

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MASTEC NORTH AMERICA, INC.

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 488, AFL-  
CIO

Case 34-CA-090246

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**RESPONDENT MASTEC, NORTH AMERICA INC.'S**  
**INITIAL BRIEF TO THE NATIONAL LABOR RELATIONS BOARD**

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## I. INTRODUCTION

Respondent MasTec North America, Inc. (“MasTec” or “Respondent”) submits the following brief pursuant to the National Labor Relations Board’s (“Board”) November 17, 2014 Order Approving Stipulation, Granting Motion, and Transferring Proceeding To The Board.<sup>1</sup> For the reasons set forth below, Respondent respectfully requests that the Board dismiss the General Counsel’s Complaint. Respondent’s Dispute Resolution Policy (“DRP”), Tape Recording Policy, and rule prohibiting “use of abusive, threatening or derogatory language towards employees, customers or management” (“Language Policy” or “LP”) (collectively described in Paragraph 8(b) of the parties’ Joint Motion and Stipulation of Facts (“Joint Motion”)) do not violate Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “Act”).

Respondent’s DRP is lawful because the class action waiver contained therein and requirement that certain employment related disputes be arbitrated on an individual basis simply do not interfere with the Section 7 rights of employees. As explained by the United States Court of Appeals for the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and cases cited therein,<sup>2</sup> all of which have rejected the Board’s analysis in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), such restrictions in an arbitration agreement are sanctioned by the Federal Arbitration Act (“FAA”) and the NLRA does not trump the FAA with respect to the enforceability of such requirements. Further, the provisions of the DRP requiring the arbitration of employment related disputes are distinguishable from those the Board has found unlawful

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<sup>1</sup> The facts in this case can be found in the Joint Motion and Stipulated Record which the Board granted on November 17, 2014.

<sup>2</sup> Critically, as discussed *infra*, the United States Court of Appeals for the Second Circuit – where this case geographically lies – has rejected the Board’s *D.R. Horton* decision.

because it allows employees to opt out of the policy. Respondent's voluntary policy is not a condition of employment, and therefore does not infringe on employees' Section 7 rights.

Respondent's Tape Recording Policy is similar to those that have been found lawful by the Board. The policy on its face states its purpose is to "eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded." Because there are legitimate and clearly articulated business reasons for the Tape Recording Policy, and no inherent right protected by the NLRA to make recordings, employees cannot reasonably interpret it as interfering with protected conduct.

Similarly, the LP cannot be reasonably construed as prohibiting Section 7 activity. The rule is clearly intended to foster a civil workplace. Moreover, Respondent submits that employees would construe the rule in the context of the LP's surrounding language, which prohibits other egregious behavior, rather than as a prohibition of protected speech.

Finally, it is undisputed that neither the Tape Recording Policy nor LP were promulgated in response to any union activity and have never been applied or enforced in a manner to interfere with any employee's Section 7 rights. Moreover, Respondent has not engaged in any other conduct that would reasonably cause employees to believe the rules were intended to interfere with Section 7 activity. Therefore, there is no reason at all for any employee to believe these rules would restrict their Section 7 rights.<sup>3</sup>

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<sup>3</sup> As of February 1, 2013, Respondent deleted the alleged unlawful language in the LP in all locations except for its Durham, Connecticut location. As a result, assuming *arguendo* the LP is deemed unlawful, the issue is moot as to all locations other than Durham, Connecticut and therefore, a remedy requiring the rescission of such rule in locations other than Durham, Connecticut and a nation-wide posting with respect to such rule is inappropriate and unnecessary to effectuate the policies of the Act.

## II. STANDARDS APPLIED TO WORK RULES UNDER THE NLRA

The analytical framework for assessing whether the maintenance of a work rule violates Section 8(a)(1) of the National Labor Relations Act (“the Act” or “the NLRA”) is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004):

[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827. Consistent with the foregoing, [the Board’s] inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, [the Board] will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

(emphasis in original).

In the present case, there is no allegation that any of the challenged rules and policies explicitly restrict Section 7 activity, were promulgated in response to union activity, or were applied unlawfully. The sole issue is whether employees would reasonably construe the language of the Handbook rules on their face to prohibit Section 7 activity. As fully discussed below, the challenged rules and policies cannot be reasonably construed to prohibit protected, concerted activity.

## III. RESPONDENT’S MAINTENANCE OF THE OPTIONAL DRP DOES NOT VIOLATE THE NLRA

The General Counsel alleges that MasTec’s DRP, which provides for the arbitration of disputes on an individual basis, unlawfully restricts employees’ rights to engage in protected concerted activity. Presumably this allegation is predicated on the Board’s decision in

*D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). The rationale of *D.R. Horton*, however, is inconsistent with Supreme Court jurisprudence and was expressly rejected by the Fifth Circuit Court of Appeals. Further, the Board’s analysis has also been rejected by the Second Circuit Court of Appeals<sup>4</sup> and every other court which has considered it. Moreover, as explained in detail below, the DRP is distinguishable from *D.R. Horton* and its progeny<sup>5</sup> because MasTec employees have the right to opt out of the DRP and, therefore may 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 choose. There is no basis for this allegation and it should be dismissed.

**A. FACTS PERTAINING TO DRP**

MasTec’s DRP provides that employees who elect to take advantage of it, agree that “any dispute arising out of or related to Employee’s employment with the Company or termination of employment” be submitted to final and binding arbitration. (Jt. Ex. “J.”).<sup>6</sup> The DRP gives the parties the “right to conduct civil discovery and bring motions, as provided by the forum state’s procedural rules.” (*Id.* at p. 2). The DRP also prohibits the arbitration of claims on a class or collective basis.

Notably, the Policy 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.

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<sup>4</sup> Since this case arises in the Second Circuit,, the law of this Circuit is directly applicable to this case.

<sup>5</sup> On October 28, 2014, the Board issued *Murphy Oil USA Inc.*, 361 NLRB No. 72 (2014), in which a bare majority with two dissents reaffirmed *D.R. Horton*. As discussed *infra*, like *D.R. Horton*, the rationale in *Murphy Oil* is flawed and is inconsistent with the mandate of the FAA.

<sup>6</sup> References to “Jt. Ex. \_\_\_” are to the exhibits affixed to the Joint Motion.

(*Id.* at p. 3). Further, the DRP affirmatively advises employees:

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 Handbook and an "Employee Acknowledgement" for them to sign. (*Id.* at p. 4). The Acknowledgement highlights the DRP in particular, and it explains the process by which employees may 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.*).

## **B. ARGUMENT PERTAINING TO LEGALITY OF DRP**

The determination of the lawfulness of the DRP cannot be decided in a vacuum of National Labor Relations Board ("Board" or "NLRB") precedent. Rather, the analysis requires a determination of the authority of the Board to act with respect to a matter Congress has chosen to regulate through another statute, namely, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the Court mandate that arbitration agreements be enforced according to their terms and reject the application of other state and federal statutes to arbitration agreements in the absence of an express "congressional command" to override the

FAA. Following the mandate of the Supreme Court, the Second, Fifth, Eighth, Ninth and Eleventh Circuits have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. Indeed, the Fifth Circuit denied enforcement of the Board's decision in *D.R. Horton*.

**1. The Validity of Respondent's DRP Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA**

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (also issued after the Board's decision in *D.R. Horton*). The Supreme Court has further held that a class action waiver is not invalidated by the so-called effective vindication doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *American Express*, 133 S. Ct. at 2310.

Under *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit*, *Marmet Health Care Ctr. v. Brown*, 133 S. Ct. 1201 (2012), and *American Express*, the validity of Respondent's Policy and class action waiver contained therein must be determined under the FAA, not the NLRA. In construing the broad reach and preemptive effective of the FAA the Supreme Court has established five well defined principles:

- The FAA reflects an "emphatic policy in favor" of arbitration. The FAA, which "reflects an emphatic federal policy in favor" of arbitration," declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for

the revocation of any contract.” *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011)(internal citations omitted); 9 U.S.C. § 2.

- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. The FAA “requires courts to enforce agreements to arbitrate according to their terms” *See, e.g., CompuCredit*, 132 S. Ct. at 669. As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. The parties to an arbitration “may agree to limit the issues they choose to arbitrate,” “may agree on [the] rules under which any arbitration will proceed,” and “may specify *with whom* they choose to arbitrate their disputes.” *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683 (2010)(internal citations omitted).
- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable “unless Congress itself has evinced an intention,” when enacting the statute, to “override” the FAA mandate by a clear “contrary congressional command.” *Mitsubishi*, 473 U.S. at 627 (internal citations omitted); *American Express*, 133 S. Ct. at 2309. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate, *CompuCredit*, 132 S. Ct. at 671, unless “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Mitsubishi*, 473 U.S. at 628; *American Express*, 133 S.Ct. at 2309. The expression of congressional intent to preclude the waiver of judicial remedies must be clear and unequivocal. *See, e.g., CompuCredit*, 132 S. Ct. at 673 (If a statute “is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001), including those containing class action waivers. The FAA requires enforceability of such agreements even if there may be “unequal bargaining power between employers and employees” and even if “the arbitration could not go forward as a class action.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991). As to this latter point, the Supreme Court in *Gilmer* recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot “abridge, enlarge or modify any substantive right”—and can be, like the choice of a judicial forum, waived.

As these principles demonstrate, the FAA established and upheld the right of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. There is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to “override” the FAA’s mandate and preclude an employee from waiving his or her procedural right to file a class action when agreeing to arbitrate employment-related claims.

Just as a union acting on behalf of its members can voluntarily agree to waive a judicial forum and to require its members to arbitrate their individual employment claims, there is no logical reason why Respondent’s employees cannot voluntarily do so as well on their own behalf. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) (“Nothing in the law suggests a

distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative”).<sup>7</sup>

## **2. Following Supreme Court Precedent, The Fifth Circuit Correctly Set Aside the Board’s D.R. Horton Decision and Order**

On December 3, 2013, the Court of Appeals for the Fifth Circuit granted the petition for review filed by Petitioner/Cross-Respondent D.R. Horton, Incorporated in the *D.R. Horton* case and ultimately set aside the Board’s decision invalidating the company’s arbitration agreement. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The court held that “the Board’s decision did not give proper weight to the [FAA].” *Id.* at 348. In a detailed opinion, the court examined the Board’s *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board’s arguments. First, the court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a “procedural device.” *Id.* at 357. The court held that the Board could not rely on the FAA’s “saving clause” to justify its invalidation of arbitration agreements, as the court explicitly stated that “[a] detailed analysis of *Concepcion* leads to the conclusion that the Board’s rule does not fit within the FAA’s saving clause.” *Id.* at 359. The court also determined that the Board’s prohibition of class action waivers disfavors arbitration, as it ruled that “[w]hile the Board’s interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or

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<sup>7</sup> To the contrary, in his dissent in *Murphy Oil*, Member Miscimarra concludes:

Section 9(a) of the Act explicitly protects the right of every employee as an ‘*individual*’ to ‘present’ and to ‘adjust’ grievances ‘at any time.’ . . . This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “*refrain* from” exercising the collective rights enumerated in Section 7. Thus, Section 9(a) and Section 7 make the same point: even *if* the Act created a substantive right to class-type adjudication of non-NLRA workplace disputes, employees have a protected right *not* to have their claims pursued on a classwide basis and, instead, to agree such claims will be resolved on an “individual” basis. And employers correspondingly do not commit an unfair labor practice by agreeing to such individual adjustments.

*See* 361 NLRB No. 72, Slip. Op. at 30. (Emphasis in original).

judicial forum—the effect of this interpretation is to disfavor arbitration.” *Id.* at 360. Next, the court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, the court stated: “When considering whether a contrary congressional command is present, courts must remember ‘that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* (internal citations omitted). The court explicitly ruled that “there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.” *Id.* Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361. The court also noted that it was of some importance that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice.” *Id.* at 362 (internal citations omitted). Thus, the court reached the conclusion that “[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA,” noting that “[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class action waivers enforceable.” *Id.*

One such “sister circuit” to have addressed this issue prior to the Fifth Circuit is the Second Circuit – in which this case geographically lies. In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298, n.8 (2d Cir. 2013), the court joined the Eighth Circuit in “declin[ing] to follow the [Board’s] decision in *D.R. Horton*.” The court explained that “[e]ven assuming that ‘*D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.’” *Id.* (internal citations omitted). The court illustrated its point by noting that courts have not “deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” *Id.* (internal

citations omitted). *See also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) *cert denied* 134 S. Ct. 2886 (June 30, 2014) (citing the Fifth Circuit’s decision with approval “that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA”). *See also Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013)(“Therefore, given the absence of any ‘contrary congressional command’ from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject [appellant’s] invitation to follow the NLRB’s rationale in *D.R. Horton* and join our fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA”); and *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-874, n. 3 (9th Cir. 2013).<sup>8</sup>

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<sup>8</sup> Numerous federal district courts and state courts are also in accord. Member Johnson’s dissenting opinion in *Murphy Oil*, 361 NLRB No. 72, Slip Op. at 36 block cited the following decisions: *Sylvester v. Wintrust Financial Corp.*, No. 12-C-01899, 2013 WL 5433593 (N.D. Ill. 2013); *Delock v. Securitas Security Services USA*, 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal.2012); *Jasso v. Money Mart Express Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012); *LaVoice v. UBS Financial Services*, No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590, at \*6 (S.D.N.Y. Jan. 13, 2012); *Palmer v. Convergys Corp.*, No. 7:10-CV-145, 2012 WL 425256 (M.D.Ga. Feb. 9, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. 2012); *Cohen v. UBS Financial Services*, 2012 WL 6041634 (S.D.N.Y. 2012); *Morris v. Ernst & Young LLP*, 2013 WL 3460052, 20 Wage & Hour Cas.2d (BNA) 1807 (N.D. Cal. 2013); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588 (S.D.N.Y. 2013); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 WL 6158040, 21 Wage & Hour Cas.2d (BNA) 1600 (N.D. Cal. 2013); *Siy v. CashCall, Inc.*, 2014 WL 37879 (D. Nev. 2014); *Cohn v. Ritz Transportation Inc.*, 2014 WL 1577295 (D. Nev. 2014); *Dixon v. NBC Universal Media, LLC*, 947 F. Supp. 2d 390 (S.D.N.Y. 2013); *Hickey v. Brinker International Payroll Co., L.P.*, 2014 WL 622883, 22 Wage & Hour Cas.2d (BNA) 248 (D. Colo. 2014); *Zabelny v. CashCall, Inc.*, 2014 WL 67638, 21 Wage & Hour Cas.2d (BNA) 1556 (D. Nev. Jan 08, 2014); *Ryan v. J.P. Morgan Chase & Co.*, 924 F. Supp. 2d 559 (S.D.N.Y. Feb 21, 2013); *Long v. BDP International Inc.*, 919 F. Supp. 2d 832 (S.D. Tex. 2013); *Green v. Zachry Industries Inc.*, -- F.Supp.2d--2014 WL 1232413 (W.D. Va. 2014); *Appelbaum v. Auto-Nation Inc.*, 2014 WL 1396585 (C.D. Cal. 2014); *Cunningham v. Leslie’s Poolmart, Inc.*, 2013 WL 3233211 (C.D. Cal. 2013); *Cilluffo v. Central Refrigerated Services*, 2012 WL 8523507 (C.D. Cal. 2012), order clarified by 2012 WL 8523474 (C.D. Cal. 2012), reconsideration denied by 2012 WL 8539805 (C.D. Cal. 2012), motion to certify appeal denied by 2013 WL 3508069 (C.D. Cal. 2013); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157 (D. Kan. 2012); *Torres v. United Healthcare Services*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013), appeal withdrawn 13-707 (2d Cir. Feb 27, 2014); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 327 P.3d 129, 173 Cal. Rptr.3d 289 (Cal. Jun 23, 2014); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 144 Cal.Rptr.3d 198 (1st Dist. Jul 18, 2012); *Truly Nolen of America v. Superior Court*, 208 Cal.App.4th 487, 145 Cal.Rptr.3d 432, (4th Dist. Aug 09, 2012); *Goss v. Ross Stores, Inc.*, 2013 WL 5872277 (1st Dist. Oct 31, 2013); *Outland v. Macy’s Department Stores, Inc.*, 2013 WL 164419 (Cal. App. 1 Dist. Jan 16, 2013); *Rivera v. Hilton Worldwide, Inc.*, 2013 WL 6230604 (4th Dist. Nov 26, 2013); *Teimouri v. Macy’s, Inc.*, 2013 WL 2006815 (4th Dist. May 14, 2013); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal.App.4th 1537, 146 Cal.Rptr.3d 616 (2nd Dist. 2012), review granted and opinion superseded by 288 P.3d 1287, 149 Cal.Rptr.3d 675 (Cal. 2012); *Leos v. Darden Restaurants, Inc.*, 217 Cal.App.4th 473, 158 Cal.Rptr.3d 384 (2nd. Dist. 2013), review granted and opinion superseded by 307 P.3d 878, 161

**3. Given Supreme Court Decisions Interpreting the FAA, and Appellate Court Decisions Rejecting D.R. Horton, There Are No Reasonable Grounds for Finding Merit in the General Counsel's Complaint**

Given the Supreme Court's decisions in *Concepcion*, *CompuCredit*, *Marmet* and *American Express*, and subsequent appellate decisions rejecting *D.R. Horton*, it cannot reasonably be averred that *D.R. Horton* and *Murphy Oil*<sup>9</sup> set forth any viable legal theory to strike down the DRP. This is especially so in light of *American Express*, which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S.Ct. at 2337. Rather, only a "contrary congressional command" in a particular statute can override the FAA's mandate that arbitration agreements be enforced according to their terms. *Id.* As the analysis set forth above demonstrates, no such "congressional command" exists in the NLRA.

Ultimately, the text of the FAA, the Supreme Court's decisions in *American Express* and *Concepcion*, and the five circuit courts that have all rejected the NLRB's decision in *D.R. Horton* clearly demonstrate that Respondent's Policy does not violate the Act. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.

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Cal.Rptr.3d 699 (Cal. 2013); *Brown v. Superior Court*, 216 Cal.App.4th 1302, 157 Cal.Rptr.3d 779 (6th Dist. 2013), review granted and opinion superseded by 307 P.3d 877, 161 Cal.Rptr.3d 699 (Cal. 2013). *But see Brown v. Citicorp Credit Services*, No. 1:12-cv-00062-BLW, 2013 WL 645942, at \*3 (D. Idaho Feb. 21, 2013); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at \*6 (W.D. Wis. Mar. 16, 2012), reconsideration denied 2014 WL 291941 (W.D. Wisc. 2014); *Grant v. Convergys Corp.*, No. 4:12-CV-496, 2013 WL 781898 (E.D. Mo. 2013), cert. for interlocutory appeal 2013 WL 1342985 (E.D. Mo. 2013), appeal dismissed No. 13-2094 (8th Cir. 2014).

Notably, the last three cases cited were not decided by courts sitting in the Second Circuit.

<sup>9</sup> *Murphy Oil*, issued pursuant to the Board's policy of "non-acquiescence" to appellate rulings with which it disagrees, simply restates the Board's discredited analysis in *D.R. Horton* and is entitled to no additional weight. (See Member Johnson's dissenting opinion in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, Slip Op. at 58).

4. MasTec's Opt-Out Provison in the DRP Distinguishes it From D.R. Horton and Murphy Oil.

The arbitration policy in *D.R. Horton and Murphy Oil*, compelled each new and current employee to enter into arbitration agreements requiring all claims be submitted to arbitration and limiting the authority of the arbitrator to individual claims. As a result, these agreements effectively *required* employees to waive their right to pursue collective or class actions in court and at the same time, precluded employees from pursuing claims on a class or collective basis in arbitration, the only forum available; thus, effectively preventing employees from engaging in protected concerted activity. In addition, these agreements expressly stated that agreement to the arbitration process was a condition of employment. The Board concluded in *D.R. Horton*, 357 NLRB No. 184, Slip Op., at 7, “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.”

Assuming *arguendo* the Board’s decisions in *D.R. Horton* and *Murphy Oil* have any validity in light of the uniform rejection of their rationale by every court that has considered them, it nevertheless is clear that the facts and circumstances pertinent to the instant case are distinguishable from those in the *D.R. Horton* and *Murphy Oil*. Unlike *D.R. Horton* and *Murphy Oil*, MasTec’s DRP is not a mandatory program and clearly advises employees they may opt out of participation without fear of adverse employment consequences.

The opening sentence of the *D.R. Horton* decision states:

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 employment*, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.

*Id.* Slip Op. at 1 (emphasis added); *see also* *Murphy Oil*, 361 NLRB No. 72, Slip Op. at 14 (“What *D.R. Horton* prohibits is *unilateral action, by an employer*, that purports to completely deny access to class, collective, or group procedures that are otherwise available to them under statute or rule.”) (emphasis added). Thus, the purported interference with Section 7 rights found in *D.R. Horton* and *Murphy Oil* was the employer’s unilateral action in “requiring” an employee to enter into an arbitration agreement with a class action waiver.<sup>10</sup>

Even assuming *arguendo* that the DRP was a term and condition of employment (which it is not), this case is distinguishable from *D.R. Horton* and *Murphy Oil* insofar as MasTec’s DRP was and is not a prerequisite to continued employment. Employees are clearly advised of their right to opt out of the DRP and are expressly advised there will be no adverse consequences on their employment status should they exercise that right. As such, the infringement on Section 7 rights found by the Board in *D. R. Horton*, is simply not present in MasTec’s policy.

As the Ninth Circuit recently held in *Johnmohammadi v. Bloomingdale’s Inc.*, 755 F.3d 1072, 1076-1077 (9th Cir. 2014), an employee cannot claim that enforcement of an arbitration agreement violates the NLRA where the employee voluntarily elects to arbitrate employment-related disputes and does not exercise her right to opt out. In those circumstances, an employer does “not require [an employee] to accept a class-action waiver as a condition of employment, as was true in *D.R. Horton*.” *Id.* at 1075. Rather, as the Ninth Circuit explained:

If [the employee] wanted to retain [the right to file a class action] nothing stopped her from opting out of the arbitration agreement. [The Employer] merely offered her a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such

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<sup>10</sup> The Board in *D.R. Horton* explicitly did not address voluntary class action arbitration agreements. *See* 357 NLRB No. 184, at n. 28.

disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis. In the absence of any coercion influencing the decision, we fail to see how asking employees to choose between those two options can be viewed as interfering with or restraining their right to do anything.

*Id.* at 1076; *see also Bloomingdales, Inc.*, 31-CA-071281, 2013 NLRB LEXIS 460, at \*24 (June 25, 2013) (employer's "opt-out procedure is sufficient to render the individual arbitration program voluntary" for purposes of *D.R. Horton*).<sup>11</sup>

Unlike the arbitration agreement at issue in *D.R. Horton*, MasTec's DRP does not foreclose all forums for class litigation. In *D.R. Horton*, the Board held the Act is 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 Inc.*, 357 NLRB No. 184, Slip Op. at 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); *id.*, Slip. Op. at 13 ("We thus hold . . . that [D.R. Horton] violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in *all* forums, arbitral and judicial")

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<sup>11</sup> Numerous other courts have held 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. 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 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 signing an opt-out provision, she chose to be bound by the enforceable arbitration agreement). *See also Fluke v. Cashcall, Inc.*, 08-cv-5776, 2009 U.S. Dist. LEXIS 43231, \*18 (E.D. Pa. May 21, 2009) (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"); (agreements to arbitrate that contain opt-out provisions "are not unilaterally imposed" but instead give "a meaningful choice as to the contract's terms"); *Black v. JP Morgan Chase & Co.*, 10-cv-848, 2011 U.S. Dist. LEXIS 99428, 57-58 (W.D. Pa. Aug. 25, 2011); *Clerk v. ACE Cash Express, Inc.*, 09-cv-05117, 2010 U.S. Dist. LEXIS 7978, \*8 (E.D. Pa. Jan. 29, 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*, 05-cv-227 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). And, once an employee has freely selected arbitration, the FAA's policy favoring arbitration becomes even stronger. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1751 (2011).

(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.*, Slip Op. at 12.

MasTec’s DRP leaves open a judicial forum for class and collective claims by providing an opportunity for employees to opt out, thereby retaining the ability to initiate or participate in a collective or class action in court.<sup>12</sup> Therefore, it does not violate the NLRA. This distinction demands, under *D.R. Horton*, a determination that MasTec’s DRP does not preclude the right to collectively pursue employment-related claims in violation of the NLRA. *See Brown v. Trueblue, Inc.*, 10-cv-0514, 2012 U.S. Dist. LEXIS 52811, \*19 (M.D. Pa. Apr. 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”).<sup>13</sup>

MasTec’s DRP, unlike the arbitration agreements in *D.R. Horton* and *Murphy Oil* is completely voluntary. Accordingly, it does not implicate any of the purported legal

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<sup>12</sup> In *MasTec Services Company, Inc.*, 16-CA-86102, 2013 NLRB LEXIS 393, at \*15 (June 3, 2013)(exceptions pending before the Board), ALJ Biblowitz erroneously held that Respondent’s DRP is unlawful notwithstanding the opt-out provision. ALJ Biblowitz cited to *Ishikawa Gasket America, Inc.*, 337 NLRB 175-176 (2001) for the proposition that “an employer may not lawfully require its employees to affirmatively act (opt out, in writing, within thirty days of receipt of the Employee Handbook) in order to maintain these rights.” ALJ Biblowitz places more reliance upon *Ishikawa Gasket America, Inc.* than it can possibly bear because in that case, receipt of severance monies were conditioned upon an employee’s pledge not to engage in protected concerted activity for a one year period. In the present case, there is no such *quid pro quo*.

ALJ Biblowitz also found that employees who opt out of the program are precluded from engaging in protected concerted activities with those employees who did not opt out and that “employees might be reluctant to exercise the opt out option for fear of angering their employer.” These findings are based wholly upon speculation and should not be given any weight by the Board in its consideration of the instant case, particularly because the conclusion is inconsistent with the express assurance by MasTec that no adverse employment consequences will flow from an employee’s decision to opt out of the DRP.

<sup>13</sup> Additionally, unlike the arbitration agreements at issue in the *D.R. Horton* and *Murphy Oil* cases, the DRP clearly excludes from coverage any claims under the National Labor Relations Act: “Claims arising under any law that permits resort to an administrative agency notwithstanding an agreement to arbitrate those claims may be brought before that agency as permitted by that law, including without limitation claims or charges brought before the National Labor Relations Board, the Equal Employment Opportunity Commission, and the United States Department of Labor. Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party’s obligation to exhaust administrative remedies before making a claim in arbitration.” (Jt. Ex. “J.”).

deficiencies present in those cases. The allegations pertaining to Respondent's maintenance of the DRP should be dismissed.

**IV. RESPONDENT'S MAINTENANCE OF ITS TAPE RECORDING POLICY IS LAWFUL BECAUSE MASTEC HAS A LEGITIMATE INTEREST IN LIMITING SECRET RECORDINGS**

MasTec's Tape Recording Policy rule states:

The Company strictly prohibits the recording of conversations with a tape recorder or other recording device unless prior approval is received from your supervisor or a member of senior management and all parties to the conversation give their consent.

The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Violation of this policy will result in disciplinary action, up to and including immediate termination. Notwithstanding this policy, the Company reserves the right to monitor its technical resources including, but not limited to, its telephone systems, e-mail systems and the internet.

MasTec's Tape Recording Policy is similar to policies that have been found lawful under the Act. For example, in *Flagstaff Medical Center, Inc.*, the Board found an employer rule prohibiting the "use of cameras for recording images of patients and/or hospital equipment, property, or facilities" lawful. *See* 357 NLRB No. 65, Slip Op. at 6 (Aug. 26, 2011). In finding that employees would not reasonably interpret the rule as restricting Section 7 activity, the Board noted that the employer had significant privacy concerns and found employees would reasonably interpret the rule as legitimately protecting privacy and not as a prohibition of protected activity. *See id.*<sup>14</sup>

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<sup>14</sup> In *Caesars Entertainment*, an ALJ found rules prohibiting the use of camera phones or other audiovisual devices at work lawful. *See* 28-CA-60841, 2012 NLRB LEXIS 134, at \*27 (Mar. 20, 2012). The ALJ held that absent some compelling evidence to the contrary, it was likely that a typical employee would perceive the rule as having "nothing at all to do" with their right to engage in union or concerted activities. *See id.*

More recently, in *Whole Foods Market*, 13-CA-103533, 2013 NLRB LEXIS 677 (Oct. 30, 2013), an ALJ found an almost indistinguishable tape recording rule to be lawful. Specifically, the rule stated:

(i) Team Member Recordings

It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Violation of this policy will result in corrective action up to and including discharge.

*Id.* at \*5. The employer's human resources representative testified that the rule applied when employees were on working time in all areas of the premises. *Id.* at \*6.

The ALJ found the rule was lawful. Preliminarily, the ALJ noted the dearth of Board authority addressing this issue, stating:

I have found no cases, and none have been cited, in which the Board has found that making recordings of conversations in the workplace is a protected right. In two cases in which recordings were made, the Board carefully limited its holdings concerning employees who made recordings, stating that the employers involved had no rule prohibiting the making of such recordings. *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011); *Opryland Hotel*, 323 NLRB 723, 723 fn. 3 (1997).

*Id.* at \*13-14.

The ALJ then explained the employer possessed the right to regulate its workplace, especially where the rule in question did not "prohibit employees from engaging in protected, concerted activities, or speaking about them....[and] [did] not expressly mention any Section 7 activity." *Id.* at \*14. In fact, the ALJ noted that "[t]he only activity the rule forbids is

recording conversations or activities with a recording device. Thus, an employee is free to speak to other employees and engage in protected, concerted activities in those conversations.” *Id.* at \*15. In addition, the ALJ relied on the fact that there had “been no showing that the rule was promulgated in response to union activity or that it has been applied to restrict the exercise of Section 7 rights.” *Id.*

The ALJ also rejected the General Counsel’s argument that the rule “could reasonably be interpreted by employees to prevent them from recording statements or conversations that involve activities permitted by Section 7 of the Act” and that it prohibited “recording of instances where employees are actually engaged in protected, concerted activities such as picketing outside the store.” *Id.* at \*16. Specifically, the ALJ explained that “Section 7 of the Act protects organizational rights ... rather than particular means by which employees may seek to communicate.” *Id.* (internal citations omitted).

The ALJ similarly rejected the General Counsel’s assertion that the rule was overbroad because it could be construed to preclude employees from making recordings during non-working time. *Id.* at \*16. The ALJ explained that “[t]his is not a case involving solicitation of employees which may lawfully take place during the employee’s non-work time. This case involves the validity of the Respondent’s rule, the question being whether employees would reasonably construe the rule to prohibit Section 7 activity.” *Id.* at \*17. Moreover, the ALJ found unpersuasive the General Counsel’s argument that the rule would inhibit employees from “recording conversations related to protected activities including allegedly unlawful statements made by supervisor, and ‘recording evidence to be presented in administrative or judicial forums in employment related matters.’” *Id.* (Internal citations omitted). On this point, the ALJ explained “the employee may present his contemporaneous, verbatim, written record of his

conversation with the other party, and his own testimony concerning employment-related matters. Only electronic recordings of conversations is prohibited.” *Id.*

The ALJ further explained that the rule clearly delineated its purpose and, when read in context of other language published near the rule, could not be construed as unlawful. *Id.* at \*18. Specifically, the ALJ explained:

The rule itself clearly explains its purpose – ‘to eliminate a chilling effect to the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded, and that recordation may inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.’ That explanation is a clear, logical and legitimate description of the reason for the rule.

The prohibition of recording conversations is embedded in a context, above, that clearly states the rule’s lawful purpose. *Target Corp.*, 359 NLRB No. 103, slip op. at 3, fn. 8 (2013). Thus, based on that embedded explanation, a reasonable employee would infer that the Respondent’s purpose in maintaining the rule is, as set forth in the GIG, “to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust.”

Similar to the rules at issue in *Lafayette Park* and its progeny, the Respondent’s rule addresses legitimate business concerns. The rule is reasonably addressed to protecting the Respondent’s legitimate business interests. As expressly made clear within the rule and the paragraph immediately preceding it, the purpose of the rule is to promote the open discussion of matters of store business, and to encourage employees to present their honest and frank opinions concerning company matters.

*Id.* at \*18-19.

As a result, the ALJ concluded the rule was lawful under the Act. *Id.* at \*21.<sup>15</sup>

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<sup>15</sup> It should be noted that there appear to be two other ALJs’ decisions issued after *Whole Foods* which invalidated workplace recording rules. Unlike in *Whole Foods*, *Prof. Elec. Contractors of Conn., Inc.*, 34-CA-071532, 2014 NLRB LEXIS 427 (June 4, 2014) does not provide a reasoned analysis supporting its conclusion (explicitly noting that the Board and appellate courts will need to resolve the issue) and should not be relied upon the Board in the instant case. Additionally, the rule in *Boeing Co.*, 19-CA-90932, 2014 NLRB LEXIS 365 (May 15, 2014) involved a prohibition on, *inter alia*, video recording devices. Prohibitions pertaining to video recording devices are substantively different than audio recording prohibitions because photo/video recording devices are not as easy to surreptitiously use or conceal because an image, unlike a verbal statement, is sought to be captured. Additionally, unlike audio, which can be manually transcribed, photographs or videos cannot easily be reproduced with a simple pen and paper.

Similarly, in *Interbake Foods, LLC*, 05-CA-033158, 2013 NLRB LEXIS 583 (Aug. 30, 2013) *adopted by Board without exceptions* 2013 NLRB LEXIS 674 (Oct. 29, 2013), the ALJ opined on the legality of another similar rule stating: “In order to keep the lines of communication open and to ensure the health and safety of all employees, personal cellular telephones, personal radios, televisions, personal tape recorders and players and similar electronic devices are not permitted anywhere in the facility.” *Id.* at \*347. The ALJ held:

There is no contention that this policy is invalid or discriminatory on its face. In addition, I find that the policy itself expresses valid, nondiscriminatory, rationales for its existence. Of course, the most obvious is the concern for safety and health which could be adversely affected by distractions created by use of these devices. Beyond this, the policy expresses a rationale precisely tailored to the facts of this case. It is apparent to me that the use of concealed recording devices would interfere with the open lines of communication that are deemed important by the policy’s terms. It is entirely reasonable for this Employer to have determined that the possibility of concealed recording of conversations would impede free and open discussion among the members of its work force.

*Id.* at \*347-348.

Just as the prohibition on the surreptitious photography and audio recording in the above cases were lawful because employees would not reasonably interpret them as restricting their protected activities, similarly, MasTec employees would not reasonably construe the Tape Recording Policy as a restriction on their protected, concerted activity. MasTec has expressly identified its legitimate concerns, including privacy and other business concerns, for maintaining the policy. The policy states, “The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.” (Jt. Ex. “K.”). As *Lutheran Heritage Village-Livonia*, 343 NLRB at 646, instructed, when evaluating the maintenance of employer rules, such rules should not be read in isolation and the context of the

rule should be considered. As MasTec has legitimate and clearly articulated business reasons for its Tape Recording Policy, employees cannot reasonably construe the rule as prohibiting protected concerted activity.<sup>16</sup>

For the aforementioned reasons, MasTec has not violated the Act by maintaining its rule prohibiting the surreptitious recording of conversations.<sup>17</sup>

**V. RESPONDENT'S RULE PROHIBITING "ABUSIVE, THREATENING OR DEROGATORY LANGUAGE" CANNOT REASONABLY BE CONSTRUED AS PROHIBITING SECTION 7 ACTIVITY**

MasTec's rule prohibiting "abusive, threatening or derogatory language" is similar to other rules regarding employee communications the Board has found lawful. In *Lutheran Heritage Village-Livonia*, the Board held a rule prohibiting "verbal abuse," "abusive or profane language," and "harassment" did not violate the Act. *See* 344 NLRB at 647-49. In holding the rule was not overbroad, the Board recognized that employers have a legitimate right to establish a "civil and decent work place." *Id.* The Board further noted that employers may

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<sup>16</sup> *Stephen's Media d/b/a Hawaii Tribune-Herald*, the one Board case finding a rule prohibiting secret audio recordings unlawful, is inapposite to the instant case. *See* 356 NLRB No. 63 (2011), *enfd.* 677 F.3d 1241 (D.C. Cir. 2012). In *Stephen's Media*, the rule prohibiting surreptitious recordings was promulgated in direct response to Section 7 activity. *See* 356 NLRB No. 63, Slip Op. at 1, 19. In addition, the employees in *Stephen's Media* had a factually reasonable basis for making secret audio recordings, as they reasonably believed their employer would violate their Weingarten rights in upcoming investigatory interviews. Unlike the facts in *Stephen's Media*, MasTec's rule was not promulgated in response to Section 7 activity or applied to restrict Section 7 activity.

<sup>17</sup> It should also be noted that Connecticut, where this case arises, recognizes the tort of "invasion of privacy based upon an unreasonable intrusion into seclusion" in cases where individuals have surreptitiously recorded face-to-face conversations. *WVIT, Inc. v. Gray*, No. 950547689, 1997 Conn. Super. LEXIS 2745 (Conn. Super. Ct. Oct. 8, 1997). In *WVIT, Inc.*, the employer asserted this cause of action against an employee who surreptitiously recorded other employees. The court granted the employer's summary judgment motion, noting that "one who intentionally intrudes physically or otherwise upon the solitude or seclusion of another or its private affairs or concerns is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." *Id.* at 5. The court explained that, in this case, the surreptitious recording "would be highly offensive no matter where it occurred and no matter what it related to." *Id.* (Internal citations omitted). In granting summary judgment to the Employer, the court concluded "'it is the fact of surreptitiously monitoring a fellow employee in and of itself that constitutes the intrusion on that employee's privacy.... The intrusion here is on the 'person' of the employee, irrespective of content.'" *Id.* at 5-6 (Internal citations omitted).

Accordingly, to the extent the Tape Recording Policy is a mechanism to minimize the likelihood that employees will commit the Connecticut tort of "invasion of privacy based upon an unreasonable intrusion into seclusion" against other employees on MasTec's premises, it cannot be construed to restrict employees' Section 7 rights.

lawfully adopt such rules because they are subject to civil liability under federal and state law should they fail to maintain a harassment or discrimination free workplace. *See id.* Finally, the Board held there was no basis for a finding that a reasonable employee would interpret a rule prohibiting “verbal abuse,” “abusive or profane language,” and “harassment” as prohibiting Section 7 activity. In *Fiesta Hotel Corp. d/b/a Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005), the Board also held the employer did not violate the Act by promulgating and maintaining a rule prohibiting employees from engaging in “conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with” other employees. The Board found the rule “no more inherently entwined with Section 7 activity” than the rule found lawful in *Lutheran Heritage Village* and that the rule’s terms were not “so amorphous” that reasonable employees would be “incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace.” *See id.*

In *Adtranz ABB Daimler-Benz Transport. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), the U.S. Court of Appeals for the District of Columbia found rules against “abusive or threatening language” to be lawful, holding:

Under the Board’s reasoning, every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company. This position is not “reasonably defensible.” It is not even close. In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language.

Similarly, MasTec employees would not reasonably believe MasTec’s rule applies to statements protected by the Act. The prohibition against “abusive, threatening or derogatory language” seeks, along with other MasTec policies, to foster a successful, civil workplace. As such, consistent with Board precedent, the rule is lawful.

In addition, Board precedent in this area necessitates examining MasTec's rule against "abusive, threatening or derogatory language" in context. In *Tradesmen Int'l*, 338 NLRB 460, 460-463 (2002), the Board found lawful a rule prohibiting "statements which are slanderous or detrimental to the company or any of the company's employees." In finding the rule did not violate Section 8(a)(1), the Board followed the directives of *Lutheran Heritage* and considered the rule as a whole. *See id.* (citing *Lutheran Heritage*, 343 NLRB at 647). As the rule in question in *Tradesmen Int'l* was among a list of rules that prohibited egregious conduct such as "sabotage" and "sexual or racial harassment," the Board found employees would not reasonably believe the rule applied to statements protected by the Act. *See Tradesmen Int'l*, 338 NLRB at 463. For another example, in *First Student*, an ALJ found an employer's rule prohibiting "Disparaging or derogatory comments or slurs" was lawful when considered in light of the entire rule. *See First Student*, 34-CA-12705, 2011 NLRB LEXIS 214, at \*133-141 (May 4, 2011). The ALJ held the rule contained sufficient examples and explanations of the purpose of the rule for a reasonable employee to understand that it prohibited the sort of conduct likely to lead to workplace violence or similarly egregious conduct, and not Section 7 protected conduct.<sup>18</sup> *See id.* Just as in *Tradesmen International* and *First Student*, MasTec's rule regarding "abusive, threatening or derogatory language" is accompanied by language that would tend to restrict the scope of its application. Specifically, MasTec's allegedly unlawful rule appears in the same list of rules that also prohibits "fighting," "gambling," "theft," "possession of a dangerous weapon," and "sale, use, possession, distribution or being under the influence of alcohol or drugs." (Jt. Ex.

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<sup>18</sup> Respondent acknowledges the Board's decision in *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989) where the Board concluded a rule prohibiting "... derogatory attacks on fellow employees, patients, physicians or hospital representatives" was unlawful. However, the Board should take this opportunity to explicitly revisit prohibitions on "derogatory" conduct in light of its decision in *Lutheran Heritage Village*, decided after *Southern Maryland Hospital Center*, which requires the Board to analyze the rule in its overall context. Therefore, Respondent urges the Board to find *Southern Maryland Hospital Center* to be inapposite and conclude that, based upon the overall context of the LP, employees would not construe the rule to constrict employees' Section 7 activity.

“L” p. 1-2). As such, reasonable employees would understand the rule restricts egregious conduct that is inappropriate and potentially dangerous to workplace life and that the rule seeks to promote a civil work environment, rather than restricting Section 7 rights.

The Board’s recent decision in *Karl Knauz Motors d/b/a Knauz BMW*, 358 NLRB No. 164 (2012), which held a rule stating that employees are “expected to be courteous, polite and friendly” and admonishing them not to “be disrespectful or use profanity or other language which injures the image or reputation of the Dealership” unlawful is clearly distinguishable.

In *Knauz BMW*, the Board found employees would reasonably construe the broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the Dealership” as encompassing statements that object to their working conditions and seek the support of others in improving them. *See id.* Primarily, the Board noted there was nothing in the rule, or anywhere else in the employee handbook, that would suggest to employees that communications protected by Section 7 were excluded from the rule’s reach. In contrast, MasTec’s “Termination” section of its Handbook contains sufficient examples and explanations to suggest to employees that communications protected by Section 7 are excluded from the “abusive, threatening or derogatory language” rule’s reach. As previously noted, the “Termination” section, viewed as a whole, suggests to employees that the rule is directed toward eliminating egregious, harmful, and dangerous conduct in the workplace. *See supra.*

A second difference between *Knauz BMW* and the instant case is that in *Knauz BMW* the Board found reasonable employees would believe that even “courteous, polite, and friendly” expressions of disagreement with the employer’s employment practices risked being deemed “disrespectful” or damaging to the employer’s image and thus were prohibited. In contrast, a reasonable employee would read MasTec’s prohibition against “derogatory”

language, when surrounded by “abusive,” “threatening,” “comments . . . indicating the possibility of violence” and other dangerous or illegal activities prohibited by the “Termination” section of the handbook, as prohibiting activities very different from those reasonably covered by the term “disrespectful” in the Knauz BMW handbook. Whereas employees of Knauz BMW would reasonably read the rule against “disrespectful” language as restricting their ability to protest their working conditions or make comments negatively reflecting on their employer, MasTec employees would not reasonably read the rule as restricting them from undertaking protected, concerted activities. Instead, reasonable MasTec employees would understand that the rule limits acceptable activities to those found in a physically safe and sexual, racial or religious harassment-free environment. As such, the MasTec rule is distinguishable from rules found to be overly broad.

## **VI. CONCLUSION**

The General Counsel’s case against Respondent is meritless based on a myriad of reasons. It is premised on the Board’s decision in *D.R. Horton*, which is inconsistent with Supreme Court jurisprudence on the enforceability of class action arbitration waivers and has been expressly rejected by virtually all courts that have considered it—including the Second and Fifth Circuits. In addition, MasTec’s Tape Recording Policy and LP do not reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, the rules are lawful, and MasTec submits the instant Complaint should be dismissed.

Dated: December 15, 2014

Respectfully submitted,

JACKSON LEWIS P.C.

By:

A handwritten signature in cursive script, appearing to read "Eric Simon", written over a horizontal line.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on December 15, 2014, I caused a true and correct copy of Respondent MasTec, North America Inc.'s Initial Brief to The National Labor Relations Board to be filed electronically with the National Labor Relations Board at [www.nlr.gov](http://www.nlr.gov) and served upon the following counsel of record via electronic mail and Federal Express overnight mail:

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