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PRIME HEALTHCARE PARADISE VALLEY, LLC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 21

PRIME HEALTHCARE PARADISE VALLEY, LLC

and Case 21-CA-133781

RICHARD CARDONA, an Individual

and Case 21-CA-133783

STEPHENE ORTEGA, an Individual

RESPONDENT'S POST HEARING BRIEF

Employer Respondent Prime Healthcare Paradise Valley, LLC hereby submits its Post Hearing Brief to the Administrative Law Judge.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Prime Healthcare Paradise Valley, LLC operates Paradise Valley Hospital, a 291-bed acute care hospital located in National City, California. There are approximately 1,200 people employed at the Hospital in a variety of positions. Richard Cardona worked for the Hospital as a Patient Account Registrar, and Stephene Ortega currently works for the Hospital as a Respiratory Care Practitioner.

Since 2010, Hospital employees have been required to sign arbitration agreements as a condition of employment. Cardona signed an old version of the agreement that is no longer in use. Cardona claims the agreement he signed violates the National Labor Relations Act ("NLRA") because reasonable employees would misconstrue it as interfering with their right to file unfair labor practice charges or otherwise access National Labor Relations Board ("NLRB") processes. This claim fails. As discussed more fully below, the agreement makes crystal clear that it ***only*** applies to claims and disputes that would otherwise be "litigated in a court or by jury trial," and that it does ***not*** apply to administrative agency proceedings. (*See* Joint Stipulation to Partially Submit Case ("JS"), Exh. 6.) Indeed, a number of employees have filed administrative charges with state and federal agencies since 2010. Those employees certainly did not feel constrained by any language in the old version of the agreement. Moreover, the uncontroverted evidence establishes that no employee has ever complained about the agreement restricting his or her access to the NLRB, and the Hospital has never sought to restrict any employee's access to the NLRB.

Cardona and Ortega also claim the Hospital violated the NLRA by requiring employees to sign arbitration agreements waiving any right to pursue employment-related claims on a class or collective basis. As noted above, Cardona signed an old version of the agreement that is no

longer in use. His agreement is silent regarding class or collective actions, and thus the class action waiver is implied. In April 2014, the Hospital began requiring all of its employees, including Ortega, to sign a new arbitration agreement containing an express class/collective action waiver.[1] Cardona did not sign a new agreement because he had resigned his position approximately one month earlier. The Hospital decided to revise its standard agreement after the U.S. Supreme Court held that class action waivers are fully enforceable in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013).

Under *Concepcion*, *Italian Colors* and a host of other Supreme Court cases, there is nothing impermissible about the class/collective action waivers in the Hospital's arbitration agreements. Indeed, ***over 40 courts across the country*** have expressly held that class/collective action waivers do not violate the NLRA because any NLRA-derived rule prohibiting such waivers is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* While the NLRB has thus far refused to join this nationwide consensus, its reasoning for doing so directly contradicts binding Supreme Court authority, including *Concepcion*, *Italian Colors*, and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Hospital respectfully maintains that Your Honor has no obligation to follow NLRB decisions that contradict Supreme Court case law. In fact, Your Honor must follow Supreme Court precedent and hold that the Hospital's class/collective action waivers are permissible.

Because all of the Charging Parties' allegations fail, the Hospital respectfully requests a ruling in its favor.

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[1] The new agreement also expressly states that it is not "intended to limit [the employee's] rights under Section 7 of the National Labor Relations Act and [the employee] will not experience any retaliation for exercising such rights." (JS, Exh. 7, ¶ 5.3.)

II. PROCEDURAL HISTORY

On April 14, 2014, Ortega filed a class action complaint against the Hospital in San Diego County Superior Court, entitled *Ortega vs. Prime Healthcare Paradise Valley, LLC*, Case No. 37-2014-00011240-CU-OE-CTL. (JS, Exh. 8.) In the complaint, Ortega alleged several causes of action under the California Labor Code as well as a derivative claim under California's unfair competition law. (*Id.*) She sought to represent a class of "all individuals who are or previously were employed by [the Hospital] in California classified as non-exempt employees and paid in whole or in part on an hourly basis ... at any time during the period beginning four (4) years prior to the filing of the Complaint and ending on the date determined by the Court." (*Id.* at ¶ 22.)

On June 20, 2014, Ortega and Cardona filed a First Amended Complaint ("FAC") in the superior court action.[2] (JS, Exh. 9.) The FAC added Cardona as a named plaintiff and added other causes of action under the California Labor Code. (*Id.*) The proposed class definition was unchanged. (*Id.* at ¶ 24.)

On July 10, 2014, the Hospital filed petitions to compel individual arbitration of the claims asserted by Ortega and Cardona in the FAC. (JS, Exhs. 10, 11.) In the petitions, the Hospital argued that: (1) Ortega and Cardona signed valid arbitration agreements covering all employment-related claims against the Hospital, (2) the claims in the FAC were all employment-related, and (3) the arbitration agreements waived any right to pursue class litigation. (*Id.*) Thus, the Hospital requested an order requiring Ortega and Cardona to arbitrate their individual claims, dismissing all class claims, and staying the superior court action pending completion of the arbitration. (*Id.*)

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[2] The FAC was filed before the Hospital had an opportunity to respond to the original complaint.

In apparent recognition that California state law supports the Hospital's position, Ortega and Cardona responded to the petitions to compel individual arbitration by filing the unfair labor practice charges underlying this proceeding on July 29, 2014. (JS, Exhs. 1, 2.) In their charges, Ortega and Cardona allege the Hospital violated the NLRA by requiring employees to waive any right to pursue or participate in class or collective actions against the Hospital. (*Id.*) Cardona also alleges that the Hospital violated the NLRA because his arbitration agreement could reasonably be read to "prohibit the filing of unfair labor practice charges." (JS, Exh. 1.)

The Hospital responded to the charges on September 26, 2015. (JS, Exh. 3.) In its response, the Hospital noted that Cardona's arbitration agreement "make[s] very clear that it ***only*** applies to claims and disputes that would otherwise be 'litigated in a court or by jury trial,' and that it does ***not*** apply to administrative agency proceedings." (*Id.* (emphasis in original).) The Hospital also highlighted several federal Circuit Court of Appeal decisions specifically holding that under *Concepcion* and *Italian Colors*, "class/collective action waivers do not violate the NLRA." (*Id.*)

Notwithstanding the points and authorities set forth in the Hospital's response, counsel for the NLRB issued a consolidated complaint on November 20, 2014, and set the matter for hearing on February 23, 2015. (JS, Exh. 4.) The Hospital timely answered on December 3, 2014. (JS, Exh. 5.) In its answer, the Hospital again pointed out the voluminous case law supporting its position that class action waivers are permissible under the NLRA. (*Id.* at p. 7.)

Meanwhile, on November 21, 2014, the San Diego County Superior Court granted the Hospital's petitions to compel individual arbitration, and dismissed Ortega's and Cardona's class claims. (JS, Exhs. 16, 17.) Notably, in so holding, the Superior Court ***denied*** "Plaintiffs' request to stay the class claims pending a decision by the National Labor Relations Board..." on the

ground that "[t]he issue submitted to the NLRB has previously been addressed, and decided adversely to Plaintiffs' position, by the California Supreme Court [in] *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014)." (*Id.*)

The hearing in this matter went forward as scheduled on February 23, 2015. The Hospital's Manager of Human Resources, Lorraine Villegas, testified on behalf of the Hospital. (*See* Official Report of Proceedings ("OR") pp. 21:6-22:13) Ortega and Cardona declined to testify, presumably to avoid cross examination. At the conclusion of the hearing, the parties were invited to submit post-hearing briefs setting forth their respective positions.

III. ARGUMENT

A. Cardona's Arbitration Agreement Cannot Reasonably Be Interpreted To Prohibit The Filing Of A ULP Charge

Cardona claims the Hospital violated Section 8(a)(1) of the NLRA because his arbitration agreement can theoretically be read to "prohibit the filing of unfair labor practice charges." (*See* JS, Exh. 1.) Cardona also claims that his agreement violates Section 8(a)(1) because it does not expressly state that it "does not extend to the filing of unfair labor practice charges." (*Id.*) These claims fail.

First, there is no requirement that an arbitration agreement expressly state that ULP charges do not fall within its scope. Rather, the test is whether an employee would "reasonably construe" the agreement to prohibit the filing of such a charge. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 363 (5th Cir. 2013); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Here, Cardona's arbitration agreement cannot reasonably be interpreted in this manner.

D.R. Horton contains a reasoned and persuasive analysis regarding the type of language that would lead a reasonable employee to believe that an arbitration agreement prohibits the

filing of a ULP charge. In *D.R. Horton*, the Fifth Circuit Court of Appeals was asked to review a NLRB decision against the employer on this issue. The Fifth Circuit affirmed the NLRB's decision. In so holding, the Fifth Circuit first noted that references in the agreement to "court actions" and the employee's "rights to trial in court before a judge or jury" implied that "administrative proceedings before the Board [we]re unaffected." *D.R. Horton*, 737 F.3d at 363. However, the Fifth Circuit went on to observe that the agreement in question did not solely refer to "court actions." Rather, it contained multiple references to administrative agencies, which would include the NLRB. Specifically, the agreement stated that the "'arbitrator w[ould] not have the authority to order any remedy that a court *or agency* would not be authorized to order," that the parties would pay any costs they "would incur if the claim(s) were litigated in a court *or agency*," and gave the arbitrator the power to award fees and costs "to the same extent a court *or agency* would be entitled to do." *Id.* (emphasis in original). The agreement also provided that the employee "waive[ed] the right to file a lawsuit *or other civil proceeding* relating to [his] employment ... *as well as* the right to resolve employment related disputes in a proceeding before a judge or jury.'" *Id.* (emphasis in original). Thus, the agreement was replete with language indicating that employees could ***not*** pursue administrative agency charges.

Based on this language, the Fifth Circuit concluded that the arbitration agreement could reasonably be "misconstrued" as prohibiting unfair labor practice charges or other "agency" claims, and upheld the NLRB's decision to require the employer "to clarify with its employees that the arbitration agreement did not eliminate their rights to pursue claims of unfair labor practices with the Board." *D.R. Horton*, 737 F.3d at 348, 363-64. No such remedy would be appropriate here. As already explained, the Hospital's current arbitration agreement, which has

been in place for nearly a year, specifies that it is not intended to limit an employee's right to pursue rights under the NLRA.

In contrast to the agreement in *D.R. Horton*, Cardona's arbitration agreement does not contain any reference whatsoever to an "agency." Unlike the agreement in *D.R. Horton*, there is no language in Cardona's agreement that could reasonably be construed as a waiver of the right to file agency proceedings. To the contrary, Cardona's agreement specifically provides that the employee ***only*** "waives [his] right to have employment related disputes ***litigated in a court or by jury trial***." (JS, Exh. 6, ¶ 7) (emphasis added).) Moreover, the agreement states that it ***only*** applies to "claims or controversies ***for which a federal or state court would be authorized to grant relief***...." (*Id.* at ¶ 2.) Finally, it also specifies that "[a]ll arbitrations covered by th[e] Agreement shall be adjudicated in accordance with California and/or federal law ***which would be applied by a court of law***." (*Id.* at ¶ 4.)

Clearly, Cardona's arbitration agreement only applies to claims that would be asserted in a court, and thus does not apply to administrative charges filed with an agency such as the NLRB. Any suggestion that a "reasonable person" would not know the difference insults the intelligence of the Hospital's employees and contradicts the facts established at trial. Between 2010 and April 2014, six employees filed administrative charges against the Hospital with agencies such as the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. (OR, pp. 28:17-29:5.) These employees signed the same agreement as Cardona (*id.* at p. 29:9-15), and demonstrably did not interpret it to prohibit the filing of charges with state and federal agencies such as the NLRB. Moreover, no Hospital employee has ever complained or indicated in any way that he or she felt the agreement precluded the filing of such a charge. (*Id.* at p. 28:13-16.) The fact that employees did not

interpret the agreement to prohibit the filing of charges is "instructive." *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007).

Further, there is no evidence that Cardona himself believed he was precluded from filing a charge with the NLRB, and the fact that he actually did so directly belies any such notion. Notably, Cardona declined to testify at trial. Thus, the Hospital was precluded from testing him on this point. There is also no evidence the Hospital ever intended to limit anyone's right to file an unfair labor practice charge. In fact, the evidence is to the contrary. As the Hospital's Human Resources Manager Lorraine Villegas testified at trial, the Hospital has never sought to compel arbitration of such a charge, and has never done anything to discourage any employee from filing such a charge. (OR pp. 27:10-28:12.)

For all these reasons, Cardona's claim that the Hospital's older arbitration agreement violates the NLRA because employees would reasonably believe it precludes them from filing charges with the NLRB must fail.

B. <u>The FAA Preempts Any NLRA Rule Prohibiting Class Or Collective Action Waivers In Arbitration Agreements</u>

The FAA proclaims a strong public policy in favor of arbitration. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012). Indeed, the Supreme Court has made clear that "the FAA was designed to ***promote*** arbitration." *Concepcion*, 131 S.Ct. at 1749 (emphasis added). As such, the FAA requires the enforcement of arbitration agreements according to their terms. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). This is true even where the FAA's goals clash with those of another federal statute. In such cases, the FAA's mandate in favor of arbitration prevails unless it "has been overridden by a contrary congressional command." *Italian Colors*, 133 S.Ct. at 2309.

In *Concepcion*, the Supreme Court applied these principles and struck down a California rule prohibiting class or collective action waivers in arbitration agreements because the rule "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the FAA. *Concepcion*, 131 S.Ct. at 1753. By *de facto* requiring the availability of classwide arbitration, the rule defeated all the benefits of arbitration – informality, speediness, efficiency and flexibility. *Id.* at 1751-52. For example, "[b]efore an arbitrator may decide the merits of a claim in classwide procedures, he must first decide ... whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* at 1751. This "makes the process slower, more costly, and more likely to generate procedural morass." *Id.* Further, class arbitration does not offer the same procedural safeguards as litigation, such as appellate review. *Id.* at 1752. "We find it hard to believe that defendants would bet the company with no effective means of review." *Id.*

As the Supreme Court explained, "[a] prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results." *Concepcion*, 131 S. Ct. at 1749. Because the California rule thwarted this objective, the rule was preempted by the FAA.

The reasoning in *Concepcion* applies with equal force to any purported rule prohibiting class or collective action waivers in arbitration agreements based on the NLRA. Such a rule would be no less offensive to the FAA's goal of "promot[ing] arbitration." Just like the rule struck down in *Concepcion*, it would require employers to participate in classwide or collective arbitration and would, therefore, defeat the "prime objective of an agreement to arbitrate" – "streamlined proceedings and expeditious results." *Concepcion*, 131 S. Ct. at 1749.

Significantly, the Fifth Circuit analyzed this very issue in *D.R. Horton* and, applying *Concepcion*, concluded that the FAA preempts any NLRA-based rule prohibiting class or

collective action waivers. In *D.R. Horton*, the NLRB held that the employer violated Section 8(a)(1) of the NLRA – the exact provision at issue here – by, among other things, requiring employees to sign arbitration agreements containing class or collective waivers. *Id.* at 355. The NLRB held that such a waiver interferes with employees' right under Section 7 to engage in "concerted activity for their mutual aid or protection," which is "central to the NLRA's purposes." *Id.* at 355-56. The NLRB found that employees have a *substantive* right under Section 7 to participate in class action litigation. *Id.* at 355.

In reaching its decision, the NLRB found that preventing employers from including class action waivers in arbitration agreements would not conflict with the FAA. *D.R. Horton*, 737 F.3d at 358. Specifically, the NLRB determined that this rule falls under the FAA's "savings clause," which "allows for non-enforcement of arbitration agreements on any 'grounds [that] exist at law or in equity for the revocation of any contract.'" *Id.* To find that an arbitration agreement must "yield to the NLRA," the NLRB reasoned, "is to treat it no worse than any other private contract that conflicts with Federal labor law.'" *Id.*

The Fifth Circuit reversed the NLRB's holding. The Fifth Circuit conceded that requiring employees to waive their right to bring a class or collective action conflicts with the "central purposes" of the NLRA. However, the Fifth Circuit held that the NLRA's "central purposes" must yield to the FAA – not the other way around.

As support for its holding, the Fifth Circuit noted that "***in every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA***." *Id.* at 357, n.8 (emphasis added). The Fifth Circuit went on to conduct an in-depth analysis to determine "whether the NLRA contains a congressional command to override the FAA," ultimately finding it does not:

> The burden is with the party opposing arbitration, and here the Board has not shown that the NLRA's language, legislative history, or purpose support finding the necessary congressional command. Because ... the NLRA does not contain a congressional command exempting the statute from application of the FAA, [the arbitration agreement] must be enforced according to [its] terms.

Id. at 362 (internal citations omitted).

Further, relying on *Concepcion*, the Fifth Circuit rejected the argument that the NLRB's rule fell within the savings clause of the FAA. A rule that is neutral on its face, but "applied in a fashion that disfavors arbitration," is not a ground that exists "for the revocation of any contract" within the meaning of the savings clause. *See Concepcion*, 131 S.Ct. at 1747. The Fifth Circuit concluded that the NLRB's rule was not arbitration-neutral. Rather, by substituting class proceedings for individual arbitration, the rule would significantly undermine arbitration's fundamental attributes by requiring procedural formality and complexity, and by "greatly increasing" the risks to defendant. *D.R. Horton*, 737 F.3d at 360 (citing *Concepcion*, 131 S.Ct. at 1750-52). As the Fifth Circuit firmly concluded: "***Requiring a class mechanism is an actual impediment to arbitration and violates the FAA***." *Id.* (emphasis added).

Finally, the Fifth Circuit rejected the NLRB's conclusion that employees have a substantive right to pursue or participate in class action litigation. *D.R. Horton*, 737 F.3d at 357 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)). As the Fifth Circuit noted, "there are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks. For example, the Supreme Court has determined that there is no substantive right to class procedures under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* despite the statute providing for class procedures." *Id.* (citing *Gilmer*, 500 U.S. at 32).

Every other Circuit Court of Appeal to address this issue has similarly rejected the NLRB's position. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297, n.8 (2d Cir. 2013) ("we decline to follow the [Board's] decision in *D.R. Horton*"); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) ("we reject [the employee'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" under the NLRA); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-36 (11th Cir. 2014) (same).

Indeed, ***more than 40 courts across the nation*** have examined this issue and virtually all of them have found that under *Concepcion*, *Italian Colors*, *Gilmer* and other Supreme Court cases, class or collective action waivers are enforceable, and any NLRA-derived rule to the contrary is displaced by the FAA. *See, e.g., Sylvester v. Wintrust Financial Corp.*, 2013 WL 5433593, at *7 (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, 1046-49 (N.D. Cal. 2012); *LaVoice v. UBS Financial Services*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. 2012); *Cohen v. UBS Financial Services*, 2012 WL 6041634, at *4 (S.D.N.Y. 2012); *Morris v. Ernst & Young LLP*, 2013 WL 3460052, at *8-*9 (N.D. Cal. 2013); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 n.7 (S.D.N.Y. 2013); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 WL 6158040, at *4 (N.D. Cal. 2013); *Siy v. CashCall, Inc.*, 2014 WL 37879, at *12-*15 (D. Nev. 2014); *Cohn v. Ritz Transportation Inc.*, 2014 WL 1577295, at *3 (D. Nev. 2014); *Dixon v. NBCUniversal Media, LLC*, 947 F.Supp.2d 390, 403 n.11 (S.D.N.Y. 2013); *Hickey v. Brinker International Payroll Co., L.P.*, 2014 WL 622883, at *2 (D. Colo. 2014); *Zabelny v. CashCall,*

Inc., 2014 WL 67638, at *12-*14 (D. Nev. Jan 08, 2014); *Ryan v. J.P. Morgan Chase & Co.*, 924 F.Supp.2d 559, 566 (S.D.N.Y. Feb 21, 2013); *Long v. BDP International Inc.*, 919 F.Supp.2d 832, 852 n.11 (S.D. Tex. 2013); *Green v. Zachry Industries Inc.*, 2014 WL 1232413, at *4-*5 (W.D. Va. 2014); *Appelbaum v. Auto-Nation Inc.*, 2014 WL 1396585, at *10 (C.D. Cal. 2014); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211, at *12 n.11 (C.D. Cal. 2013); *Cilluffo v. Central Refrigerated Services*, 2012 WL 8523507, at *7 (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, at *2 (D. Kan. 2012); *Torres v. United Healthcare Services*, 920 F.Supp.2d 368, 378-79 (E.D.N.Y. 2013); *Iskanian*, 59 Cal.4th at 366-74; *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1132-35 (2012); and *Truly Nolen of America v. Superior Court*, 208 Cal.App.4th 487, 514 (2012).

Despite this overwhelming consensus, the NLRB recently revisited and reaffirmed its *D.R. Horton* decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). But the reasoning in *Murphy Oil* is no different from the reasoning in *D.R. Horton*. Thus, the reasoning in *Murphy Oil* has ***already*** been rejected by a higher court. Moreover, the NLRB made no effort to explain how its holding could possibly be consistent with the central tenet of *Concepcion* – that prohibiting class action waivers (and thereby mandating the availability of classwide arbitration) would defeat all the primary benefits of arbitration – informality, speediness, efficiency and flexibility. *See Concepcion*, 131 S.Ct. at 1751-52.

Notably, in *Murphy Oil*, the NLRB placed great weight on its determination that employees have a substantive right under the NLRA to pursue or participate in class action litigation. *See id.* at *31-*37. But the Supreme Court has made clear that class actions are

merely procedural mechanisms and there is no substantive right to pursue claims on a class basis. *See Amchem*, 521 U.S. at 612-13; *Roper*, 445 U.S. at 332. Indeed, the Supreme Court has specifically noted, "In *Gilmer*, ... we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311 (citing *Gilmer*, 500 U.S. at 32). If class waivers are permitted – even in circumstances where the federal statute at issue expressly permits collective actions – they certainly are permitted where, as here, there is only a claim that the federal statute "impliedly" permits collective actions.

In short, class action waivers are entirely permissible under binding U.S. Supreme Court authority. The NLRB's *D.R. Horton* and *Murphy Oil* decisions are inconsistent with that authority, and therefore must be disregarded.

IV. CONCLUSION

Based on the foregoing, it is clear the Hospital has not violated the NLRA. The Charging Parties' allegations are unfounded. The Hospital therefore respectfully requests a ruling that the Charging Parties' arbitration agreements are valid and binding.

DATED: March 31, 2015

Respectfully Submitted,
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By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-1422.

On **March 31, 2015,** I served true copies of the following document(s) described as **RESPONDENT'S POST HEARING BRIEF** on the interested parties in this action as follows:

Norman Blumenthal, Esq.
Aparajit Bhowmik, Esq.
Blumenthal Nordrehaug & Bhowmik
2255 Calle Clara
La Jolla. CA 92037

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the 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.

☐ **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package provided by Overnight Delivery and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of Overnight Delivery or delivered such document(s) to a courier or driver authorized by Overnight Delivery to receive documents.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 31, 2015**, at Los Angeles, California.

Christine M. Rios

Christine M. Rios