 (1963) (employer did not violate Section 8(a)(1) where there was no "threat of reprisal or promise of benefit" in the event the employees decided not to resign from the Union).

Here, MasTec did not impose upon, require, or force Hobbs – or any employee – to waive Section 7 rights, nor did it otherwise interfere with, restrain, or coerce him from excising his right to collectively seek legal redress. To the contrary, the Dispute Resolution Policy and Employee Acknowledge Form advised Hobbs that he would only be covered under the Arbitration Agreement unless he chose to opt out. MasTec also advised him that he could consult with an attorney. The Dispute Resolution Policy even went a step further by expressly informing him that his decision "to opt out will not be subject to any adverse employment action as a consequence of that decision." (Jt. Ex. 2). It thus presented him with the option to freely and voluntarily waive class litigation in a judicial forum in exchange for the benefits of mutual arbitration or waive the benefits of mutual arbitration in favor of retaining the ability to pursue

collective relief or jury trials – the choice was his. Such conduct is perfectly acceptable under the NLRA as neither the mere act of informing employees of their right to waive Section 7 right, nor assisting employees in waiving those rights, is coercion. *Ace Hardware Corp*., 271 NLRB 1174, *1174 (1984) (employer "did not violate Section 8(a)(1) of the Act by informing employees how to cancel their checkoff authorizations and offering assistance in doing so"); *Perkins Machine Co*., 141 NLRB at 700 (employer acted lawfully in bringing to the attention of its employees their contractual right to resign from the Union and to revoke their dues deduction authorizations").

5. Finding That MasTec's Voluntary Opt-Out Dispute Resolution Policy Does Not Violate The NLRA Strikes The Appropriate Balance Between The Important Policies Reflected In The NLRA And The FAA.

Not only does MasTec's Dispute Resolution Policy comply with NLRA, but it also complies with the FAA. Like the NLRA, the FAA requires that a voluntary, non-coerced arbitration agreement not be invalidated by the Board. As noted in D.R. Horton, in enforcing the rights that the NLRA confers, "the Board must be and is mindful of any conflicts between the terms or policies of the Act and those of other federal statutes, including the FAA." 357 NLRB No. 184, slip op. at p. 8. Thus, the Board has acknowledged its duty to "undertake a 'careful accommodation'" of the NLRA and the FAA when the two statutes arguably conflict. Id. This is consistent with the Supreme Court's admonition in Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) that:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Indeed, "when circumstances arise that present a conflict between the underlying

purposes of the Act and those of another federal statute, the Board has recognized that the issue must be resolved in a way that accommodates the policies underlying both statutes to the greatest extent possible." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 8 (emphasis added); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("The Southern S. S. Co. line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975) (rejecting a claim that federal antitrust policy should defer to the NLRA); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984) (holding that the Board's remedial authority was limited by federal immigration policy, explaining that the Board was obliged to take into account the equally important Congressional objective adopted in the Immigration Reform and Control Act, even if that led to the unavailability of more effective remedies under the NLRA).

In *D.R. Horton*, the Board attempted its required balancing of the NLRA and FAA and determined that the MAA at issue did "not conflict with the letter or interfere with the policies underlying the FAA, and even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 8. The Board based this holding on four considerations: (1) the agreement was treated as favorably as other private contracts that required employees, as a condition of employment, to pursue claims solely on an individual basis; (2) by categorically prohibiting class claims in "any" forum, the agreement required employees to forego substantive rights, something the FAA does not require or permit; (3) when balancing the public policy interests of the NLRA and the FAA, considering the NLRA's strong policy against agreements in which employees are required, as a condition of employment, to cede their rights to engage in collective action, holding that an

employer violates the NLRA by requiring employees, to adopt such agreements "accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible"; and (4) the FAA would be required to yield to the NLRA's policies, as expressed in the Norris-LaGuardia Act, in a circumstance where a private agreement "seeks to prohibit a 'lawful means [of] aiding any person participating or interested in' a lawsuit arising out a labor dispute . . ." *Id*. at pp. 9-12.

The rationale underlying the Board's determination that the MAA in *D.R. Horton* violated the NLRA, and that this finding did not conflict with the FAA, evaporates in the instant case. First, unlike the agreement in *D.R. Horton*, MasTec's Dispute Resolution Policy contains an opt-out provision giving the employee freedom of choice, and, thus, finding it unlawful would violate the FAA by treating it less favorably than other voluntary private contracts. *Concepcion*, 131 S.Ct. at 1745. Second, the Dispute Resolution Policy does not require employees to (arguably) forego substantive rights afforded by the NLRA because, unlike the agreement in *D.R. Horton*, it does not categorically prohibit joint, class, or collective claims in "any" forum. Instead, as explained above, the Dispute Resolution Policy leaves open the judicial forum for joint, class, or collective claims so long as an interested employee opts out of the Policy.

Third, on balance, the public policy interest in enforcing MasTec's Dispute Resolution Policy outweighs the public policy against enforcing it. In *D.R. Horton*, the balance shifted towards refusing to enforce the MAA at issue because the MAA "required" waiver of class action rights as a "condition of employment." Here, however, MasTec's Policy is not a "condition of employment" but is instead a voluntary agreement for the mutual benefit of arbitration. As such, in this case, the policies inherent in the NLRA and the FAA must be rebalanced. With the heavy weight of mandatory waiver removed, the NLRA's concerns are,

concomitantly, diminished. Indeed, as stated above, a voluntary relinquishment of Section 7 rights must be considered less burdensome on NLRA rights than a mandatory one because the NLRA expressly allows for the voluntary waiver of Section 7 rights. *See* 29 U.S.C. § 157; *Lee*, 393 F.3d at 494-95; *Barton Brands, Ltd*., Case No. 9-CA-24511 (General Counsel Memorandum, Oct. 21, 1987) (recognizing that "Section 7 rights can be voluntarily waived by an employee").

On the other hand, the FAA represents a strong public policy favoring enforcing arbitration agreements in accordance with their terms. In fact, the Board recognized in *D.R. Horton* that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" and that "'the switch from bilateral to class arbitration' . . . sacrifices the principal advantage of arbitration—its informality.'" 357 NLRB No. 184, slip op. at p. 11 (*citing Concepcion*, 131 S.Ct. at 1748, 1750.)

Here, the Board must rebalance the polices behind the NLRA in light of numerous courts that have determined that arbitration agreements containing opt-out clauses are not mandatory "conditions of employment," as described above. Such a consideration would compel the conclusion that an employer does not violate the NLRA by offering employees voluntary choice to waive their right to class or collective action. This outcome is required because it accommodates the policies underlying both the NLRA and the FAA "to the greatest extent possible." *D.R. Horton*, 357 NLRB No. 184 at p. 8. Employee choice is preserved, and the FAA's mandate that arbitration agreements be enforced is honored.

6. Post-*D.R. Horton* Supreme Court Authority Further Confirms That The Agreement Is Enforceable Under The FAA.

Recent Supreme Court authority, including *American Express Co*., *CompuCredit*, and

Concepcion, clarify voluntarily, bilateral arbitration agreements must be enforced according to their terms absent a contrary Congressional command. This principle extends to employment-related arbitration agreements with equal force.

In *Concepcion*, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of such an agreement on the availability of classwide arbitration. 131 S. Ct. at 1753. The Court concluded that the state law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and that it was therefore preempted by the FAA. *Id*. at 1753. The Court reasoned 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. *Concepcion*, applying longstanding Supreme Court precedent, concluded the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms — including provisions that waive the right to pursue class or collective relief in arbitration.

The Supreme Court reaffirmed these principles shortly after the *D.R. Horton* decision in *CompuCredit*, 132 S. Ct. at 669. In that case, the Court reiterated that the FAA "requires courts to enforce agreements to arbitrate according to their terms." *Id*. Moreover, the Court emphasized that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id*. (citations omitted) (emphasis added). In support of this conclusion, the Court relied upon *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) — an employment case arising under the Age Discrimination in Employment Act, a federal statute. *Id*. at 669-71.

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to

show that Congress intended to preclude a waiver of judicial remedies, and further held that a federal statute's silence on the subject of arbitration must lead to the enforcement of an arbitration agreement in accordance with its terms. *Id*. at 672 n. 4. To meet this burden, a "Congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *See id*. at 670-73. Thus, the Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id*. at 673.

Again, reaffirming this principal, the U.S. Supreme Court on June 20, 2013 reversed a Second Circuit opinion and held that the FAA does not permit a court to invalidate an arbitration agreement with a class action waiver on the ground that a plaintiff's cost of individually arbitrating federal statutory claims exceeds the potential recovery. *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (June 20, 2013). In its decision, the Supreme Court reiterated that courts "must rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes." Relying on *CompuCredit* and *Gilmer*, the Court stated this was true even for claims brought under a federal statute, "unless the FAA's mandate has been overridden by a contrary congressional command." The Court then found no such contrary congressional command in the federal antitrust laws at issue in the case.

As the Supreme Court found in *American Express*, here there is similarly no "contrary Congressional command" in Section 7 of the NLRA – or anywhere else in the Act – that permits the Board to abrogate otherwise lawful, voluntary, and enforceable arbitration agreements that contain class or collective action waivers. There is nothing in the NLRA's plain language or the Act's legislative history that indicates that Section 7 creates a substantive right for employees to

bring or participate in class or collective actions particularly where those claims are premised upon rights not contained in the NLRA itself.[6]

The Supreme Court has carefully developed the law surrounding the enforcement of the

[6] There is nothing in the NLRA's plain language or the Act's legislative history that even remotely indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions. As explained by the Supreme Court, "the term 'concerted [activity]' is not defined in the Act." *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984). At the time the NLRA was enacted, neither Rule 23 of the Federal Rules of Civil Procedure nor the Fair Labor Standards Act existed. This is significant because the Senate Report accompanying the NLRA provided:

> [the] bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.

Sen.Rep.No.573, 74th Cong., 1st Sess. 8 (1935).

Because Congress never intended to guarantee individual employees a statutory right to file putative class actions, there is no basis for concluding that Section 7 encompasses the right to participate in a class or collective action.

Moreover, the Board's pre-*D.R. Horton* authority does not establish any Section 7 protection with respect to employee class action rights. Board precedent clearly provides that the NLRA prohibits employers from taking adverse employment actions against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer. *See, e.g., Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *Le Madri Restaurant*, 331 NLRB 269, 275-78 (2000); *Mojave Elec. Coop.*, 327 NLRB 13, 18 (1998); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–49 (1942). However, this line of Board cases generally protects resort to legal process, *not* the particular procedural form that process may take. Never before *D.R.Horton* has the Board intruded into the interplay of court rules and procedural devices in an effort to extend the reach of the NLRA. Moreover, the above cases certainly do not outlaw arbitration agreements in which an employee voluntarily agrees to waive the right to bring or participate in class or collective actions.

Section 7 simply prohibits employers from interfering with the efforts of employees who knowingly, voluntarily, and affirmatively wish to engage in legal process to act concertedly. The statute does not extend to procedural steps internal to the litigation itself, such as class actions. If this concept was accepted, there are many additional procedural rights that could come under Section 7 including interpleader actions, joint defense agreements, mandatory and voluntary joinder, mass actions, related case motions, motions to consolidate, to list only a few. Clearly, no one in Congress nor any witness brought to testify about the enactment of Section 7 even remotely extended the concept to internal court procedures. In fact, in 2006, the then-General Counsel declared in a Guideline Memorandum that the substantive guarantee of the NLRA is only that employees may not be "disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim." GC Memo. 10-06, at 6, available at http://tinyurl.com/bvv7j8o). As the Board's General Counsel admonished, whether such actions can proceed to judgment, and in what forum, are "normally determined by reference to the employment law at issue and do[] not involve consideration of the policies of the National Labor Relations Act." *Id*. at 5.

FAA to rest on operative legal principles that transcend specific industries or types of contracts (apart from those identified on the face of the statute). This is well illustrated in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010), in which the Supreme Court noted, "Our cases invoking the federal 'policy favoring arbitration' of commercial and labor disputes apply the same framework." [7] *Id*. at 2858.

7. Voluntary Waivers Of Class Actions Must Be Upheld To Avoid Conflict With The Rules Enabling Act.

The ability to pursue class-wide relief on behalf of employees is a procedural right provided under rule 23 of the Federal rules of Civil Procedure. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. at 332. The Rules Enabling Act prohibits any interpretation of the procedural right to litigate a class action that would "abridge, modify or enlarge any substantive right." 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution….[N]o reading of the Rule can ignore the Act's mandate that 'rules of procedure shall not abridge, enlarge or modify any substantive right") (internal citation omitted). As such, the Supreme Court has held that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997). For that reason, Rule 23 cannot be interpreted as providing a substantive right to participate in class actions under the NLRA. Such an interpretation would constitute an enlargement of the rights enumerated in the NLRA to engage in protected, concerted activity.

[7] Furthermore, several Circuit Courts have applied *Concepcion* and *CompuCredit* to class action waivers in arbitration agreements between employers and employees. *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. Jan. 3, 2013) (applying *CompuCredit* to hold that a employer-employee arbitration agreement with a class action waiver provision is enforceable) *Quilloin v. Tenet HealthSystem Phila., Inc.,* 673 F.3d 221, 223 (3rd Cir. 2012) (applying *Concepcion* to rule that employer-employee arbitration agreement was enforceable and rejecting argument that class action waiver in arbitration agreement rendered arbitration agreement unenforceable); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2012) (relying on *Concepcion* in affirming the district court's order enforcing class action waiver in employer-employee arbitration agreements).

Because the maintenance of a class action is not a substantive right, the Supreme Court has repeatedly held that, pursuant to the Rules Enabling Act, the procedural rights contemplated by Rule 23 must yield to substantive statutory rights, such as those set forth in the FAA. *See e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011) (citing the Rules Enabling Act and holding that a class of employees could not be certified under Rule 23 where the employer would "not be entitled to litigate its statutory defenses to individual claims"); *Ortiz*, 527 U.S. at 842, 845 (adopting "limiting construction" of Federal Rule of Civil Procedure 23 that, inter alia, "minimizes potential conflict with the Rules Enabling Act"); *Shady Grove Orthopedic Associates v. Allstate Ins*., 130 S.Ct. 1431 (2010); *Amchem Products*, 521 U.S. at 612-13.

In *D.R. Horton*, the Board held that "Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not." 357 NLRB No. 184, slip op. at p. 10. However, even if allowing employees to "act concertedly by invoking Rule 23" is required by the NLRA (which MasTec denies), the Board must enforce an arbitration agreement which contains an undisputed, voluntary opt-out clause, even if it contains a class waiver, as explained herein. Adopting a more restrictive policy that prohibits employers from including a class action waiver in voluntary arbitration agreements would directly conflict with the Rules Enabling Act, in addition to infringing upon the policies of the FAA, as described in the Supreme Court's decisions.

The NLRA, the FAA, and the Rules Enabling Act can be harmonized by holding that employees may voluntarily opt-out of an arbitration policy containing a class action waiver, if they so choose.

8. Arbitration Is A Mutually-Beneficial Means Of Dispute Resolution That Employees Should Be Free To Choose As Their Exclusive Means Of Resolving Workplace Disputes.

The AGC would have the Board believe arbitration is an undesirable forum. However,

the Board has long recognized the benefits of arbitration and the importance of arbitration as a method of enforcing collective bargaining agreement rights. *See e.g. Smurfit-Stone Container Corp*., 344 NLRB 658, 658-59 (2005); *United Technologies Corp*., 268 NLRB 557, 558-61 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 839-43 (1971). Moreover, in *D.R. Horton* the Board denied any "hostility or suspicion" of arbitration and instead noted that "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." 357 NLRB No. 184, slip op. at p. 13 (*citing United Steelworkers of America v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578 (1960); *Spielberg Mfg. Co*., 112 NLRB 1080, 1081 (1955)).

There are significant practical advantages for employees as well as employers with respect to arbitration. Arbitration allows employees to quickly and inexpensively receive awards that can be directly enforced without full appellate review. Additionally, an employee is more likely to have his or her "day in court," through arbitration because traditional litigation involves much more complicated pre-trial, trial and appellate procedures which can delay a case, dismiss the case on a technicality, or resolve the case by dispositive motions. *See* Lewis L. Maltby, Employment Arbitration: Is It Really Second-Class Justice?, DISPUTE RESOLUTION MAGAZINE, 23-24 (Fall 1999) (noting that employment discrimination cases are disposed of in federal court with much greater frequency pre-trial than in arbitration). Further, access to process is more readily available in arbitration than in court, with or without a lawyer, and irrespective of the size of the plaintiff's claim. Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 COLUM. HUM.RIGHTS L. REV. 29 (1998); Theodore J. St. Antoine, The Changing Role of Labor Arbitration, 76 IND. L. J. 83 (2001). In sum, specifically as to bilateral arbitration, the Supreme Court has repeatedly recognized that arbitration's mutual

benefits include its "streamlined proceedings" and its informality, which makes the process faster, less expensive, and less likely to generate procedural morass than final judgment. *Concepcion*, 131 S.Ct. at 1750-52; *Stolt-Nielsen*, 130 S. Ct. at 1768-71.

Because arbitration is a mutually beneficial means of dispute resolution, Section 7 should be interpreted and enforced in a way that harmonizes the NLRA with the FAA, preserving the practical benefits of arbitration.

9. MasTec Did Not Violate Section 8(a)(1) Of The Act By "Interfer[ing] With, Restrain[ing] or Coerc[ing]" Employees In The Exercise of Section 7 Rights.

As explained above, MasTec does not concede that the right to engage in a class or collective action is a protected, concerted activity under Section 7 of the Act. Participation in class or collective actions is a procedural right afforded by federal and state courts subject to their own rules and statutory enactments. Nonetheless, the AGC failed to establish the elements legally necessary for a violation of Section 8(a)(1) even if participation in a class or collective action were held to be a Section 7 right.

To establish a violation of the Act, Section 8(a)(1) requires proof that an employer has "interfere[d] with, restrain[ed], or coerce[ed] employees in the exercise of the rights guaranteed" in Section 7 of the NLRA. 29 U.S.C. § 158(a)(1) (emphasis added). Section 8(a)(1) is not violated when employees refrain from exercising their Section 7 rights on their own volition and without any coercion or interference by their employer. *Perkins Machine Co*., 141 NLRB 697, 700 (1963) (employer did not violate Section 8(a)(1) where there was no "threat of reprisal or promise of benefit" in the event the employees decided not to resign from the Union).

Hobbs was given a voluntary choice to have disputes decided through arbitration and forgo participation in a class or collective action. As explained above, Hobbs had 30-days to make his decision. He was informed that his choice would not in any way affect his employment

relationship with MasTec, his decision could be made without fear of retaliation, he could consult an attorney, and he could opt out without even having to inform his immediate manager. The record reflects that the Company did not interfere with, restrain, or coerce Hobbs in making his choice whether to forego the opportunity to participate in class or collective actions as part of the Policy. Based on the record, the AGC has presented no evidence of interference, restraint or coercion regarding the voluntary decision to forego participation in class or collective actions.

In summary, to find a violation of Section 8(a)(1), the AGC needs to prove the Company interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. Because participation in a class or collective action is not protected concerted activity under the facts of this case, the alleged violation automatically fails. Separately, should the Board conclude that a Section 7 right is involved in this case, the record is completely void of any evidence of interference, restraint or coercion. This alone defeats any claim that Section 8(a)(1) is violated.

F. D.R. Horton Was Wrongly Decided

Though *D.R. Horton* does not extend to the facts of this case, MasTec respectfully submits *D.R. Horton* was wrongly decided, as even an arbitration policy with a class action waiver that *is* a mandatory condition of employment must be enforced under the Federal Arbitration Act and United States Supreme Court precedent.

1. *Horton* Is Inconsistent With The FAA And Contrary To Binding Supreme Court Precedent.

D.R. Horton is critically flawed because of its failure to accommodate the policies Congress advanced in the FAA. The FAA encourages private alternative dispute resolution, with informal, inexpensive, and bilateral arbitration as its focus. The FAA has its own prerogatives, and the Supreme Court has held that because of the FAA's mandate, an arbitration agreement

containing a class waiver must be enforced as written. *Concepcion*, 131 S. Ct. at 1748-53. The Supreme Court held in *Concepcion* that the FAA preempts any state law that prohibits a class waiver in an arbitration agreement. *Id*. at 1753. The Court reasoned 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. According to *Concepcion*, the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms — including provisions that waive the right to pursue class or collective relief in arbitration.

Exceptions to the FAA's reach apply only when the party opposing arbitration can show an express contrary congressional command in another federal statute, and such a command does not exist when, as here, the NLRA is silent on the question of whether bilateral arbitration only may be mandated by an employment arbitration agreement governed by the FAA. *CompuCredit*, 132 S. Ct. at 669.

The Supreme Court reaffirmed these principles shortly after the *D.R. Horton* decision in *CompuCredit*, 132 S. Ct. at 669 and, again, in *American Express Co.* In *CompuCredit*, the Court reiterated that the FAA "requires courts to enforce agreements to arbitrate according to their terms." *Id*. The Court emphasized that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id*. (citations omitted). In support of this conclusion, the Court relied upon *Gilmer* — an employment case arising under a federal statute. *Id*. at 669-71.

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies, and further held that a federal statute's silence on the subject of arbitration must lead to the enforcement of an

arbitration agreement in accordance with its terms. *Id*. at 672 n. 4. To meet this burden, a "congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *See id*. at 670-73. Thus, the Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id*. at 673.

Because *D.R. Horton* directly conflicts with the policies set forth in the FAA, it should be overturned by a properly constituted quorum.[8]

G. The Remedy Issued By The ALJ Is Impermissible.

Instead of requiring the Employer to cease and desist its maintenance and enforcement of the Agreement on a prospective basis, the ALJ impermissibly issued a remedial order that

[8] State and federal courts across the United States have rejected *D.R. Horton* in light of its irresolvable conflict with the FAA. *See, e.g., Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, *26-28 (N.D. Cal. April 13, 2012) (granting employer's motion to compel and rejecting plaintiff employee's contention that class action waivers are not enforceable in employment disputes in light of the Board's reasoning in *D.R. Horton*); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 U.S. Dist. LEXIS 63985, *32-34 (N.D. Cal. May 7, 2012) (same); *Delock v. Securitas Security Services USA, Inc.*, 2012 U.S. Dist. LEXIS 107117, *12-18 (E.D. Ark. August 1, 2012) (noting that *D.R. Horton* Board "did not have the benefit of *CompuCredit"* and finding that "[a] fair reading of the FAA and the precedents, on the other hand, requires this Court to enforce the [parties'] agreement to arbitrate all employment-related disputes individually, not collectively" and that the FAA prevails in the conflict with the NLRA); *Spears v. Waffle House*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012) (rejecting argument that *D.R. Horton* rendered arbitration agreement's delegation clause unenforceable even though agreement included a waiver of class claims); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573, *6-7 (M.D. Fla. May 18, 2012) (finding collective action waiver in arbitration agreement enforceable despite plaintiff's argument that *D.R. Horton* renders the agreement unenforceable); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 5277 (S.D. N.Y. Jan. 13, 2012) (declining to follow *D.R. Horton*); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (M.D. Ga. February 9, 2012) (finding that *D.R. Horton* did not "meaningfully apply" to the facts of the case, which involved the validity of employee class action waiver agreements); *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1134 (2012) (declining to follow *D.R. Horton* and noting that *D.R. Horton* reflected a "novel interpretation of section 7 and the FAA"); *Iskanian v. CLS Transportation Los Angeles LLC*, 206 Cal. App. 4th 949, 962 (2012) (declining to follow *D.R. Horton* and noting that "the NLRB's attempt to read into the NLRA a prohibition of class action waivers is contrary to [*CompuCredit*]"); *Truly Nolen of America v. Superior Court,* 2012 Cal. App. LEXIS 871, *50-51 (August 9, 2012) ("As have other courts, we find the NLRB's conclusion on the preemption issue to be unpersuasive and we decline to follow it. The United States Supreme Court has held that arbitration agreements pertaining to statutory claims must be enforced according to their terms, absent an express 'contrary congressional command' overriding the FAA.' In light of this clear authority, *Horton*'s analysis is unsupported") (internal citations omitted).

effectively seeks to undo earlier rulings by Article III courts and deprives MasTec of the right to make legal arguments in support of the enforceability of the Agreement. Such a sweeping remedial order is unprecedented and beyond the Board's authority. Moreover, given the novelty of the ALJ's decision (and the *D.R. Horton* decision), retroactive relief is not appropriate in this case.

1. The Retroactive Remedies Sought Exceed the Board's Authority

By compelling MasTec to withdraw its legal position regarding the enforceability of the Agreement, the ALJ effectively compels the Company to seek to negate earlier Article III court determinations regarding the enforceability of the Agreement, which were arrived at by duly-appointed Judges who reviewed legal arguments made by many parties, and to forfeit well-accepted legal arguments regarding the validity of the Agreement. The remedy is not permissible because it essentially strips MasTec of its due process right to be heard with respect to its argument that the Agreement is lawful and enforceable.

It is well established that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *See, e.g., Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) (*quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). By requiring the Company to concede the issue of the enforceability of the Policy's class or collective action waiver in cases where courts have already determined the Policy and waiver to be enforceable, the ALJ's remedial order deprives the Company of its due process right to be fully heard on the issue.

The Board cannot compel courts to capitulate to the Board's interpretation of the Act, which is what the ALJ's Order effectively seeks to accomplish by precluding the Employer from arguing in favor of the validity of the Agreement. Courts are free to reject the Board's interpretation of the Act. Indeed, as explained above, several courts have upheld class or

collective action waivers and have expressly refused to follow the Board's decision in *D.R. Horton*.

Moreover, the remedial order ignores the fact that the courts were already under an obligation to determine whether the Policy violated the Act, assuming the issue arose. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982) ("While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates [the Act]."). Indeed, the courts could not enforce any agreements that waived, discouraged, or forbade an employee's exercise of the rights provided in the NLRA. *See National Licorice Co. v. NLRB*, 309 U.S. 350, 360, 364 (1940); *J.I. Case v. NLRB*, 321 U.S. 332, 337 (1944); *Jasso*, 2012 U.S. Dist. LEXIS 52538 at *22.

2. A Retroactive Remedy In This Case Is Inappropriate.

Under Board law, "the propriety of retroactive application [of a ruling] is determined by balancing any ill effects of retroactive activity against 'the mischief of producing a result which is contrary to statutory design or to legal and equitable principles.'" *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), enfd. *sub nom. Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988). Retroactive application of a ruling is not warranted when the Board issues a decision that "marks a significant departure from preexisting law." *Dana Corp*., 351 NLRB 434, 443-44 (2007), overruled on other grounds by *Lamons Gasket Co*., 357 NLRB No. 72 (2011). The reasoning for not retroactively applying new policies and standards in cases such as this is sound. It is unfair to penalize a party for its past actions if the party could not have reasonably understood at the time of the activity at issue that such activity violated the Act. *Id*. It is also inequitable to punish a party for past actions that were undertaken in reliance on the law at the time the action was taken. *Id*.

Even if the Board determines that *D.R. Horton* controls this case, it is important to note

that *D.R. Horton* was a case of first impression before the Board. Prior to *D.R. Horton*, there was no precedent finding class action waivers invalid under the Act. In fact, the previous General Counsel of the Board issued a memorandum stating that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06.) In the memorandum, the former General Counsel opined that "[s]o long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found." *Id*. at p. 7.

As such, prior to January 3, 2012, the date the Board issued *D.R. Horton*, there was no authority remotely suggesting that class action waivers violated the Act per se. Moreover, there is still no authority suggesting voluntary, bilateral arbitration agreements in which an employer and employee agree to resolve all claims through individual arbitration are unlawful, as the Board expressly declined to reach that question in *D.R. Horton*. 357 NLRB No. 183, slip op. at p. 13, n. 28.

It is telling that in the *D.R. Horton* decision, the Board made no reference whatsoever to retroactive application of its ruling. Indeed, there is nothing in the case that suggests that the Board intended to enforce *D.R. Horton* retroactively. Rather, in *D.R. Horton*, the Board directed the employer to: (1) cease and desist from enforcing the MAA; (2) rescind or revise the MAA; (3) notify its employees of the rescission or revision of the MAA; and (4) post a notice. *D.R. Horton*, 357 NLRB No. 184, slip op. at pp. 13-14. The Board did not require D.R. Horton to notify all judicial and arbitral forums in which D.R. Horton had enforced the MAA that the

company "no longer oppose[d] the seeking of collective or class action type relief."

In this case, retroactive application of any remedy is improper. As explained by the Supreme Court in its recent decision, *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2168 (2012), "where . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *Id*. at 2168. The Court further noted, "while it may be 'possible for an entire industry to be in violation of the [law] for a long time without the [governmental enforcement agency] noticing,' the 'more plausible hypothesis' is that the [agency] did not think the industry's practice was unlawful." *Id*. *quoting Yi v. Sterling Collision Centers, Inc*., 480 F.3d 505, 510-511 (7th Cir. 2007). Here, the Board did not take a position with respect to class action waivers until January of 2012. It is manifestly unjust to penalize employers based on the Board's novel and recent *D.R. Horton* ruling.

Unlike the circumstances such as those at issue *John Deklewa & Sons*, there are no significant countervailing interests in this case justifying retroactive application. In *John Deklewa & Sons*, the Board determined that the statutory benefits for employees, employers, and unions in the constructive industry arising out of the Board's changes in its interpretation of Section 8(f) far outweighed any hardships resulting from immediate imposition of the changes. Thus, the Board decided to apply the change in Section 8(f) retroactively. *John Deklewa & Sons*, 282 NLRB at 1389. The Board's determination in that case simply required employers to honor Section 8(f) agreements through the duration of such agreements, which the Board concluded to be an appropriate remedy in order to stabilize existing bargaining relationships entered into pursuant to Section 8(f). *Id*. at 1377-78. Here, by contrast, the remedial order would invalidate potentially thousands of agreements that MasTec and its employees voluntarily

entered into in reasonable reliance of the law as it existed. Interests favoring retroactive application such as the restoration or preservation of "employee free choice" and "labor relations stability" are not applicable in this case because the agreements at issue are already voluntarily and MasTec does not have any bargaining obligations with respect to any labor organizations. Accordingly, the balance of the equities weighs strongly against a retroactive remedy that requires the Company to undo its prior efforts to enforce the Dispute Resolution Policy.

IV. CONCLUSION

For the foregoing reasons and based on the record evidence, MasTec respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the Employer. As explained above, it must be found that MasTec's Agreement does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act and the AGC's Complaint must be dismissed.

Respectfully submitted,

LITTLER MENDELSON, P.C.

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Date: June 28, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2013, a copy of Respondent Mastec Services Company, Inc.'s Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order was served on the following:

Via E-Filing	Executive Secretary National Labor Relations Board 1099 14th Street, N.W, Washington, D.C. 20570
Via E-Filing:	Division of Judges National Labor Relations Board Division of Judges 410 West Peachtree Street, N.W. Suite 1708 Atlanta, GA 30308-3510
Via E-Filing:	Martha Kinard Regional Director, Region 16 National Labor Relations Board Room 8A24, Federal Office Bldg. 819 Taylor Street Fort Worth, TX 76102
Via E-Mail: (and Certified Mail)	Trans Tran 3050 Post Oak Blvd. Suite 1720 Houston, TX 77056-6548 *Charging Party's Counsel*
Via Certified Mail:	Noble Hobbs 4204 Golden Horn Lane Fort Worth, TX 76123-2568 *Charging Party*

/s/ Steven Kaplan
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