

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

KO HUTS, INC.

and

Case No. 14-CA-164874

MICHAEL TIFFANY, an Individual

**RESPONDENT KO HUTS, INC'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

This case focuses on a mutual Agreement to Arbitrate (“Arbitration Agreement”) that Respondent, K.O. Huts, Inc. (“KO Huts”) entered into with Charging Party, Michael Tiffany (“Tiffany”). As part of this agreement, Tiffany agreed that any claim he may seek to bring would be brought only on an individual basis, and not as part of a class or collective action. When Tiffany subsequently filed an individual federal lawsuit asserting class-wide claims for relief under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.* and Oklahoma state wage and hour law, KO Huts moved for, and the district court ordered, a stay of Tiffany’s claims and compelled him to proceed in individual arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*

Employment arbitration agreements containing class action waivers, like KO Huts’ Arbitration Agreement, have received near-universal approval from the federal courts as lawful and enforceable under the FAA. Nonetheless, Administrative Law Judge Arthur J. Amchan (“ALJ”), relying entirely on the Board’s decisions in *Murphy Oil USA, Inc.*, 316 NLRB No. 72 (2014), *D.R. Horton*, 357 NLRB No. 2277 (2012), and their progeny, found that KO Huts separately violated Section 8(a)(1) of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. § 160 *et seq.*, by (i) maintaining the Arbitration Agreement and (ii) seeking a court order enforcing it against Tiffany.¹ Not only did the Board incorrectly conclude in those decisions that the right to pursue a class or collection action under federal or state procedural rules is a non-waivable substantive right under the NLRA, but the Board’s position also fails to account for the strong policy favoring arbitration.

¹ The ALJ acknowledged that the Fifth Circuit Court of Appeals denied enforcement of the Board’s orders in each case. [ALJ’s Decision, p. 4 (citing *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)]. For clarity of reference, we will cite to the Board’s decision in each case as “I” and the Fifth Circuit’s decision in each case as “II.”

Similarly, in spite of the fact that Tiffany's conduct in filing his federal lawsuit was undisputedly individual in nature, in reliance on the Board's decision in *Beyoglu*, 362 NLRB No. 152 (2015), the ALJ erroneously found that Charging Party had engaged in concerted activity because of the "potential" that his lawsuit might initiate group action or induce or prepare for group action.

The ALJ's Decision, like the Board decisions on which it relies, fails to recognize the strong National policy in favor of arbitration under the FAA. This policy has been stated and re-stated in numerous recent Supreme Court decisions, including cases involving the interplay between arbitration and federal statutory claims. As these cases make clear, when the FAA applies, as it does here, its mandate may be disregarded only when it is clear that the FAA has been overridden by a contrary congressional command. There is nothing in the NLRA or the Norris-LaGuardia Act ("NLGA") that meets the stringent showing required by the courts to override the FAA.

Further, the ALJ's Decision contains an erroneous finding that KO Huts engaged in "unlawful" litigation in obtaining the district court's order compelling Tiffany to individual arbitration. Flowing from this flawed conclusion is the ALJ's Remedy, which requires KO Huts to reimburse Tiffany for the attorney's fees and costs Tiffany expended in unsuccessfully opposing the motion to compel individual arbitration. This aspect of his Decision, which penalizes KO Huts for reasonably pursuing a claim in good faith through the federal courts, not only fails to follow the precedent on which he purports to rely, but clearly runs afoul of KO Huts' rights under the First Amendment. It also exceeds the authority granted the ALJ under the Act.

Because the Board’s rationale in cases like *D.R. Horton* and *Murphy Oil*, among others, reflects hostility towards arbitration that runs counter to the strong federal policy in favor of arbitration, the Board’s position must yield. Accordingly, KO Huts respectfully urges the Board to reverse the ALJ, reconcile its stance with the Circuit Court precedent rejecting *D.R. Horton* and its analysis, and find that KO Huts’ arbitration agreement with Charging Party to resolve disputes through individual arbitration does not interfere with, restrain or coerce employees in the exercise of Section 7 rights and does not violate Section 8(a)(1) of the Act.

II. QUESTIONS PRESENTED

Whether the ALJ erred in finding that KO Huts (1) violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, and (2) violated Section 8(a)(1) of the Act by filing an “unlawful” motion in the federal district court to compel Tiffany to engage in individual arbitration of his claims.²

III. FACTUAL BACKGROUND

Michael Tiffany (“Tiffany”) sought employment with KO Huts, Inc., a Pizza Hut franchisee, as a delivery driver at a KO Huts restaurant in Enid, Oklahoma. [ALJ’s Decision, p. 2]. In conjunction with his hiring, Tiffany and KO Huts mutually executed “KO Huts, Inc. Agreement to Arbitrate” (“Arbitration Agreement”) [*Id.*]. The Arbitration Agreement provides, in relevant part, that each party agrees to use binding arbitration for any claims that it may have against the other. The Arbitration Agreement also provides that all claims subject to arbitration

² More specific questions presented for the Board’s review are set forth in the Argument and Authorities headings and sub-headings. *See infra* Section IV.

“may be instituted and arbitrated only in an individual capacity, and not on behalf of or as part of any purported class, collective, representative, private attorney general, or consolidated action.” [ALJ’s Decision, pp. 2-3]. Through this aspect of the Arbitration Agreement, the parties intended “to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures . . . with respect to all claims subject to this Agreement to Arbitrate.” [Id.]. Notably, the Agreement expressly permits Tiffany to pursue “action with an administrative agency in accordance with applicable law, including the filing of charges or claims with the National Labor Relations Board” [Id.]

On October 21, 2015, Tiffany filed a civil action styled *Michael Tiffany v. KO Huts, Inc.*, (Case No. CIV-15-1190-HE), in the United States District Court for the Western District of Oklahoma (“Lawsuit”). Tiffany’s claims in the Lawsuit centered on the allegation that KO Huts did not properly reimburse him for expenses he allegedly incurred using his personal vehicle to make deliveries. Tiffany alleges that this under-reimbursement violated the minimum wage provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 206(a), and the Oklahoma equivalent. [ALJ’s Decision, pp. 3-4; *see also* Exhibit G attached to Parties Joint Motion and Stipulation of Facts (“Joint Stipulation”)]. Although the Complaint is styled as a collective action under the FLSA and a class action under Oklahoma law, it was filed individually by Tiffany alone. There is no evidence that Tiffany discussed the matter with any other KO Huts’ employees, either prior or subsequent to filing the Lawsuit, and to date no other employees have sought to join the Lawsuit or otherwise pursue like claims against KO Huts.

On November 19, 2015, KO Huts filed a motion in the Lawsuit to seek judicial enforcement of the Arbitration Agreement by requiring Tiffany to prosecute his claims on an

individual basis in arbitration. [ALJ’s Decision, p. 4].³ Counsel for KO Huts and counsel for Tiffany each submitted legal briefs to the court supporting or opposing KO Huts’ motion. On April 15, 2016, the district court determined that the waiver was enforceable under the FAA and was not “even arguably prohibited” by the NLRA. [Exhibit B to Respondent’s Brief to ALJ, at p.3].

IV. ARGUMENT AND AUTHORITIES

A. Applicable Statutory Frameworks

1. National Labor Relations Act

Section 7 of the Act provides that employees have the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of mutual collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities” 29 U.S.C. § 157. Section 8 of the Act sets forth various types of conduct that violate Section 7 rights and constitute an unfair practice. Relevant to the Complaint in this case is Section 8(a)(1), which makes it unlawful for an employer to “interfere with, restrain or coerce” employees in the exercise of their rights under Section 7. *Id.* § 158(a)(1).

“The Board’s well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on ‘whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.’” *Desert Springs Hosp. Med. Cntr.*, 363 NLRB No. 185 (2016). The General Counsel bears the burden of proving the elements of the alleged unfair labor practice, including that the

³ On November 23, 2016, Tiffany initiated an arbitration action with the American Arbitration Association, asserting the same FLSA claims as those alleged in his Complaint in the Lawsuit. That arbitral action remains pending.

employee engaged in concerted activity. *N.L.R.B. v. Transportation Mgm't Corp.*, 462 U.S. 393, 401 (1983); *see also* 29 U.S.C. § 160(c).

2. Federal Arbitration Act

Congress passed the FAA with the express intention of eliminating hostility towards the enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The core substantive provision of the FAA states that a written agreement to resolve disputes through arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA further provides that courts must stay litigation of claims to which an arbitration agreement applies, and compel arbitration in accordance with the terms of the agreement. *See id.* § 3, § 4.

As the Supreme Court has repeated in numerous cases, the FAA establishes “a liberal federal policy favoring arbitration agreements.” *AT&T Mobility*, 563 U.S. at 339 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). To further the federal policy behind the FAA, arbitration agreements must be “rigorously enforce[d]” according to their terms. *American Exp. Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304, 2309 (2013); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). From this strong policy, the Supreme Court has held that the parties to an arbitration agreement “may limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate disputes.” *AT&T Mobility*, 563 U.S. at 344 (internal quotations and citations omitted) (emphasis in original). The Congressional policy favoring arbitration applies with equal force to employment-related arbitration agreements. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Where an alleged statutory conflict exists, the FAA controls unless “the FAA’s mandate has been ‘overridden by a contrary congressional command in another federal statute.’” *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665 (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). If such a command exists it will be clearly stated in the statutory text or its legislative history, or the command will create an “inherent conflict” between arbitration and the statute’s underlying purpose. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26. In assessing whether a conflict exists, “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Thus, doubts must be resolved in favor of arbitration. Where a statute is “silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *CompuCredit*, 132 S.Ct. at 673.

B. The ALJ Erred in Deciding the Validity of KO Huts’ Arbitration Agreement under the Board’s *D.R. Horton* and *Murphy Oil* Decisions Rather than the FAA and the Controlling Supreme Court Precedent Interpreting It.
(Exception Nos. 1, 2, 3, 4, 8, 9)

In describing the case, the ALJ determined that “[e]ssentially the issues herein are those considered by the Board in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) *enforcement denied in relevant part* 737 F.3d 344 (5th Cir. 2013) and reaffirmed by the Board in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) *enforcement denied in relevant part* 808 F.3d 103 (5th Cir. 2015).” [ALJ’s Decision, p.1] After determining that KO Huts’ Arbitration Agreement was analogous in relevant part to the arbitration agreements at issue in *D.R. Horton* and *Murphy Oil*, the ALJ simply applied the Board’s holding without further analysis. Although the ALJ recognized that the Fifth Circuit had denied enforcement in both cases, he stated that he remained obligated to apply *Murphy Oil* and find that KO Huts violated Section 8(a)(1). [*Id.* at p.4] Because the

underlying Board decisions that the ALJ felt compelled to apply were erroneously decided, the ALJ's decision was similarly faulty and should not be upheld.

1. The Board's Determination in *D.R. Horton*, restated in *Murphy Oil*, that Section 7 Provides an Unwaivable Right to Bring a Class or Collective Action Was in Error.

Implicit to the ALJ's Decision, and based on his reliance on the Board's decisions in *D.R. Horton* and *Murphy Oil*, is the conclusion that employees have a nonwaivable right under Section 7 to pursue class or collective actions under the FLSA, and presumably all other federal employment statutes. KO Huts recognizes the ALJ's obligation to follow Board precedent, but respectfully submits that those decisions missed the mark.

The Board's holding does not address the procedures for claims raised under the NLRA; rather, it focuses on the procedures for pursuing claims under other federal statutes. This would include rules promulgated under the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, such as the Federal Rules of Civil Procedure and its Rule 23 regarding class actions, as well as the collective action procedures contained in the FLSA. The problem with the Board's approach is that it flies in the face of Supreme Court authority conclusively determining that these rules constitute only procedural, and not substantive, rights. "[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Amchen Prods. Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Likewise, the collective action mechanism under the FLSA sets forth only procedural rights and does not establish "a non-waivable substantive right to a collective action."

Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1335 (11th Cir. 2014) (following Supreme Court’s guidance in *Gilmer* and *Italian Colors*).⁴

The majority’s response to this position was to focus on the language of Section 7 in determining that the substantive right is derived from the NLRA and not the FLSA or other federal statute. The problem with this approach, as Member Johnson aptly described, is that it would effectively make Section 7 a “procedural superhalo,” capable of converting what are clearly procedural rules into non-waivable substantive rights. *Murphy Oil I*, 361 NLRB No. 72, slip op. at 43. The Board’s position would “result in the tautology that [non-NLRA procedural] rights are Section 7 rights because they are ‘substantive,’ and thus Section 7 protects them as substantive rights. The Board cannot make something that walks like, looks like, and sounds like a procedural duck into a substantive swan, merely by declaring that it falls into the ambit of Section 7.” *Id.*, slip op. at 51.

Affording such a significant expanse to Section 7 goes well beyond anything Congress could have intended when the NLRA was passed. While the NLRA was enacted in 1935, the collective action procedures within the FLSA were not added until 1947. And modern class action practice did not arise until amendments to the Federal Rules of Civil Procedure in 1966. Clearly, these changes occurred well after the “mutual aid and protection” language was enacted through Section 7. One cannot contend that Congress intended in 1935 to protect group litigation procedures within the scope of Section 7 when those procedures did not yet exist. *Murphy Oil I*, 361 NLRB No. 72, slip op. at 44 (Member Johnson dissenting).

The backdrop of the amendments to the FLSA that added the collective action procedures calls the Board’s position further into question. Congress amended the FLSA in 1947 to institute

⁴ Although addressing a different statute (Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*), the Court’s opinion in *Gilmer* remains noteworthy given that Congress adopted the FLSA’s collective action mechanism for use under the ADEA. *See* 29 U.S.C. § 626(b).

the requirement that each individual employee must affirmatively file a consent form with the court in order to become a party-plaintiff to an FLSA collective action. 29 U.S.C. § 216(b). Through this statutory framework, Congress specifically intended to limit the right that an individual would have to pursue a group action under the FLSA. *See Walthour*, 745 F.3d at 1336. “Even assuming Congress intended to create some ‘right’ to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well.” *Id.* at 1335 (quoting *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013)). It is nonsensical to conclude that Congress would create a statutory provision in the FLSA that an employee may waive, while treating that same mechanism as non-waivable through the NLRA. The Board’s expansive interpretation of Section 7 pushes an agenda that is inconsistent with the goals Congress sought to address through the FLSA’s collective action mechanism.

Moreover, even assuming that non-NLRA procedures can be viewed as protected by Section 7, the Board’s position that these rights are non-waivable directly conflicts with Section 9(a) of the Act. That section guarantees that “any individual employee . . . shall have the right at any time to present grievances to [the] employer and to have such grievances adjusted.” 29 U.S.C. § 159(a). Through this provision, Congress intended to protect each employee’s right to individually adjust the merits of any dispute that the employee may have with his or her employer. *See Murphy Oil I*, 361 NLRB No. 72, slip op. at 32 (Member Miscimarra dissenting) (relying on extensive analysis of legislative history of Wagner Act). The logical extension of the right to individually adjust the merits of a dispute is the right of each individual employee to agree to the procedure to be used to resolve a dispute. *Id.*

Moreover, this interpretation of Section 9(a) is consistent with Section 7, which also provides that employees have the right to “refrain from” engaging in the various activities that are otherwise statutorily protected. 29 U.S.C. § 157. “Taken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers – and not the NLRB – to choose for themselves *whether* to pursue non-NLRA disputes on a ‘collective’ versus ‘individual’ basis.” *Murphy Oil I*, 361 NLRB No. 72, slip op. at 33 (Member Miscimarra dissenting) (emphasis in original).

2. The Board Erred in Concluding that the FAA’s Savings Clause Applies to KO Huts’ Arbitration Agreement.

The operative language of the FAA provides that a written arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In *D.R. Horton*, the Board found this exception, known as the “savings clause” applied to invalidate the class waiver in the arbitration agreement. The Board viewed the NLRA as creating rights, akin to a public policy exception, that would justify revocation of the arbitration agreement. *D.R. Horton I*, 357 NLRB No. 184, slip op. at 2287. Even assuming that Section 7 protects an employee’s right to utilize class or collective action procedures, the Board’s conclusion disregards the Supreme Court precedent interpreting the scope of this aspect of the FAA.

The Supreme Court has determined that the “savings clause” permits arbitration agreements to be invalidated according to “generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotes omitted). Further, because of the FAA’s strong policy favoring arbitration, where an otherwise facially neutral defense results in a

disproportionate impact on arbitration, the “savings clause” is inapplicable to that defense. On this point, Supreme Court’s decision in *AT&T Mobility* is instructive, and controlling.

AT&T Mobility dealt with a California statute that prohibited the enforcement of unconscionable contracts. Known as the *Discovery Bank* rule, this statute had been interpreted by California courts to prohibit class waivers in most contracts. *AT&T Mobility*, 563 U.S. at 340 (describing California’s “*Discovery Bank*” rule). Although the rule ostensibly applied equally to all contracts, the Supreme Court struck it down, finding that the rule had a disproportionate impact on and thus stood as an impermissible obstacle to arbitration. *Id.* at 352.

The Court held that “[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344. Class proceedings “sacrifice[] the principal advantage of arbitration – its informality – and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348. In addition, the risks to employers would significantly increase, given the limited judicial review afforded arbitral decisions and the much higher stakes that class arbitrations present. *Id.* at 350 (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”). This “unacceptable risk” would cause defendants to avoid arbitration rather than employing it as Congress intended under the FAA. *AT&T Mobility*, 563 U.S. at 350-51.

The effect of the Board’s rule from *D.R. Horton* is indistinguishable from that of the *Discovery Bank* rule and, thus, fatally flawed for the same reasons. The Supreme Court’s opinion in *AT&T Mobility* provides a controlling view of how the FAA must be interpreted. In its rejection of the Board’s position in *D.R. Horton*, the Fifth Circuit determined, after a detailed analysis of *AT&T Mobility*, “that the Board’s rule does not fit within the FAA’s savings clause.”

D.R. Horton II, 737 F.3d at 359. “Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The savings clause is not a basis for invalidating the waiver of class procedures in an arbitration agreement.” *Id.* at 360. The California Supreme Court unanimously came to the same conclusion. It explained that, by requiring the availability of class procedures, the Board’s position “interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice.” *Iskanian v. CLS Transp. Los Angeles LLC*, 327 P.3d 129, 141 (Cal. 2014) (finding *AT&T Mobility* controlling and rejecting the Board’s *D.R. Horton* rule).

3. The Board Erred in Concluding that the NLRA or NLGA Contains the Requisite “Contrary Congressional Command” Necessary to Override the FAA’s Mandate.

Citing Section 7’s protection of “concerted activity” and the Act’s general goal of equalizing bargaining power between employers and employees, the Board held that the NLRA evidenced a “contrary congressional command” to override the FAA. *Murphy Oil I*, 361 N.L.R.B. No. 72, slip op. at 9. However, neither of these reasons is adequate to disregard the FAA’s mandate. The Supreme Court has long-held that “[m]ere inequality in bargaining power” is an insufficient reason to override the FAA’s policy of enforcing arbitration agreements. *Gilmer*, 500 U.S. at 32-33. And, neither the statutory language nor the legislative history of the NLRA provides the requisite clarity to establish the requisite contrary command.

Since 1987, when the Supreme Court issued its decision in *McMahon*, the Court has addressed numerous cases in which the FAA’s policy of promoting arbitration was alleged to be contrary to another federal statute. In each case, the Court reaffirmed the validity of individual arbitration agreements under the FAA in rejecting the argument that a conflict exists between the FAA and the particular statute at issue. From these opinions, the importance of clear statutory

language reflecting the contrary congressional command to override the FAA cannot be overstated. *See e.g., American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013) (despite focus of Sherman Act on protecting consumers from antitrust violations and acknowledgment of the significant expense associated with proving these violations, Court found nothing in it to prohibit enforcement of class waiver under FAA); *CompuCredit*, 132 S. Ct. at 672-73 (finding no conflict between FAA and Credit Repair Organizations Act, in spite of express language in CROA that gives affected individuals the “right to sue” an organization that violates the act); *Gilmer*, 500 U.S. at 27-29 (no conflict between arbitration agreement under FAA and Age Discrimination in Employment Act, even though ADEA expressly authorizes and provides procedures for group actions).

This view has been followed by numerous federal appellate courts in cases under the FLSA, which contains clear and express language regarding group actions. An action to recover wages under the FLSA, such as minimum wage claims as alleged in the Lawsuit, “may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by *any one or more employees for and in behalf of himself or themselves and other employees similarly situated.*” 29 U.S.C. § 216(b) (emphasis added). Congress went on to craft an express and unique group action procedure whereby each similarly-situated employee, before being allowed to join a collection action, must provide “his consent in writing” that must be filed with the court. *Id.* In spite of this language authorizing collective actions, several federal appellate courts have addressed the issue and rejected the argument that the FLSA contains the requisite clear congressional command to override the FAA. *See e.g., Walthour*, 745 F.3d at 1334-35; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013). Although the Supreme Court has not yet addressed

this issue head-on, one could infer the same conclusion from the Court's opinion in *Gilmer* where it rejected the argument that the ADEA's collective action mechanism, which mirrors the FLSA's, was a sufficiently clear indication of congressional intent to override the FAA's command to enforce arbitration agreements according to their terms. As the Court explained, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32.

The Board has ignored this framework in concluding that the NLRA contains a clear congressional command to invalidate arbitration. It is undisputed that nothing in the NLRA's language suggests, much less expressly states that Congress intended to override the FAA through the NLRA. The Supreme Court had made it clear that the sort of conflict necessary to override the FAA cannot be inferred from statutory silence. *See e.g., CompuCredit*, 132 S. Ct. at 665 (finding no conflict between the FAA and Credit Repair Organizations Act despite express statutory language granting the right to pursue CROA violations through a class action lawsuit and statutory silence on whether claims could proceed in arbitration). While Section 7 protects an employee's right to associate with other employees, when assessed against the backdrop of cases interpreting what is required to establish a conflict with the FAA, that general language does not meet the Supreme Court's standard. As the Fifth Circuit held, Section 7 "is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the [NLRA's] text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suit all have been found insufficient to

infer a congressional command against application of the FAA.” *D.R. Horton II*, 737 F.3d at 360 (citing *CompuCredit*, 132 S. Ct. at 670-71).

Similarly, the NLRA’s legislative history does not support the conclusion that Congress intended to preclude the enforcement of arbitration agreements pursuant to the FAA. As the Fifth Circuit noted, the legislative history of the NLRA and its predecessor suggest only a goal of “level[ing] the playing field” between workers and employers. *See D.R. Horton II*, 737 F.3d at 361. Further, as discussed above, class and collective action lawsuits did not exist when the NLRA was enacted. For these reasons, the courts to consider this issue have held that the legislative history “does not provide a basis for a congressional command to override the FAA.” *Id.*; *see also Iskanian*, 327 P.3d at 141.

The Board’s reliance on the Norris-LaGuardia Act (“NLA”), 29 U.S.C. § 101 *et seq.* to further support a contrary congressional command is similarly unavailing. It’s worth noting that the courts, and not the Board, are charged with interpreting and enforcing the NLA. Thus, the Board’s view of that statute is not entitled to any deference. *D.R. Horton II*, 737 F.3d at 362 n.10 (“It is undisputed that the NLA is outside the Board’s interpretive ambit.”). More importantly, the NLA neither expressly prohibits class waivers in arbitration agreements nor provides the requisite clear language from which it can be concluded that Congress intended to override the FAA’s strong policy favoring arbitration.

“Congress passed the Norris-LaGuardia Act to curtail and regulate the jurisdiction of courts, not . . . to regulate the conduct of people engaged in labor disputes.” *Marine Cooks & Stewards, AFL v. Panama S.S. Co.*, 362 U.S. 365, 372 (1960). To that end, the primary substantive provisions of the NLA are designed to render “yellow dog” contracts, through which an employee “promises not to join, become, or remain a member of any labor organization,”

unlawful and unenforceable, and to prohibit courts from enjoining certain types of lawful conduct “involving or growing out of any labor dispute.” 29 U.S.C. § 103, § 104.

In *Murphy Oil I*, the Board claimed to find the requisite contrary congressional command through the NLA’s protection of individuals using “lawful means [to] aid[] any person . . . prosecuting any action or suit in any court of the United States or any State.” *Murphy Oil I*, 361 NLRB No. 72, slip op. at 6 (citing 29 U.S.C. § 104(d)). First, this provision does not provide the support the Board believes, because nothing in the Arbitration Agreement prohibits other employees from lending aid to Tiffany. Tiffany remains free to provide all manner of aid to or receive such aid from other employees. See *Iskanian*, 327 P.3d at 142 (noting that employees remain able to “discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual actions”). The Arbitration Agreement simply requires that the actual prosecution of claims occur on an individual basis. In addition, given the FAA’s strong policies in favor of arbitration, one cannot reasonably view an individual’s intentionally breaching his or her obligations under an arbitration agreement as “lawful means” under the NLA. See *Murphy Oil I*, 361 NLRB No. 72, slip op. at 55 (Member Johnson, dissenting); see also *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) (stating “[a]n agreement to arbitrate is not one of those contracts to which the [NLA] applies”).

The Board’s continued reliance on *D.R. Horton* and *Murphy Oil* is baffling in light of the wave of federal courts to reject the Board’s position. In addition to the Fifth Circuit, two other Circuit Courts have addressed the foundation on which the Board’s position lies and each of these courts has rejected it as inconsistent with the Supreme Court’s controlling interpretations of the FAA. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol*

Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013); *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting the “overwhelming majority” of courts that have considered the issue have rejected the Board’s decision in *D.R. Horton* as conflicting with Supreme Court authority interpreting the FAA); *but see Lewis v. Epic Sys. Corp.*, No. 15-2997 (7th Cir. May 26, 2016). Legions of federal district courts have similarly rejected the Board’s position, including many courts outside of the circuits that have already ruled. *See e.g., Bell v. Ryan Trans. Serv., Inc.*, No. ___ F. Supp. 3d ___, 2016 WL 1298083, at *8 (D. Kan. Mar. 31, 2016) (enforcing arbitration agreement containing class waiver, concluding that “the Tenth Circuit, if faced with this issue, would similarly reject the Board’s decision in *D.R. Horton*”); *Tenet Healthsystem Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012) (rejecting argument that arbitrator’s decision to disregard the Board’s position *D.R. Horton* was a manifest disregard of applicable law); *Morvant*, 870 F. Supp. 2d at 842 (rejecting Board’s position as inconsistent with Supreme Court’s interpretation of FAA); *see also Murphy Oil I*, 361 NLRB No. 72, slip op. at 36 n.5 (Member Johnson dissenting) (citing dozens of opinions to conclude that “[t]he result of [the Board’s] unsound approach has been near universal condemnation from the federal and State courts”). The time has come for the Board to recognize that its position regarding class waivers within otherwise enforceable arbitration agreements improperly overrides the FAA’s mandate that arbitration agreements be enforced according to their terms. The Board should overrule those aspects of *D.R. Horton* and *Murphy Oil* that are in conflict with the FAA and in so doing, reverse the ALJ’s decision.

C. Because the Board’s *Beyoglu* Decision was Wrongly Decided, the ALJ’s Reliance on that Decision to Conclude that Tiffany’s Entirely Individual Actions Constituted Protected Activity Was also in Error.
(Exception Nos. 3, 8, 9)

For the protections of Section 7 of the Act to apply, an employee must be engaged in one of the enumerated forms of protected conduct, the only one of which that is even arguably applicable to the case at hand is “other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Based on the Act’s legislative history, the type of concerted activity that Congress sought to protect was activity “in terms of *individuals united* in pursuit of a *common goal*.” *Meyers Indus.*, 268 NLRB 493 (1984) (“*Meyers I*”). This led to the Board’s conclusion that “concerted” meant that there had to be multiple employees engaged in the activity or, if only a single employee was involved, he or she had to be acting “on the authority of other employees, and not solely by or on behalf of the employee himself.” *Id.* at 496. The Board subsequently explained that individual employee action may be viewed as concerted activity when it is done with the intent “to initiate or to induce or to prepare for group action.” *Meyers Indus.*, 281 NLRB 882, 887 (1986) (“*Meyers II*”). However, this requires more than simply filing a lawsuit that might benefit others. Section 7 rights are not triggered by “a single employee’s invocation of a statute enacted for the protection of employees generally.” *Meyers II*, 281 NLRB at 887; *see also Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 13-16 (2014) (Member Miscimarra dissenting).

In *Beyoglu*, 362 NLRB No. 152 (2015), relying upon language from its earlier opinion in *Murphy Oil*, the Board significantly and improperly expanded the definition of concerted activity by holding that the filing of a FLSA lawsuit by an individual employee is per se concerted activity if the pleading includes allegations for class-wide relief. The Board concluded that

simply filing such an action “contemplates – and may well lead to – active or effective group participation by employees in the suit.” *Beyoglu*, 362 NLRB No. 152, slip op. at 2. “It is this *potential* to initiate or induce or to prepare for group action . . . that satisfies the concert requirement of Section 7.” *Id.* (emphasis added).

As the Board acknowledged in *Beyoglu*, concerted activity in this context is nothing more than a “potential” result. The Supreme Court has long held that the essential elements of an unfair labor practice, which include the existence of concerted conduct, must be proven through evidence. It is insufficient to rely on speculation, suspicion, conjecture, or the “arguable possibility” that an essential element of the alleged violation existed. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 312-13 (1965).⁵ Moreover, the Board’s conclusion in *Beyoglu* ignores the practical reality that class-wide allegations in a non-NLRA lawsuit may serve many purposes, some of which are purely individual in nature, such as increasing the potential leverage that a plaintiff may bring to bear in settlement negotiations. *See AT&T Mobility*, 563 U.S. at 350 (recognizing the significant risk and settlement pressure that class claims can impose on defendants). Presuming concerted activity in this way “expands Section 7 coverage of individual employee actions far beyond what is permissible under the statutory language and manifest Congressional intent.” *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 27 (2014) (Member Johnson dissenting).

This case was submitted on a stipulated record, and that record is entirely devoid of any evidence regarding Tiffany’s intentions when he filed the Lawsuit. The participation by other employees is not required, legally or practically, for Tiffany to pursue his FLSA claims. Even if

⁵ The Board’s holding is close kin to the concept of presumed concertedness that the Board has previously rejected. *See Meyers I*, 268 NLRB at 496 (following numerous courts of appeals and overruling *Alleluia Cushion Co.*, 221 NLRB 999 (1975), which had held that concertedness could be inferred by the fact that other employees might have an interest in what the employee was doing).

Tiffany proves an FLSA violation, he is entitled under that statute to recover back wages for himself alone. He cannot recover back wages on behalf of others. 29 U.S.C. § 216(b). Thus, the complaint provides no basis from which to infer Tiffany's motives.

There is neither evidence that Tiffany spoke with any other employees about his intentions in filing the Lawsuit nor evidence that any other employees shared Tiffany's views about the alleged unlawful conduct. Moreover, since the Lawsuit was filed, it is undisputed that no other employees have joined, or even sought to join, the action. The act of filing the Lawsuit cannot be viewed as an appeal to other employees, as there is no guarantee that any other employees will ever become aware of the case, much less decide to participate in it. There is no assurance that certification of Tiffany's FLSA claims would have ever been granted.

The Board should reassess its *Beyoglu* holding and apply the definition of concerted activity that had stood strong for forty-plus years before it. Applying that test, and because there is no evidence that Tiffany engaged in concerted activity in conjunction with filing the Lawsuit, or that he intended to induce group action by filing the Lawsuit, the ALJ's Decision that KO Huts violated Section 8(a)(1) by seeking to enforce the Arbitration Agreement in the Lawsuit should be overturned. *See Murphy Oil I*, 361 NLRB No. 72, slip op. at 40 (Member Johnson dissenting) ("There is simply no basis for the Board to find that the filing of a class action is concerted under these circumstances, and *D.R. Horton's* presumption of concertedness is contrary to the precedence it cites.").

D. The ALJ's Decision Violates KO Huts' Constitutional Right of Access to the Courts Pursuant to the First Amendment's Right to Petition Clause.
(Exception Nos. 5, 6, 8, 9)

As set forth above, KO Huts' Arbitration Agreement, including its class action waiver, does not constitute an unfair labor practice. Thus, KO Huts' actions in lawfully (and

successfully) seeking to enforce the arbitration agreement in federal court, as provided under the FAA, do not violate the Act.⁶ The ALJ's conclusion that these efforts amounted to "unlawful litigation" and his associated remedy requiring KO Huts to reimburse the Charging Party for his attorney's fees and costs, go beyond constitutional limits.

The First Amendment provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances." U.S. Const. amend. I. The right to petition clause is "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 524 (2002). An important aspect of the right to petition is the right of access to the courts. *See Bill Johnson's Rests. Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (citing *California Motor Trans. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). This right of access must be considered when interpreting federal law. *See BE&K Constr.*, 536 U.S. at 525 (restating the long-held principle that the Court "would not lightly impute to Congress an intent to invade freedoms protected by the Bill of Rights, such as the right to petition." (quotations and ellipses omitted)). Both the Supreme Court and the Board have recognized this principle in the context of the NLRA.

[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right.

Bill Johnson's Rests., 404 U.S. at 510 (quoting the Board's decision in *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973)) (ellipses in original).

⁶ The ALJ's Decision inaccurately describes KO Huts' motion as a Motion to Dismiss. [Decision, p. 4, line 25, p. 5, line 7.] The filing was actually titled "Defendant's Motion and Supporting Brief to Compel Individual Arbitration and Stay Plaintiff's Claims." [Joint Stipulation, ¶ 16(b) and Exhibit I attached thereto].

In *Bill Johnson's* and *BE&K Construction*, the Supreme Court expressly addressed the interplay between the First Amendment's Right to Petition and the Board's remedies under the NLRA. These opinions demonstrate that even if an employer's conduct in filing a lawsuit may constitute an unfair labor practice, such as interference under Section 8(a)(1) or retaliation under 8(a)(3), the First Amendment generally protects the employer's right to seek legal relief through the federal courts. An exception to this rule exists when an employer seeks to pursue a lawsuit that is both objectively baseless and subjectively motivated by an unlawful purpose. *See BE&K Const.*, 536 U.S. at 531. That exception, however, is inapplicable here.

There can be little debate that KO Huts' efforts to enforce the arbitration agreement meet neither of these requirements, much less both of them. First, and most notably, KO Huts' efforts cannot possibly be considered objectively baseless in light of the state of the law at the time the motion was filed. In particular, the only federal Court of Appeals to have squarely addressed the issue had twice rejected it (and more recently denied the Board's petition for rehearing *en banc* without a single active member of the court calling for a poll), not to mention the Western District of Oklahoma's order in KO Huts' favor. The district court determined that the FAA required enforcement of the Arbitration Agreement according to its terms. As the Fifth Circuit concluded, "it is a bit bold for [the Board] to hold that an employer who followed the reasoning of our D.R. Horton decision had no basis in fact or law or an 'illegal objective' in doing so." *Murphy Oil II*, 808 F.3d at 1021. There is also nothing to suggest that KO Huts was subjectively motivated by any unlawful purpose. KO Huts simply sought to enforce the terms of the Arbitration Agreement in accordance with the FAA's requirements. *See BE&K Constr.*, 536 U.S. at 534 (stating that as long as the plaintiff's purpose is to enforce federal legal rights the employer reasonably believed to exist, access to the courts is protected).

Any suggestion that the NLRA requires a different outcome was foreclosed by the Supreme Court in *BE&K Construction*. There, even assuming that an employer filed an ultimately unsuccessful lawsuit with a retaliatory (*i.e.* unlawful) purpose under the NLRA, the Court still held the filing of the lawsuit to be protected by the First Amendment where there was a reasonable basis for the employer's claim.

Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid.

BE&K Constr., 536 U.S. at 536.

From this authority it is clear that the Board must reject the ALJ's determination that KO Huts violated Section 8(a)(1) by filing its motion to stay proceedings and compel individual arbitration. Further, the Board must amend any penalty to remove the requirement that KO Huts "must reimburse the plaintiff for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss his collective FLSA action and compel individual arbitration." (ALJ's Decision, p. 5).

E. The ALJ's Imposition of Charging Party's Litigation Expenses Goes Beyond His Statutory Authority.
(Exception Nos. 6, 8, 9)

In conjunction with the finding that KO Huts violated Section 8(a)(1), the ALJ included within his proposed Remedy that KO Huts must reimburse Charging Party's litigation costs, including attorney's fees incurred in responding to KO Huts' motion to compel arbitration. [ALJ's Decision, p. 5]. The ALJ cited no authority for this award, describing it as the Board's "usual practice in cases involving unlawful litigation." [*Id.*] Even assuming solely for argument's sake that KO Huts actions in seeking to enforce the arbitration agreement violated the Act, the Act does not authorize an award of litigation costs.

The Supreme Court has long recognized that the “American Rule” of litigation is premised on each party bearing its own attorney’s fees and other litigation expenses. This rule has led to a presumption against fee shifting. *Alyeska Pipeline Svc. Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975) (holding that any fee shifting must be grounded in statutory authority). To infer a congressional intent to override the presumption against fee shifting, there must be “clear support” in the plain language of the statute or its legislative history. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 801 (D.C. Cir. 1997) (citing *Summit Valley Indus., Inc. v. Carpenters*, 456 U.S. 717, 726 (1982)). This requirement applies to federal agencies, like the Board, which operate solely under statutory authority. See *Unbelievable*, 118 F.3d at 803.

It is unquestioned that no provision of the NLRA expressly authorizes the Board to award litigation expenses. In terms of monetary relief, when the Board finds an unfair labor practice to exist, Section 10(c) authorizes the Board only to “issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.” 29 U.S.C. § 160(c). It is well-accepted that this provision grants the Board authority to provide only “truly remedial and not punitive” relief. *HTH Corp. v. NLRB*, ___ F.3d ___, 2016 WL 2941936, *10 (D.C. Cir. May 20, 2016) (citing *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998)).

After extensively analyzing this issue, the D.C. Circuit in *Unbelievable* held that “neither the plain text nor the legislative history of § 10(c) provides ‘clear support’ for the authority of the Board to order the payment of attorney’s fees.” *Unbelievable*, 118 F.3d at 804. Further, the court held that the phrase “such affirmative action . . . as will effectuate the policies of the Act,”

could not be read so broadly as to authorize fee shifting. *Id.* More recently, the D.C. Circuit reinforced this holding in *HTH Corp.*

HTH Corp. dealt with an employer who had “committed a host of severe and pervasive unfair labor practices.” *HTH Corp.*, 2016 WL 2941936 at *1. Based on its “inherent authority” to address “bad faith” conduct, the Board imposed the union’s litigation costs against the employer. The court acknowledged the description of the employer’s litigation tactics as well as the causal relationship between the employer’s conduct and the union’s litigation expenses. Nonetheless, the court still rejected the award, finding that because the Act lacked the clear statutory authority for fee shifting, the court found the Board’s imposition of it to be punitive in nature. *See id.*, 2016 WL 2941936 at *10 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991), which viewed fee-shifting analogous to a fine for civil contempt). Because the Act does not authorize punitive remedies, the court struck down that aspect of the Board’s order. *See id.*, 2016 WL 2941936 at *11.

The court rejected the Board’s argument that the award was compensatory in that it was designed to reimburse the union for the monies it was forced to expend to respond to the employer’s “unlawful conduct.” *Id.*, 2016 WL 2941936 at *10. “To the extent the Board is relying upon the idea that a party is not made whole unless it recovers its attorney’s fees, that is but a criticism of the American Rule – indeed, a criticism that the Supreme Court has heard and rejected.” *Id.* (quoting *Unbelievable*, 118 F.3d at 805). “Even assuming that attorney’s fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority.” *Unbelievable*, 118 F.3d at 805 (quoting *Summit Valley*, 456 U.S. at 724-25).

The ALJ points to no specific support for this aspect of his award. In *Murphy Oil I* the Board cited two Supreme Court cases in support of its order imposing litigation expenses, but neither provides the support the Board claims. *Murphy Oil I*, 361 NLRB No. 72, slip op. at 20-21. In *Bill Johnson's*, the Court addressed the Board's authority to enjoin pending litigation that was retaliatory in nature. 461 U.S. 731.⁷ More recently, in *BE&K Construction*, the Court further interpreted *Bill Johnson's*, focusing on whether the Board could find a reasonably-based, but ultimately unsuccessful retaliatory lawsuit to violate the Act. *See BE&K Constr.*, 536 U.S. at 524. In neither of these cases was the Court presented with the question of whether the Board had the authority to award attorney's fees and litigation costs against an employer whose conduct violated the Act. In fact, the Court expressly did not address that issue. *See id.* at 530 (“[W]e need not address whether the Board otherwise has authority to award attorney’s fees when a suit is found to violate the NLRA.”).

Similar to the facts at issue in *HTH*, the Board alleged KO Huts engaged in allegedly unlawful litigation tactics that caused the employee to incur litigation costs, which the Board ordered KO Huts to reimburse. However, just as in *HTH*, because authority to shift fees in an unfair labor practice case is not clearly authorized by the Act and is thus, penal in nature, the ALJ was without authority to order it.

⁷ Although the Court stated that “if a violation is found, the Board may order the employer to reimburse the employees for whom he had wrongly sued for their attorney’s fees and other expenses,” *Bill Johnson's*, 461 U.S. at 747, this statement was dicta and, thus, not a binding statutory interpretation. *See BE&K Constr.*, 536 U.S. at 527 (describing quote from *Bill Johnson's* as “dicta”).

CONCLUSION

For the reasons set forth above, the Decision and Order of the Administrative Law Judge should not be upheld by the Board and the Complaint against KO Huts, Inc. should be dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 27th day of May, 2016, I electronically filed the foregoing with the National Labor Relations Board's E-Filing System and served a copy of the foregoing via electronic mail to the following:

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