UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

FUJI FOOD PRODUCTS, INC. And NANCY SANDRA GONZALEZ, an Individual	Case 21-CA-095997

RESPONDENT FUJI FOOD PRODUCTS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Respondent Fuji Food Products, Inc. ("Respondent") submits this brief in support of its exceptions to the Decision of the Administrative Law Judge ("ALJ") dated July 15, 2014. In particular, Respondent excepts to the ALJ's Decision that Respondent violated Section 8(a)(1) and 2(6) and (7) of the National Labor Relations Act (the "Act") by: (1) requesting a state court to compel individual arbitration of the class-action wage and our lawsuit filed against it by Charging Party and former employee Nancy Sandra Gonzalez, pursuant to the mandatory arbitration provisions of the "Confidential Information and Inventions Agreement" ("CIIA") signed by Charging Party as a condition of employment; and (2) maintaining provisions in the CIIA stating that employees must submit employee-related disputes to final and binding arbitration. Based on the undisputed facts and governing law, there is no proper basis for the ALJ's decision and the Board should not make the ALJ's Decision its order.

II. STATEMENT OF PROCEEDINGS

This case arises from an unfair labor practice charge filed by Nancy Sandra Gonzalez ("Gonzalez" or "Charging Party") on January 7, 2013, alleging that Respondent violated Sections 7 and 8(a)(1) of the NLRA. Specifically, in her charge and amended charge, Gonzalez alleges that "[d]uring [her] employment, employees were required, as a condition of employment, to sign a handbook agreeing to a mandatory arbitration provision. Subsequent to her employment she attempted to engage in a class wide arbitration. [Respondent] maintains that this provision prohibits class wide arbitration." (Exhibits 1 and 2 to Stipulation of Facts.)

On July 8, 2013, the Acting General Counsel issued a Complaint and Notice of Hearing (Complaint). (Exhibit 3 to Stipulation of Facts). On July 19, 2013, Respondent timely filed its Answer to the Complaint. (Exhibit 4 to Stipulation of Facts.) On March 24, 2014, the parties

submitted their Stipulation of Facts, Motion to Submit Case on Stipulation, and Motion Requesting to Forgo Submissions of Short Position Statements to Administrative Law Judge Honorable Jeffrey D. Wedekind, which were granted. Thereafter, the parties submitted post-hearing briefs by April 29, 2014. On July 15, 2014, the ALJ issued his Decision.

III. SUMMARY OF FACTS

A. Parties

Gonzalez was employed by Respondent in California as a non-exempt Logistics Warehouse Assistant from about July 10, 2009 to October 14, 2009. (Stipulation of Facts, Paragraphs 5-6(a)). Thereafter, Gonzalez was re-employed by Respondent from October 6, 2010 to July 28, 2011. (Stipulation of Facts, Paragraphs 6(a) and 6(c)). Accordingly, at the time that Gonzalez filed the underlying charge on January 7, 2013, she had not been employed by Respondent for more than 17 months.

B. Gonzalez Voluntarily Executed An Arbitration Agreement, Which Does Not Expressly Waive Her Rights to Bring Class or Collective Actions and Does Not Prevent Her from Filing Charges with the NLRB

On July 10, 2009, during her first period of employment with Respondent, Gonzalez voluntarily accepted and agreed to Respondent's Confidential Information and Inventions Agreement ("CIIA"). (Exhibit 5 to Stipulation of Facts). Under the CIIA, Gonzalez agreed to resolve employment-related disputes through binding arbitration. (Exhibit 5 to Stipulation of Facts). The CIIA provides in pertinent part:

> 10.1 Arbitration
>
> EXCEPT AS PROVIDED IN SECTION 10.2 BELOW, I AGREE THAT ANY DISPUTE OR CONTROVERSY ARISING OUT OF, RELATING TO, OR CONCERNING ANY INTERPRETATION, CONSTRUCTION, PERFORMANCE OR BREACH OF THIS AGREEMENT, SHALL BE SETTLED BY ARBITRATION TO BE HELD IN LOS ANGELES COUNTY,

CALIFORNIA, IN ACCORDANCE WITH THE RULES THEN IN EFFECT OF JAMS. THE ARBITRATOR MAY GRANT INJUNCTIONS OR OTHER RELIEF IN SUCH DISPUTE OR CONTROVERSY, THE DECISION OF THE ARBITRATOR SHALL BE FINAL, CONCLUSIVE AND BINDING ON THE PARTIES TO THE ARBITRATION. JUDGMENT MAY BE ENTERED IN THE ARBITRATOR'S DECISION IN ANY COURT HAVING JURISDICTION, THE COMPANY AND I SHALL EACH PAY ONE-HALF OF THE COSTS AND EXPENSES OF SUCH ARBITRATION, AND EACH OF US SHALL SEPARATELY PAY OUR COUNSEL FEES AND EXPENSES.

THIS ARBITRATION CLAUSE CONSTITUTES A WAIVER OF EMPLOYEE'S RIGHT TO A JURY TRIAL AND RELATES TO THE RESOLUTION OF ALL DISPUTES RELATING TO ALL ASPECTS OF THE EMPLOYER/EMPLOYEE RELATIONSHIP (EXCEPT AS PROVIDED IN SECTION 10.2 BELOW), INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING CLAIMS:

I. ANY AND ALL CLAIMS FOR WRONGFUL DISCHARGE OF EMPLOYMENT; BREACH OF CONTRACT, BOTH EXPRESS AND IMPLIED; NEGLIGENT OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; NEGLIGENT OR INTENTIONAL MISREPRESENTATION; NEGLIGENT OR INTENTIONAL INTERFERENCE WITH CONTRACT OR PROSPECTIVE ECONOMIC ADVANTAGE; AND DEFAMATION;

II. ANY AND ALL CLAIMS FOR VIOLATION OF ANY FEDERAL, STATE OR MUNICIPAL STATUTE, INCLUDING, BUT NOT LIMITED TO, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE CIVIL RIGHTS ACT OF 1991, THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, THE AMERICANS WITH DISABILITIES ACT OF 1990, THE FAIR LABOR STANDARDS ACT, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT, AND LABOR CODE SECTION 201, ET SEQ.;

III. ANY AND ALL CLAIMS ARISING OUT OF ANY OTHER LAWS AND REGULATIONS RELATING TO EMPLOYMENT OR EMPLOYMENT DISCRIMINATION.

10.2 Equitable Remedies.

I AGREE THAT IT WOULD BE IMPOSSIBLE OR INADEQUATE TO MEASURE AND CALCULATE THE COMPANY'S DAMAGES FROM ANY BREACH OF THE COVENANTS SET FORTH IN SECTIONS 2, 3, 4, 5, 7 AND 8 HEREIN. ACCORDINGLY, I AGREE THAT OF I BREACH ANY OF SUCH SECTIONS, THE COMPANY WILL HAVE AVAILABLE, IN

ADDITION TO ANY OTHER RIGHT OR REMEDY AVAILABLE, THE RIGHT TO OBTAIN AN INJUNCTION FROM A COURT OF COMPETENT JURISDICTION RESTRAINING SUCH BREACH OR THREATENED BREACH AND TO SPECIFIC PERFORMANCE OF ANY SUCH PROVISIONS OF THIS AGREEMENT. I FURTHER AGREE THAT NO BOND OR OTHER SECURITY SHALL BE REQUIRED IN OBTAINING SUCH EQUITABLE RELIEF AND HEREBY CONSENT TO THE ISSUANCE OF SUCH INJUNCTION AND TO THE ORDERING OF SPECIFIC PERFORMANCE.

10.3 Consideration

I UNDERSTAND THAT EACH PARTY'S PROMISE TO RESOLVE CLAIMS BY ARBITRATION IN ACCORDANCE WITH THE PROVISIONS OF THIS AGREEMENT, RATHER THAN THROUGH THE COURTS, IS CONSIDERATION FOR OTHER PARTY'S LIKE PROMISE. I FURTHER UNDERSTAND THAT I AM OFFERED EMPLOYMENT IN CONSIDERATION OF MY PROMISE TO ARBITRATE CLAIMS.

(Exhibit 5 to Stipulation of Facts.)

The CIIA does not expressly prohibit Gonzalez from asserting claims on behalf of other employees on a class-wide or collective basis. It is silent on the issue of class arbitration. Moreover, the CIIA does not expressly prevent an employee from filing a claim with the NLRB.

C. Respondent No Longer Requires Employees to Sign The CIIA

In connection with Gonzalez's re-employment by Respondent, on or about October 6, 2010, Gonzalez was required to sign an Employment Agreement. (Exhibit 6 to Stipulation of Facts; Stipulation of Facts, Paragraph 6(a).) In fact, by October 6, 2010, Respondent had ceased requiring newly-hired employees to sign the CIIA (Exhibit 5 to Stipulation of Facts), but instead had begun requiring the signing of the Employment Agreement, which does not contain an arbitration provision. (Exhibit 6 to Stipulation of Facts; Stipulation of Facts, Paragraph 7(a)). Only approximately three of Respondent's employees who were required to sign the CIIA have not signed the Employment Agreement (Exhibit 6 to Stipulation of Facts).

D. Gonzalez's Underlying Lawsuits

On June 28, 2012, almost one year after her employment with Respondent ended, Gonzalez filed a putative class action lawsuit against Respondent in Los Angeles Superior Court alleging wage-and-hour violations under California's Labor Code ("Class Action Lawsuit"). (Exhibit 7 to Stipulation of Facts.) On December 28, 2012, Respondent filed a motion to compel Gonzalez to arbitrate her claims in the Class Action Lawsuit pursuant to the arbitration provision in the CIIA. (Exhibit 11 to Stipulation of Facts.) As of the filing of the instant brief, the motion to compel in the Class Action Lawsuit remains pending before the Los Angeles Superior Court. (Stipulation of Facts, Paragraph 9(e).)

On July 13, 2012, Gonzalez filed another lawsuit in the Los Angeles County Superior Court (Case No. BC487714) against Respondent for purported sexual orientation discrimination (Orientation Lawsuit). (Stipulation of Facts, Paragraph 9(e).) Respondent also filed a motion to compel arbitration of Gonzalez's claims in the Orientation Lawsuit pursuant to the arbitration provision in the CIIA, but on September 20, 2013, the Court in the Orientation Lawsuit denied the motion to compel arbitration in that case, reasoning among other things, that the CIIA was superseded by the Employment Agreement Gonzalez signed when Respondent reemployed her in October 2010. (Exhibit 13 to Stipulation of Facts.)

IV. LEGAL ARGUMENT

A. The ALJ Failed to Find/Conclude That The Charging Party's NLRB Complaint Was Untimely. [Exception Nos. 9, 13, 14.]

The ALJ failed to find/conclude that Gonzalez's NLRB Complaint is untimely. [ALJ Decision, 4:25-6:2; 6:35-40; 7:5-8:17.] Section 10(b) of the NLRA provides that, "no complaint shall issue based on an unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. §160(b). In its controversial opinion of *D.R. Horton*, 357

NLRB No. 184 (2012), the Board itself recognized that any alleged unfair labor practice resulting from the arbitration provisions in the CIIA would have occurred when Gonzalez signed the CIIA on July 10, 2009, not at a later date when her employment ended, she filed the Class Action Lawsuit or Respondent moved the Los Angeles County Superior Court to compel arbitration.

It is clear from *D.R. Horton,* that the alleged unfair labor practice on which the Board focused in that decision was the employer's requirement that the employee enter into an arbitration agreement. The *D.R. Horton* decision provides in its very first sentence, as follows:

> In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes from filing joint, class, or collective claims addressing wages, hours or other working conditions against the employer in any forum, arbitral or judicial.

Id. at *1 (emphasis added).

Similarly, *Local Lodge 1424 v. NLRB (Bryan Manufacturing)*, 362 U.S. 411, 422 (1960), provides that the enforcement of the CIIA was "inescapably grounded" on its execution. Thus, because the act of requiring the execution of the CIIA was allegedly illegal, Respondent's subsequent use of the CIIA in litigation was just a natural and foreseeable effect thereof and cannot be found independently unlawful under the rationale of *Bryan Manufacturing. See NLRB v. Preston H. Haskell Co.,* 616 F.2d 136, 139-140 (5th Cir. 1980).

Here, Gonzalez did not file an unfair labor charge within six months of entering into the CIIA on July 10, 2009. (Exhibit 5 to Stipulation of Facts.) In fact, she did not file the underlying charge in this matter until January 7, 2013, approximately three and one-half years after she signed the CIIA. (Exhibit 1 to Stipulation of Facts.) Therefore, Gonzalez's charge is well beyond the six-month limitations period for filing an unfair labor practice and, therefore, the Complaint must be dismissed.

B. The ALJ Failed to Find/Conclude That The *D.R. Horton* Decision Does Not Control In This Case. [Exception Nos. 1, 2, 3, 5, 13, 14.]

The ALJ failed to find/conclude that the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012), is not controlling authority in this case. [ALJ Decision, 3:3-5; 3:14-19; 3:21-24; 3:37-35; 6:35-40; 7:5-8:17.] Even if the Board's decision in *D.R. Horton* remains good law after the Fifth's Circuit ruling as discussed below, the decision by its terms does not control in this case. Unlike the arbitration agreement at issue in *D.R. Horton*, the CIIA at issue here does not contain a provision banning class or collective actions. (Exhibit 5 to Stipulation of Facts.)

D.R. Horton only governs agreements in which an employer requires employees to waive any right to bring or participate in a class or collective action. In *D.R. Horton*, the employer required each new and current employee to enter into a Mutual Arbitration Agreement (MAA), through which they agreed to not pursue a class or collective litigation of claims in any forum, arbitral or judicial. *D.R. Horton*, 357 NLRB No. 184, at *1. In deciding whether the MMA violated the NLRA, the Board held that "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 *7. Thus, according to the Board, the employer violated the NLRA by requiring employees to waive their rights to engage in concerted activity as a condition of employment.

In the opinion, the Board repeatedly specified that the opinion only addressed the lawfulness of mandatory class waivers. The Board specifically noted the limited reach of its holding in *D.R. Horton* by stating, "We emphasize the limits of our holding and its basis. Only a small percentage of arbitration agreements are potentially implicated by the holding in this case... only those agreements that would be reasonably read to bar protected, concerted activity are vulnerable. For example, an agreement requiring arbitration of any individual employment-

related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA...." *D.R. Horton*, 357 NLRB No. 184 at *12-13. The Board declined to reach "the more difficult question" of whether an employer may enter into an agreement with an individual employee "to resolve either a particular dispute or all potential disputes through non-class arbitration rather than litigation in court." *Id.* at *13 n. 28.

Thus, *D.R. Horton* does not address the situation presented here: whether a voluntary arbitration agreement, which does not contain a class/collective action waiver, to resolve all employment related disputes on an individual basis violates the NLRA. Instead, the decision only controls circumstances where an employer mandated arbitration agreement contains an express class/collective action waiver. Accordingly, there is no Board precedent holding that voluntary arbitration agreements in which an employer and employee agree to resolve claims through individual arbitration, as is the case with the CIIA at issue here, are unlawful.

C. The ALJ Failed To Find/Conclude That The Fifth Circuit Has Overruled *D.R. Horton* And That The Decision Conflicts With The Federal Arbitration Act and U.S. Supreme Court Precedent. [Exception Nos. 1, 2, 4, 5, 6, 13, 14.]

The ALJ failed to find/conclude that the Fifth Circuit has overruled *D.R. Horton* and that the Decision conflicts with the Federal Arbitration Act and U.S. Supreme Court precedent. [ALJ Decision, 3:3-5; 3:14-19; 3:21-24; 3:27-35; 6:35-40; 7:5-8:17.] On December 3, 2013, the Fifth Circuit Court of Appeals overruled the Board's decision in *D.R. Horton*, concluding that "the Board's decision did not give proper weight to the Federal Arbitration Act." *D. R. Horton v. NLRB*, 737 F.3d 344, 348 (5th Cir. 2013). The Fifth Circuit held that that the Federal Arbitration Act ("FAA") permits employers and employees to enter into individual arbitration agreements with class action waivers, irrespective of the employees' rights under the NLRA. Specifically, the Fifth Circuit found that, "Like the statute in *Concepcion*, the Board's interpretation prohibits class-action waivers. While the Board's interpretation is facially neutral – requiring that

employees have access to collective procedures in an arbitral or judicial forum – the effect of this interpretation is to disfavor arbitration." *Id.* at 360.

The Fifth Circuit noted that "[c]ase law under the FAA points us in a different direction than the course taken by the Board." *Id.* at 357. As the Court explained, the use of class action procedures is not a substantive right. *Id.* Following *AT&T Mobility LLC v. Concepcion*, 131S.Ct. 1740 (2011) ("*Concepcion*"), the Fifth Circuit held that "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton,* 737 F.3d at 360. Moreover, the Court noted that "[t]he NLRA does not explicitly provide for such collective action, much less the procedures such an action would employ. 29 U.S.C. §158. Thus, there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* "The legislative history also does not provide for a congressional command to override the FAA." *Id.* at 361.

Prior to the Fifth Circuit's opinion, other federal Circuit Court of Appeals opinions had also reviewed and rejected the Board's decision in *D.R. Horton.* In *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-1055 (8th Cir. 2013) the Eight Circuit Court of Appeals declined to follow *D.R. Horton* because the U.S. Supreme Court expressly held in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012), that the FAA requires governing bodies to enforce arbitration agreements according to their terms absent a contrary Congressional command and such a command does not exist in relation to the NLRA. Similarly, in a per curiam decision, the Ninth Circuit Court of Appeals founds that "*D.R. Horton* ... conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA]. ... [T]he Supreme Court recently reiterated that courts must rigorously enforce arbitration agreements according to their terms ... unless the FAA's mandate has been overridden by a

contrary congressional; command. ... Congress, however, did not expressly provide that it was overriding any provision of the FAA when it enacted the NLRA or the Norris-LaGuardia Act." *Richards v. Ernst & Young*, 734 F.3d 871, 874 (9th Cir. 2013) (internal quotations and citations omitted).

Moreover, since the NLRB issued its decision in *D.R. Horton*, numerous state and federal courts have rejected its reasoning and refused to apply it to deny enforcing otherwise proper arbitration agreements that required individual arbitration. *See Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012) ("The *Horton* decision is neither binding nor subject to deference, and is inconsistent with Fifth Circuit and Supreme Court authority."); *Tenet HealthSystem Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012) (rejecting *D.R. Horton* because "the NLRB has no special competence or experience interpreting the FAA" and many district courts "have declined to adopt its rationale altogether in the face of conflicting Supreme Court precedent, statutory schemes, and questions over its precedential value"); *Reyes v. Liberman Broad., Inc.*, 208 Cal.App.4th 1537, 1560 (2012) ("California authority finds *D.R. Horton* . . . unpersuasive."); *Truly Nolen of Am. v. Superior Court*, 208 Cal.App.4th 487, 514 (2012) ("[W]e find the NLRB's conclusion on the [FAA] preemption issue to be unpersuasive and we decline to follow it."); *Delock v. Securitas Sec. Servs. USA, Inc.*, 2012 WL 3150391, at **2-6 (E.D. Ark. Aug. 1, 2012) (under *CompuCredit* and *Gilmer*, *D.R. Horton* is contrary to the FAA); *Luchini v. Carmax, Inc.*, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012) (plaintiff "points to no pertinent authority that the NLRA . . . establish[es] a nonwaivable right to class litigation"), *perm. app. denied,* 2012 WL 3862150 (E.D. Cal. Sept. 5, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1133-1134 (2012) (*D.R. Horton* is unpersuasive because "[o]nly two Board members subscribed to it," the "subject matter of the

decision – the interplay of class action litigation, the FAA, and section 7 of the NLRA – falls well outside the Board's core expertise," and the decision "reflects a novel interpretation of section 7 and the FAA"); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012) (*D.R. Horton* is contrary to *Concepcion*); *De Oliveira v. Citicorp. N. Am., Inc.*, No. 8:12-cv-251, slip op. at 5, 2012 WL 1831230 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, No. 11cv1301, slip op. at 4-5 (S.D. Cal. May 15, 2012), ECF No. 22; *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *8-12 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.*, 2012 WL 1309171, at *7-10 (N.D. Cal. Apr. 13, 2012); *Brown v. Trueblue, Inc.*, 2012 WL 1268644 (M.D. Pa. Apr. 16, 2012); *Johnmohammdadi v. Bloomingdale's Inc.*, No. 11-6434, slip op. at 2 (C.D. Cal. Feb. 29, 2012), ECF No. 40; *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012); *Sanders v. Swift Transp. Co. of Az., LLC*, 2012 WL 523527 (N.D. Cal. Jan. 17, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (holding that "this Court must read *AT&T Mobility* as standing against any argument that an absolute right to collective action is consistent with the FAA's 'overarching purpose' of 'ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings'" and that, "[t]o the extent LaVoice relies on … the recent decision of the [NLRB] in *D.R. Horton, Inc.* …, as authority to support a conflicting reading of AT&T Mobility, this Court declines to follow th[at] decision[]" (quoting *Concepcion*, 131 S.Ct. at 1748)); *Iskanian v. CLS Transp. Los Angeles, LLC*, __ Cal.4th __(June 23, 2014) (In *Iskanian,* the California Supreme Court recently agreed with the Fifth Circuit's ruling on *D.R. Horton* that the NLRA does not foreclose enforcement of a class action waiver in an arbitration agreement).

Furthermore, in *Chesapeake Energy Corporation*, Case No. 14-CA-100530, 2013 WL 5984336 (Nov. 8, 2013), the Administrative Law Judge observed that the Supreme Court's opinion in *American Express Co. v. Italian Colors Restaurants,* 133 S.Ct. 2304 (2013), implicitly rejected the analysis used by the NLRB in its *D.R. Horton* decision. *Chesapeake Energy Corp.*, 2013 WL 5984336 at *6. The Administrative Law Judge noted that in *American Express Co.,* the Supreme Court observed that the Sherman and Clayton Acts not only do not mention class actions, but were enacted decades before the advent of Federal Rule of Civil Procedure 23, which provides for class procedures. *Id.* at *7. As such, the Administrative Law Judge held that "the principles expressed by the Supreme Court equally apply to the board since the act does not mention class actions, and was enacted long before the advent of Rule 23." *Id.* Therefore, the Administrative Law Judge recommended dismissing sections of the complaint that referred to violations of Section 8(a)(1) of the Act. *Id.*

Similarly, the Administrative Law Judge in *Haynes Building Services LLP, et al.,* Case No. 31-CA-093920, 2014 WL 534754 at *6 (Feb. 7, 2014), held that "Supreme Court decisions, issued after the Board's decision in D.R. Horton, relieve that case's rationale of its vitality." *CompuCredit Corp v. Greenwood*, 132 S.Ct. 663 (2012), was issued a week after the Board's *D.R. Horton* decision and *American Express Company v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), was issued one year and a half later. *Id.* at *10. "As a result of the *American Express Co.* holding, the Board's *D.R. Horton* rationale no longer remains viable." *Id.* "In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must 'rigorously enforce' arbitration agreements according to their terms. It further stressed that courts remained obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute." *Id.* "The Court noted one narrow

exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA's arbitration mandate has been 'overridden by a contrary congressional command.' *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2309. The word 'command' again suggests that Congress must express clearly and unmistakably its intent to override the FAA's mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision." *Id.* "[T]he *CompuCredit Corp.* opinion pointed out that even a specific statutory authorization to bring suit in 'district court' did not neutralize the parties' agreement to submit a dispute arbitration and courts remained obligated to enforce that arbitration agreement. Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a 'congressional command' contradicting the FAA's mandate." *Id.* "The National Labor Relations Act does not include any language resembling a 'congressional command' to lift the FAA's arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here." *Id.*

"It bears repeating that, in *D.R. Horton,* the Board stressed that it was *not* mandating class arbitration. 'Rather, we hold only that employers may not compel employees to waive their NLRB right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration.' 357 NLRB No. 184, slip op. at 12." *Id.* at *11. "However, in view of its previous decisions, the Court might well conclude that the Board was affording only a Hobson's choice. A requirement to leave open a judicial forum neuters the effect of most arbitration agreements, and thus conflicts with the FAA's mandate. The alternative, to find unlawful all arbitration agreements except those specifically authorizing class action, would impose a form of arbitration

which the Supreme Court considers likely to create a procedural morass. More than that, it would collide head-on with the strong FAA policy favoring arbitration." *Id.* "The Supreme Court's recent decision in *American Express Co.*, considered in the context of its earlier opinions concerning the Federal Arbitration Act, leaves no doubt; the FAA policy would prevail. When all the recent Supreme Court decisions interlock, they create space in which the *D.R. Horton* rationale has no oxygen." *Id.* "The Court will find a 'contrary congressional command' only when Congress has spoken in the clearest of its terms. Congress has not done so with respect to the National Labor Relations Act." *Id.* at 13.

Here, Gonzalez agreed to submit her employment-related claims to binding arbitration pursuant to the CIIA. (Exhibit 5 to Stipulation of Facts.) Neither Gonzalez nor Respondent agreed to class arbitration. *Id.* Moreover, the CIIA makes no reference to employee groups or to other employees of Respondent, but instead refers exclusively to the "COMPANY AND I." *Id.*

Therefore, under the United States Supreme Court's binding precedent, which provides the authority allowing Respondent to enforce the CIIA, the Complaint should be dismissed in its entirety.

D. The ALJ Failed to Find/Conclude That Charging Party Did Not Engage In Concerted Activity And Has No Standing. [Exception Nos. 7, 8, 13, 14.]

The ALJ failed to find/conclude that Gonzalez has not engaged in protected concerted activity and has no standing to pursue a charge before the Board. [ALJ Decision, 4:6-23; 4, fn. 9; 6:35-40; 7:5-8:17.] For employee conduct to constitute "protected concerted activity," it must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Holling Press, Inc.*, 343 NLRB 301, 302 (2004).

In *Meyers Industries, Inc.*, 268 NLRB 493 (1984) [*Meyers I*], the Board overturned the doctrine of "constructive concerted activity," previously announced in *Alleluia Cushion*

Company, 221 NLRB 999 (1975), which allowed a presumption that concerted activity existed. In *Meyers I*, the Board also defined concerted activity under Section 7 as an activity that is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, at 497. *Meyers Industries, Inc.*, 281 NLRB 882 (1986) [*Meyers II*], clarified that concerted activity occurs when "individual employees seek to initiate or to induce or to prepare for group action" (*Meyers II*, at 887) and that "[t]he question of whether an employee has engaged in concert activity is a factual one based on the totality of the record evidence." *Meyers II*, at 886. As such, *Meyers I* and *Meyers II* made clear that concerted activity cannot be presumed, but must be established by evidence of group activity instead of an individual complaint.

Here, it cannot be presumed that Gonzalez engaged in protected concerted activity simply because she filed a putative class-action. Gonzalez cannot establish that she was engaged in protected concerted activity at the time she filed the Class Action Lawsuit, as distinguished from individual activity. Although Gonzalez's Class Action Lawsuit complaint contained class allegations, she had no co-plaintiff and there was no evidence that anyone other than Gonzalez and her counsel were involved in the initiation or prosecution of the case at the time she filed the lawsuit on June 28, 2012, or when Respondent filed its motion to compel arbitration on December 28, 2012. (Exhibits 7 and 11to Stipulation of Facts.) Moreover, on January 7, 2013, Gonzalez filed her unfair labor practice charge only on her own behalf. (Exhibits 1 and 2 to Stipulation of Facts.)

Accordingly, Gonzalez cannot establish that her actions in filing the Class Action Lawsuit constituted concerted activity. Moreover, the mere fact that Gonzalez filed the Class

Action Lawsuit does not result in a presumption of concerted activity. *Meyers II*, at 887-889; *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

Furthermore, Gonzalez cannot support that she engaged in protected concerted activity when she initiated the Class Action Lawsuit for two additional reasons. First, at the time Gonzalez filed her Class Action Lawsuit she was no longer an employee of Respondent, having ended her employment with Respondent almost one year before. (Stipulation of Facts, Paragraphs 6(c) and 8(a).) Second, Gonzalez's action of filing the Class Action Lawsuit was not for the purpose of "mutual aid or protection," because at the time she filed the lawsuit she no longer had any stake in the working conditions of Respondent.

Finally, as a former employee of Respondent, Gonzalez does not have standing to assert an unfair labor practice claim. Gonzalez had not been an employee for more than 17 months at the time she filed her charge, and the alleged conduct on which she bases her charge (Respondent's filing of a motion to compel arbitration) occurred after her employment ended, thereby eliminating any right she might have to improve the working conditions at her former employer. (Exhibits 1, 2 and 11 to Stipulation of Facts; Stipulation of Facts Paragraphs 1, 6(c) and 9(b).) *See Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2559–2560 (2011) (holding that "plaintiffs no longer employed [by defendant] lack standing to seek [similar] injunctive or declaratory relief against employment practices"); *see also Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1142, n. 5 (2011) ("Price does not seek injunctive relief... nor could he because as a former Starbucks employee he lacks standing.")

Therefore, because Gonzalez cannot establish that she engaged in protected concerted activity and does not have standing to assert her unfair labor practice charge, the Complaint should be dismissed in its entirety.

E. The ALJ Failed To Find/Conclude That Respondent Did Not Engage In Unfair Labor Practices By Enforcing The CIIA In State Court By Seeking To Compel Individual Arbitration of Charging Party's Class-Action Wage and Hour Lawsuit. [Exception Nos. 1, 2, 3, 4, 5, 6, 11, 13, 14.]

The ALJ failed to find/conclude that Respondent did not engage in unfair labor practices by enforcing the CIIA in state court by seeking to compel individual arbitration of Gonzalez's Class Action Lawsuit. [ALJ Decision, 3:3-5; 3:14-19; 3:21-24; 3:27-35; 6:22-29; 6:35-40; 7:5-8:17.] Because the CIIA does not contain a class action waiver (or even mention class actions), it is fully enforceable and provides an entirely legitimate basis for compelling the individual arbitration of Gonzalez's claims. As the Supreme Court articulated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010), a party "may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *See also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1750 (2011) (*Concepcion*). Because there is no contractual basis for requiring class arbitration under the CIIA, Respondent's reliance on it to compel arbitration on an individual basis was clearly lawful and does not support a violation of the NLRA.

Given the Supreme Court's repeated admonitions that strong federal policy favors the enforcement of arbitration agreements to be enforced "in accordance with their terms," Respondent may enforce the CIIA on an individual basis entirely irrespective of whether the parties entered into an agreement containing the type if class action waiver that the *D.R. Horton* decision addressed. To preclude Respondent from asserting lawful affirmative defenses to Gonzalez's Class Action Lawsuit or moving to compel arbitration in that lawsuit would violate Respondent's rights under the First Amendment "to petition the Government for a redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *BE & K Construction v. NLRB* 536 U.S. 516 (2002). The Board does not have the right to dictate which

affirmative defenses a defendant can assert in a civil lawsuit or what motion a defendant can make in a pending civil lawsuit. It is for the court to decide whether an affirmative defense or a motion has merit, not the Board.

In *Bill Johnson's Restaurants*, the Supreme Court held that the First Amendment prevents the "filing and prosecution of a well-founded lawsuit" from being "enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Bill Johnson's Rests.*, 461 U.S. at 743. The Supreme Court observed that the First Amendment provides a fundamental right to petition the government to access courts. *Id.* at 741; *see also BE & K Construction*, 536 U.S. at 524. The Board has also recognized that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Peddie Bldgs.*, 203 NLRB 265, 272 (1973), enforcement denied on other grounds, *NLRB v. Viceglia*, 498 F.2d 43 (3d Cir. 1974). Accordingly, the Board may not find an unfair labor practice based on a litigation position taken in court.

Here, Respondent's motion to compel arbitration of Gonzalez's Class Action Lawsuit is protected by the First Amendment and, therefore, cannot constitute an unfair labor practice. Respondent moved to compel arbitration based on the parties' lawful and enforceable arbitration agreement, providing for arbitration of employment related disputes, as well as the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion*. (Exhibits, 5, 7 and 11 to Stipulation of Facts.) Therefore, Respondent's enforcement of the CIIA through a motion to compel arbitration cannot constitute a violation of the Act because it was reasonably based on fact and law and constitutes constitutionally protected activity under the First Amendment.

Additionally, Respondent did not violate Gonzalez's Section 7 rights. Respondent did not take any adverse action against Gonzalez when she filed her putative class action complaint on July 28, 2012, or when she filed her unfair labor practice charge in this case on January 7, 2013. In fact, at the time Respondent filed its motion to compel arbitration on December 28, 2012, Gonzalez had not worked for Respondent for approximately 17 months. Moreover, as held by the Administrative Law Judge in *Countrywide Fin'l Corp.*, Case Nos. 31-CA-072916 and 31-CA-072918, 2013 WL 587589 (Feb. 13, 2013), while an employer's action in preventing employees from filing class actions may violate of Section 7, an employer's actions in presenting its legal arguments to a court do not violate Section 7. Specifically, the Administrative Law Judge held that "the Section 7 [right] that could not be waived in *D.R. Horton* was the right of employees to collectively pursue class or collective work-related complaints against the employer. This is different from any right that the claims be heard and decided on a class-wide basis; that issue is for the appropriate forum, and not the Board, to decide." *Id.* at *17-18. Thus, Respondent could not (and did not) do anything to violate Gonzalez's Section 7 rights.

Accordingly, Respondent's actions in the Class Action Lawsuit to enforce the CIIA cannot be a basis for an unfair labor practice claim and, therefore, the Complaint should be dismissed in its entirety.

F. The ALJ Failed to Find/Conclude That Respondent Did Not Engage In Unfair Labor Practices By Maintaining Provisions In The CIIA That Required Employees To Submit Employment-Related Disputes To Final Arbitration. [Exception Nos. 10, 12, 13, 14.]

The ALJ failed to find/conclude that Respondent did not engage in unfair labor practices by maintaining provisions in the CIIA that required employees to submit employment-related disputes to final arbitration. [ALJ Decision, 6:12-18; 6:22-24; 6:31-33; 6:35-40; 7:5-8:17.] Respondent did not restrict Gonzalez's exercise of her Section 7 rights by maintaining the CIIA.

The CIIA does not expressly prohibit employees from engaging in concerted activities for mutual aid or protection or filing a charge with the NLRB and, therefore, does not violate Section 7. The language of the CIIA simply does not lead employees to reasonably believe that they are prohibited from engaging in concerted activities and, therefore, does not violate the Act.

First, the CIIA merely contemplates the resolution of personal individual claims between the employee and employer. In this regard, it provides that, "EACH PARTY'S PROMISE TO RESOLVE CLAIMS BY ARBITRATION ... RATHER THAN THROUGH THE COURTS, IS CONSIDERATION FOR OTHER PARTY'S LIKE PROMISE." In fact, the CIIA does not even mention the NLRB or the NLRA. Thus, the plain language of the CIIA excludes from its purview unfair labor practices charges, which are administrative (not judicial).

Moreover, the CIIA does not prevent employees from working together in asserting common rights by, for example, pooling together their finances, negotiating as a group, sharing information, or seeking safety in numbers. The CIIA also does not prohibit employees from soliciting other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the same legal claims, or coordinate the litigation of those claims by obtaining common representation, jointly investigating their claims, and developing common legal theories and strategies.

Furthermore, the CIIA does not contain an express class action waiver. Unlike the agreement at issue in *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012), the CIIA does not provide that an arbitrator "may not have the authority to consolidate the claims of other employees" or that an arbitrator "does not have 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..." *Id.* at *1. In fact, the CIIA is silent on the treatment of class claims and collective actions. Thus, the plain

language of the CIIA cannot lead employees to reasonably believe that they are prohibited from engaging in concerted activities.

Accordingly, because the CIIA does not impair any Section 7 rights it cannot be a basis for an unfair labor practice claim and, therefore, the Complaint should be dismissed in its entirety.

V. CONCLUSION

For the foregoing reasons, it cannot be shown that Respondent violated the NLRA in any way. Accordingly, Respondent respectfully requests that the Board sustain its exceptions to the ALJ's Decision and dismiss the Complaint in its entirety.

DATED: August 12, 2014

MECKLER BULGER TILSON MARICK & PEARSON LLP

By: _____
DANIEL J. CRAWFORD
JUAN C. ARANEDA
Attorneys for Respondent
FUJI FOOD PRODUCTS, INC.

CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is Meckler Bulger Tilson Marick & Pearson LLP, 575 Market Street, Suite 2200, San Francisco, CA 94105.

On August 12, 2014, I served the within:

RESPONDENT FUJI FOOD PRODUCTS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

On the parties and interested persons in said proceeding

[X] By enclosing the documents in a sealed envelope or package addressed to the persons at the addresses listed and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

[X] By forwarding a true and correct copy thereof electronically from e-mail address yorleny.hernandez@mbtlaw.com to the persons at the e-mail address set forth below:

Matthew J. Matern Tagore Subramaniam MATERN LAW GROUP 1320 Rosecrans Avenue, Suite 200 Manhattan Beach, CA 90266	***Counsel for Charging Party*** ***Nancy Sandra Gonzalez*** T: (310) 531-1900 F: (310) 531-1902 C: (310) 623-7509 E: matthewjmatern.mlg@gmail.com Tagore.mlg@gmail.com
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Additionally, on August 12, 2014, I electronically filed the above-mentioned document with the Board's Office of the Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 12th day of August 2014 at San Francisco, California.

Yorleny C. Hernandez