UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

KELLOGG BROWN & ROOT LLC and
MOLYCORP, INC.

and **Cases 31-CA-140948 and**
31-CA-145896

DAVID L. TOTTEN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. PRELIMINARY STATEMENT

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel submits this Answering Brief in opposition to Respondents' Exceptions to the Decision of Administrative Law Judge Jeffrey D. Wedekind in the captioned matter. Counsel for the General Counsel hereby respectfully requests that the National Labor Relations Board deny Respondents' exceptions in their entirety.

II. PROCEDURAL HISTORY

In a decision that issued on April 4, 2016, Administrative Law Judge Jeffrey D. Wedekind ("ALJ") held that Respondent, Kellogg Brown & Root LLC, violated Section 8(a)(1) of the National Labor Relations Act by maintaining a mandatory arbitration policy that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums and seeking to enforce the arbitration policy against David Totten ("Totten") since September 2014. The ALJ also held that Respondent, Molycorp, Inc. violated Section 8(a)(1) of the National Labor Relations Act by seeking to enforce the arbitration policy against Totten since September 2014. This Brief answers Respondents' Exceptions and arguments in support thereof.

III. ARGUMENT

A. The ALJ Correctly Relied on the Board's Decision in *D.R. Horton* and *Murphy Oil USA* to Find That Respondents Violated the Act by Maintaining and Enforcing the Dispute Resolution Plan so as to Preclude Class or Collective Actions.

Respondents assert that the Board's decisions in *D.R. Horton*[1] and *Murphy Oil*[2] are not controlling in this case, that, instead, the enforceability of the arbitration clause contained in the Dispute Resolution Plan ("DRP") is governed by the Federal Arbitration Act ("FAA"), and that numerous Circuit Courts of Appeals have rejected the Board's position on the matter. This is

[1] 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013).
[2] 361 NLRB No. 72 (2014).

incorrect. In *Pathmark Stores*, the Board reiterated that,

> [i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise **[I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed.** Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378 n. 1 (2004) (emphasis added) (quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir 1964) (quoting *Insurance Agents' International Union AFL-CIO*, 119 NLRB 768, 773 (1957))).

Furthermore, on April 30, 2015, the Board reversed an ALJ, who, after the Board's decision issued in *D.R. Horton*, but before it decided *Murphy Oil*, sought to apply the holding of *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) to reverse *D.R. Horton* and foreclose further findings that class and collective action waivers contained in an employment arbitration agreement could, in and of themselves, violate the Act. *Chesapeake Energy*, 362 NLRB No. 80, slip op. at 1-3 (2015). The Board expressly rejected the ALJ's arguments for the deference of the NLRA to the Federal Arbitration Act (FAA) and held, once again, that arbitration policies violate Section 8(a)(1) when their class and collective action waivers fail the *Lutheran Heritage* test. *Id.* at 3.

Thus, the Board was correct to adhere to its own well-reasoned precedent in deciding *Murphy Oil* and, therefore, established Board precedent should be followed in reaching the conclusions of law regarding Respondents' unlawful DRP in the instant case.

i. Section 7 of the Act Creates a Substantive Right to Pursue Collective Legal Action.

The Board emphasized in *D.R. Horton* that finding an arbitration agreement unlawful does

not conflict with the FAA because "the intent of the FAA was to leave substantive rights undisturbed." 357 NLRB No.184, slip op. at 11. As the Board has held time and again since then, the NLRA's core substantive right is the Section 7 right of employees to act collectively for their mutual aid or protection. *Chesapeake Energy*, supra, slip op. 3-4; *Flyte Tyme*, 363 NLRB No. 107, slip op. 1 (2016); *Cellular Sales*, 362 NLRB No. 27 slip op. 7-8 (2015); *Murphy Oil*, supra, slip op. at 6. It is unquestionably a substantive, not a procedural, right, as indicated by the statement of purpose in Section 1 of the Act that the NLRA was enacted to correct "the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and [corporate] employers," and to remove the impediments which that same inequality presents to the free flow of commerce. "[T]he *D.R. Horton* Board was clearly correct when it observed that the 'right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Murphy Oil*, supra, slip op. at 7 (quoting *D.R. Horton*, supra, slip op. at 10) (emphasis original to *Murphy Oil*).

ii. The Board's Decisions in *D.R. Horton* and *Murphy Oil* Correctly Accommodate the NLRA and the FAA.

The Board in *Murphy Oil* found that mandatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict employees' substantive right, established by Section 7 of the Act, to improve their working conditions through administrative and judicial forums. The Board also found that finding a mandatory arbitration agreement unlawful under the Act does not conflict with the FAA requirement that arbitration agreements must be enforced according to their terms. The Board emphatically affirmed that the FAA's savings clause provides for the revocation of otherwise mandatory arbitration agreements "upon such grounds as exist at law. " and that "Section 7. amounts to a

'contrary congressional command' overriding the FAA." 361 NLRB No. 72, slip op. at 9. As the *D.R. Horton* Board noted, the Supreme Court has not addressed whether an employer can infringe upon employees' substantive Section 7 right to concertedly pursue employment-related claims; *AT&T Mobility v. Concepcion*,[3] for example, arose in the context of a commercial arbitration agreement and the high court focused its opinion on the preemption of a state consumer protection law, not employees' substantive, federal collective action rights under Section 7. 357 NLRB No. 184, slip op. at 12.

Moreover, in *Murphy Oil*, the Board explained that when the NLRA was enacted in 1935 and amended in 1947, the FAA had not ever been applied to individual employment contracts, and noted:

> [i]t is hardly self-evident that the FAA – to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees – survived the enactment of the Norris-LaGuardia Act ("NLGA") [in 1932] and its sweeping prohibition of "yellow dog" contracts.

supra, slip op. at 10.[4] The Board found that even if there is a conflict between the NLRA and the

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[3] 131 S.Ct. 1740 (2011).

[4] The FAA, a product of the *Lochner* era, was enacted in 1925; its own legislative history indicates that it was self-evident to the 68th Congress that the Act would *never* be applied to employment or consumer contracts. As Justice Black wrote in his dissent to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409, n. 2 (1965): "The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. 50 A.B.A.Rep. 357 (1925). Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce,' Mr. Bernheimer, a chief exponent of the bill, replied: 'Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance.' Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Con., 1st Sess., 7." Furthermore, "On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. [citation omitted] He noted that such contracts 'are really not voluntarily (sic) things at all' because 'there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court. .' He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases." 388 U.S. at 414 (Black, J., dissenting).

FAA, the NLGA prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a" lawsuit arising out of a labor dispute. *Id.* The Board found that in the event of a conflict, the FAA would therefore have to yield to the NLRA insofar as necessary to accommodate Section 7 rights.

iii. Respondents' Other Arguments Are Without Merit.

Respondents' other exceptions and arguments – including their First Amendment argument, those regarding Respondent Molycorp's employer status and Totten's employee status, those regarding concerted activity, and their argument that this case falls within the "voluntariness" carve-out in *D.R. Horton*[5] – are equally without merit. These arguments, for the most part, are fully addressed in the ALJ's decision, counsel for the General Counsel's post-hearing brief, or the Board's decision in *Murphy Oil*.

IV. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board reject Respondents' Exceptions, affirm the ALJ's findings and conclusions, and adopt his recommended Order.

Dated at Los Angeles, California, this 6th of June, 2016.

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[5] The "voluntariness" carve-out in *D.R. Horton*, as acknowledged by Respondents, involved consideration of arbitration agreements that are not a condition of employment. Based on the stipulated facts here, the "voluntariness" carve-out does not apply to this case because employees were required to agree to the DRP as a condition of employment. (Joint Stip., ¶ 13(b); Joint Exh. 2). In any event, the Board has done away with the "voluntariness" carve-out. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op at 1, 4–5 (2015).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE, was served on the 6th day of June, 2016:

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