UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHESAPEAKE ENERGY CORPORATION and its wholly owned subsidiary CHESAPEAKE OPERATING, INC.

Case 14-CA-100530

and

BRUCE ESCOVEDO, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. Statement of Exceptions to Decision of the Administrative Law Judge

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel respectfully submits these limited exceptions to the decision of Administrative Law Judge Bruce Rosenstein (ALJD) in the above-captioned case. Specifically, Counsel for the General Counsel excepts to the following:

- To the ALJ's conclusion, "I find in agreement with Respondents that the Board's position that class and collective action waivers in arbitration agreements violate Section 8(a)(1) of the Act cannot be sustained." (ALJD: 9: 40-44).[1]

II. Procedural History

On March 15, 2013, Bruce Escovedo, an individual (Charging Party), filed an unfair labor practice charge against Chesapeake Operating, Inc. (Respondent Chesapeake Operating), in Case 14-CA-100530. (JM, Exhs. A and B). The charge was amended on June 17, 2013, alleging that Respondent Chesapeake Operating and its parent company Chesapeake Energy Corporation (Respondent Chesapeake Energy) violated Section 8(a)(1) of the National Labor Relations Act (Act) by maintaining a mandatory arbitration policy that (1) precludes access to the National Labor Relations Board (Board) and (2) precludes employees from filing class or collective actions. (JM, Exhs. C and D).

On July 30, 2013, the Regional Director for Region 14 issued a Complaint and Notice of Hearing alleging that Respondents violated the Act as described above. (JM, Exh. E) On August 12, 2013, Respondents filed their initial Answer in response to the Complaint. On September 9, 2013, Respondents filed an Amended Answer denying any violations of the Act and setting forth their defenses. (JM, Exh. F). On September 12, 2013, Respondents, the Charging Party and

[1] References to the Administrative Law Judges' Decision will be denoted by "ALJD" followed by page and line numbers. References to the parties' Joint Motion and Stipulation of Facts will be denoted by "JM" followed by applicable exhibit, page and paragraph numbers.

Counsel for the Acting General Counsel filed a Joint Motion and Stipulation of Facts for this matter to be heard by Judge Rosenstein by stipulated record. On September 16, 2013, Judge Rosenstein granted the parties' motion, setting a briefing deadline of October 22, 2013. On October 17, 2013, Judge Rosenstein rescheduled the deadline for submitting briefs to November 1, 2013. On November 8, 2013, Judge Rosenstein issued his ALJD concluding that Respondents DRP violated Section 8(a)(1) of the Act by interfering with employees' access to the Board and its process, but also that Respondents' DRP did not violate the Act by prohibiting employees' class and collective action.

III. Pertinent Facts

Respondent Chesapeake Energy has been a corporation with an office and place of business located in Oklahoma City, Oklahoma, and through its subsidiaries and related companies, is a producer of natural gas, natural gas liquids and oil. Respondent Chesapeake Operating, a corporation and subsidiary of Respondent Chesapeake Energy, also maintains an office and place of business in Oklahoma City, Oklahoma, and at all relevant times has been engaged in the business of oil and gas exploration, production and distribution.

The parties stipulated that at all relevant times since July 2011, Respondents have required their employees to sign Respondents' Arbitration Agreement and Dispute Resolution Policy (DRP). (JM, p. 3-4 at para. 4 and 5(c); JM, Exh. G). Respondents require all employees to execute the DRP set forth at Exhibit G and consider the document to be binding. Id. Respondents assert within the parties' stipulated record that Charging Party Bruce Escovedo electronically signed the DRP on July 19, 2011, and as with all of Respondents' employees, is bound by the agreement. Id.

Respondents stipulated that the DRP applies to both Respondent Chesapeake Energy and Respondent Chesapeake Operating. This fact is supported by paragraph 1 of the DRP executed by the Charging Party, which reads,

> "At-Will Employment: It is hereby agreed by Bruce Escovedo ("Employee") and Chesapeake Energy Corporation, and all its wholly-owned or related entities and affiliates (see attached list of entities, collectively referred to as the "Company"), that Employee's employment is "at will" in nature, meaning that it can be terminated by the company or the Employee at any time, with or without cause, and with or without notice unless the Employee and the company have entered into a separate written employment agreement specifying a set term of employment which is signed by both parties." (JM, Exh. G).

The list of subsidiaries listed on the fourth page of the DRP includes Respondent Chesapeake Operating. (JM, Exh. G, p. 4).

Respondents' DRP contains language that mandates that all disputes between the employee in question and Respondents be resolved through binding arbitration. Paragraph 2 of the DRP, "Mandatory Dispute Resolution Policy" reads,

> "Employee acknowledges that the Company has a mandatory Dispute Resolution Policy ("DRP") which requires binding arbitration to resolve all disputes between the Employee and the Company including any such disputes which may arise out of or relate to employment (see also paragraph 5 below). Employee acknowledges that the DRP is to be broadly interpreted to apply to any dispute which Employee and the Company may have between each other, to include disputes over whether claims are covered by the DRP. Employee also acknowledges that the DRP provides mutual benefits for Employee and the Company, to include faster and more economical resolution of employment related disputes." (JM, Exh. G, p.1 at para. 2).

Paragraph 5 of the DRP describes the "Claims Covered by DRP", including in relevant part,

> "A) Employee acknowledges that any claim or dispute between the Employee and the Company including any claim or dispute in any way related to or arising out of his/her employment with the Company is subject to binding arbitration under the DRP, to specifically include discrimination, harassment or retaliation claims, whether under federal or state law; by way of example only, claims under...*the National Labor Relations Act* (emphasis added). B) Employee acknowledges that any claims Employee may have relating to or arising out of the employment relationship, to include application for employment, actual employment, termination of employment or events occurring

after termination, shall be subject to binding arbitration under the DRP. C) Employee acknowledges that any claim or dispute Employee may have against the Company includes claims or disputes with the Company's owners, directors, officers, managers, other employees, agents, representatives, and affiliated parties and entities, including affiliated parties relating to the administration of the Company's employee benefit and health plans are subject to binding arbitration under the DRP." (JM, Exh. G, p. 1 at para. 5).

Respondents' DRP also includes language that precludes employees from engaging in class or collective actions. Paragraph 9 of the DRP reads,

"No Class or Collective Actions Permitted: Employee agrees that he/she shall have no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or a private attorney general capacity on behalf of a class of persons or the general public. No class, collective or representative actions are thus allowed to be arbitrated pursuant to the DRP and Employee agrees that he/she must pursue any claims that they may have solely on an individual basis through arbitration." (JM, Exh. G, p. 2 at para. 9).

IV. Argument

Counsel for the General Counsel excepts to the Administrative Law Judge's decision that Respondents' DRP does not violate the Act by precluding class and collective action, as set forth by the Board in *D.R. Horton*, 357 NLRB No. 184 (January 3, 2012), enf. denied in part ___F.3d__, 2013 WL 6231617 (December 3, 2013).

A. American Express v. Italian Colors

The Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (June 20, 2013), relied upon by the ALJ (ALJD 9:10-44), does not affect this issue. The Court's decision in *American Express* was premised on its conclusion that "[n]o contrary congressional command" required the Court to reject the waiver of class arbitration at issue there, based on its finding that the "antitrust laws do not 'evinc[e] an intention to preclude a waiver' of class-action procedure." *Id.*, 133 S.Ct. at 2309, quoting *Mitsubishi*

Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628 (1985). The Court further declined to invalidate the arbitration agreement at issue in *American Express* based on the respondents' argument that it prevented the "effective vindication" of a federal statutory right. 133 S.Ct. at 2310-11, citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, (1991). Based on these findings, the Board's analysis of the NLRA is properly distinguished from the Court's analysis of anti-trust law. As the Board stated in *D.R. Horton*, "[t]he question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See *Gilmer*, supra. Rather, the issue here is whether the MAA's categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." 357 NLRB No. 184, slip op. at 9 (emphasis in original; footnote omitted).

Significantly, *American Express* did not address another basis for invalidating an arbitration agreement raised in *Gilmer*, i.e., where there is an "inherent conflict" between that arbitration and the underlying purposes of another Federal statute. 500 U.S. at 26 (if Congress intended to preclude a waiver of a judicial forum for ADEA claims, "it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes"). This is the aspect of *Gilmer* that is most relevant to *D.R. Horton*, 357 NLRB No. 184, slip op. at 11 ("under *Gilmer*, there is an inherent conflict between the NLRA and the MAA's waiver of the right to proceed collectively in any forum"). Therefore, *American Express* did not in any way affect the Board's holding in *D.R. Horton.*

B. Federal Arbitration Act

In his *American Express* analysis, and notations of other Supreme Court cases involving the enforceability of arbitration agreements, the ALJ erred in finding that this case presents a

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

The Board also emphasized that finding an arbitration policy such as the one presented here unlawful does not conflict with the FAA because "the intent of the FAA was to leave substantive rights undisturbed." *Id.* The mandatory arbitration agreement here clearly requires employees to forego substantive rights under the NLRA—namely, employees' right to pursue employment-related claims in a collective or class action—and the Board has so held. *Id.*, slip. op. at 10-11. Thus, the mandatory arbitration agreement here is unlawful not because it involves arbitration or specifies particular litigation procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in collective legal activity in any forum.

The ALJ further erred in finding that the mandatory arbitration agreement here runs afoul of the Supreme Court's decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758 (2010), and *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).[2] In *D.R.*

[2] The ALJ also cited *Rent-A-Center, West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010), for the proposition that the FAA reflects the overarching principle that arbitration is a matter of contract, and *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221 (1985), for its statement that the FAA

Horton, the Board specifically addressed these two decisions, which stated that a party cannot be required, without its consent, to submit to arbitration on a classwide basis.[3] These cases establish that an arbitrator cannot order class arbitration unless there is a contractual basis for concluding that the parties affirmatively agreed to do so.

The Board found that these cases did not affect its application of the Act, as it was not holding that employers were *required* to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. Instead, the Board held only that employers may not compel employees to waive their Section 7 right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. Thus, so long as the employer leaves open some judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. 357 NLRB No. 184, slip op. at 12.

Thus, *D.R. Horton* does not *compel* class arbitration, as Respondent is free to limit its arbitration program to individual arbitration, so long as employees remain free to exercise their Section 7 right to engage in collective legal activity in court and are not compelled to only act individually. Any such policy would be entirely permissible under the FAA and would not run afoul of either *Stolt-Nielsen* or *AT&T*. While *Stolt-Nielsen* and *AT&T* make it clear that bilateral arbitration is *favored* under the FAA, neither of these decisions suggests that it is *compelled.*

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applies even for claims alleging a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command. As we do not disagree with these general principles, but only with the ALJ's application of them here, we need not address these cases further.

[3] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 1775–1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement's arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1751–1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA).

Indeed, *Stolt-Nielsen* makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. 130 S.Ct. at 1774-75. Thus, any claimed infringement on the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA, without offending those inherent in the FAA. Put another way, requiring an employer to adhere to the NLRA is consistent with the FAA.

Finally, as the *D.R. Horton* Board made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the NLRA and the FAA, "the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute." 357 NLRB No. 184, slip. op. at 12, n. 26.[4] For the reasons stated here, and for those iterated by the Board in *D.R. Horton*, finding Respondent's mandatory arbitration agreement unlawful under the Act will not pose a conflict with the FAA.

In *D.R. Horton*, the Board held that finding a mandatory arbitration agreement to be unlawful, "consistent with the well established interpretation of the NLRA and with core

[4] While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, the legislative history and the Supreme Court make clear that the relevant date of enactment is in 1925. See, e.g., H.R. Rep. No. 80-251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing law); H.R. Rep. No. 80-255 (1947), reprinted in 1947 U.S.C.C.A.N. 1515 (same); *Compucredit Corp. v. Greenwood*, ____ U.S. ____, 132 S.Ct. 665, 668, 2012 WL 43514 (January 10, 2012) ("the Federal Arbitration Act (FAA), enacted in 1925"); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 ("[t]he FAA was enacted in 1925," "class arbitration was not even envisioned by Congress when it passed the FAA in 1925"); *Vaden v. Discover Bank*, 556 U.S. 49, 58, 129 S.Ct. 1262, 1271 (2009) ("[i]n 1925, Congress enacted the FAA"). The relevant date of enactment for the NLRA is 1935.

principles of Federal labor policy, does 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." *Id.*, slip op. at 8. Initially, the Board noted that: (1) under the FAA, "arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration;" and (2) mandatory individual arbitration agreements prohibit employees from exercising their substantive statutory right to engage in collective legal action. *Id.*, slip op. at 9, 9-11. Thus, the Board emphasized that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *Id.*, slip op. at 11. Rather, a refusal to enforce a mandatory arbitration agreement's class action waiver would directly further core policies underlying the NLRA, and is consistent with the FAA. *Ibid.* Therefore, "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." *Id.*, slip op. at 12. Finally, the Board noted in *D.R. Horton* that even if there were a direct conflict between the NLRA and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicate that the FAA would have to yield. *Ibid.*

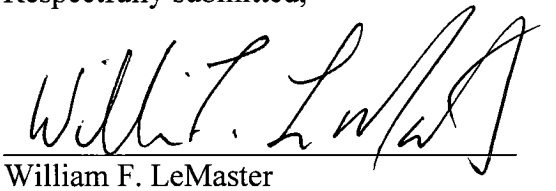
For all these reasons, the Board in *D.R. Horton* made clear that nothing in the FAA precludes finding mandatory arbitration agreements that prohibit collective and class litigation to be unlawful. Therefore, nothing supports the ALJ's erroneous conclusion that Respondents' DRP lawfully prohibits employees' protected right under the Act to engage in collective and class legal action.

V. Conclusion

Counsel for the General Counsel respectfully submits that the above-demonstrated facts and arguments establish that the ALJ erred by concluding that Respondents' DRP does not violate Section 8(a)(1) of the Act by precluding employee collective and class action. The Board should affirm the ALJD in all other respects.

Dated: December 4, 2013

Respectfully submitted,



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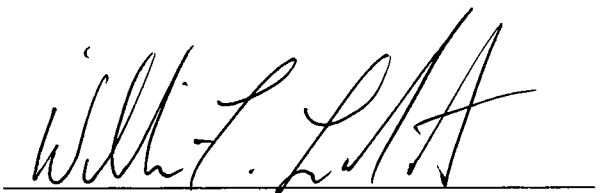
STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the General Counsel's Limited Exceptions on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Board with service by electronic mail on the parties identified below.

Dated: December 4, 2013



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