

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

**IIG WIRELESS, INC. f/k/a UNLIMITED PCS,
INC.; and UPCS CA RESOURCES, INC.**

and

Case 21-CA-152170

JOANNA ROSALES, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENTS'
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

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I. INTRODUCTION

The General Counsel files this answering brief in response to IIG Wireless, Inc. f/k/a Unlimited PCS, Inc. (IIG) and UPCS CA Resources, Inc.'s (UPCS) (collectively referred to as "Respondents") exceptions to the decision (JD) of Administrative Law Judge Jeffrey D. Wedekind (Judge Wedekind), which issued on April 14, 2016. In his decision, Judge Wedekind correctly held that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., by unlawfully maintaining and enforcing a mandatory Mutual Arbitration Agreement (MAA) to preclude employees from pursuing employment-related claims on a class or representative basis in all forums, whether judicial or arbitral. Judge Wedekind also correctly held that the Respondents violated Section 8(a)(1) of the NLRA by maintaining an MAA that would reasonably be construed by employees to prohibit them from filing unfair labor practice charges with the National Labor Relations Board (Board).

The present case is controlled by current Board precedent, including *D.R. Horton*, *Murphy Oil USA*, and other similar cases. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). As discussed below, *D.R. Horton* and *Murphy Oil* remain the relevant legal framework for analyzing mandatory arbitration agreements despite the Court of Appeals for the Fifth Circuit's decisions to deny enforcement in those cases, as neither the U.S. Supreme Court nor the Board itself has overturned them. Accordingly, Judge Wedekind properly applied Board precedent in the present case, and his decision should be affirmed in its entirety. Furthermore, the Respondents do not raise any issues or arguments not already considered and rejected by Judge Wedekind, or previously ruled on by the Board.

II. STATEMENT OF FACTS

A. Respondents' Businesses and Rosales' Joint Employment with Respondents

At all material times, IIG, a California corporation with principal offices and a facility located at 13247 Harbor Boulevard, in Garden Grove, California, has been engaged in the business of the retail sale of wireless and telecommunications products. (Jt. Exh. 1, para. 5(a); JD 1 fn. 2.¹) At all material times, since about April 2013, UPCS, a California corporation with principal offices and a facility located at 780 Roosevelt, in Irvine, California, has been engaged in the business of providing staffing for wireless-communications retail facilities. (Jt. Exh. 1, para. 6(a); JD 1 fn. 2.) IIG and UPCS are both employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the NLRA. (Jt. Exh. 1, para. 7(b); JD 1 fn. 2.)

Since about April 2013, UPCS has been a joint employer of the employees of IIG, including Charging Party Joanna Rosales (Rosales). (Jt. Exh. 1, para. 9; JD 2:4-5.) UPCS has provided staffing for wireless-communications retail facilities operated by IIG at its California facilities, administered a common labor-relations policy with IIG for its employees, and exercised control over that policy. (Jt. Exh. 1, para. 8; JD 2:5-7.)

In about August 2012, IIG hired Rosales for the retail sale of wireless and telecommunications products, and Rosales worked for IIG through January 2014. (Jt. Exh. 1, para. 10; JD 2:1.) Rosales was jointly employed by both IIG and UPCS from about April 2013 through January 2014. (Jt. Exh. 1, para. 9.) About January 2014, IIG and UPCS terminated Rosales from her employment. (Jt. Exh. 1, para. 10; JD 2:22-23.)

¹ References to joint exhibits will be referred to as "Jt. Exh." followed by the appropriate exhibit number. References to the Administrative Law Judge Decision will be referred to as "JD" followed by citations to the appropriate page and line numbers.

B. Respondents' Mandatory Mutual Arbitration Agreement

On August 8, 2012, pursuant to her hiring by IIG, Rosales signed and agreed to be bound by the MAA. (Jt. Exh. 1, para. 11; JD 2:9-11.) The Respondents admit that at all material times, since at least November 14, 2014, IIG has maintained and presented the MAA to employment applicants and employees for their execution as part of the employment-application process. (Jt. Exh. 1, para. 36; JD 2:9-11.) The MAA provides, in part, that as a “condition of employment,” employees “must” agree to use the arbitration forum for employment-related disputes and other disputes as described in the MAA. (Jt. Exh. 1, para. 11.) The MAA specifically states the following:

ARBITRATION

Binding arbitration of disputes, rather than litigation in courts, provides an effective means for resolving issues arising in or from employment situations. Arbitration is generally faster, cheaper and less formal for all parties. Unlimited PCS, Inc. [now IIG Wireless, Inc.] is committed to using binding arbitration to resolve all legal disputes, whether initiated by Unlimited PCS, Inc. or by an employee, in a forum which provides this alternative to the court system. As a condition of employment, employees must also agree to use the arbitration forum. Unlimited PCS, Inc.'s agreement to use binding arbitration is confirmed by this statement; your agreement is confirmed by your signature below or by your acceptance or continuation of employment upon notice of this policy. This policy, unlike other employment terms, is not subject to unilateral modifications or rescission by Unlimited PCS, Inc.; it may not be modified or rescinded except by a mutual, written and signed further agreement by both Unlimited PCS, Inc. and by you.

MUTUAL ARBITRATION AGREEMENT

Unlimited PCS, Inc. (the “Company”) and I mutually agree that any dispute or controversy between us arising from or in any way related to my employment with the Company, shall be submitted to and determined by binding arbitration under the California Arbitration Act (Cal. Code Civ. Proc. § 1280 *et seq.*). The arbitration shall be conducted by a single neutral arbitrator who will be a retired judge. The arbitration will be held in the county that I last worked for the Company.

As used in this agreement, the term “the Company” means Unlimited PCS, Inc., any of its successor entities, its owners, directors, officers, managers, employees, agents, parent companies, subsidiaries, and affiliates.

This agreement governs all disputes between the Company and me, including without limitation disputes related to my seeking employment with the Company, the terms or conditions of my employment, the termination of my employment, and breaches of any duty owed by me to the Company. This agreement governs all disputes whether based on tort, contract, statute, common law or otherwise, including but not limited to claims for misappropriation of trade secrets, breach of any duty of loyalty, contractual obligation or fiduciary duty, harassment and discrimination. This agreement, however, does not govern disputes regarding entitlement to Worker’s Compensation or Unemployment Insurance benefits.

In the case of any claim brought under the California Fair Employment and Housing Act (Cal. Gov’t. Code § 12900 *et seq.*) (“FEHA”), or as otherwise required by law, all provisions of section 1283.05 of the California Code of Civil Procedure are hereby incorporated into this agreement and the parties are entitled to conduct all discovery permitted under that section. Additionally, in the case of any claim brought under FEHA, or as otherwise required by law, the arbitrator must issue a written arbitration decision that will reveal the essential findings and conclusions on which the award is based.

I understand that by agreeing to this binding arbitration provision, both I and the Company give up our rights to trial by jury.

Should any term or provision, or portion thereof, be declared void or unenforceable or deemed in contravention of law, it shall be severed and/or modified by the arbitrator or court and the remainder of the agreement shall be enforceable.

I hereby acknowledge that I have read the above statement, understand it and agree to its terms.

DO NOT SIGN UNTIL YOU HAVE READ AND UNDERSTOOD THE ABOVE STATEMENT AND AGREEMENT.

(Jt. Exh. 1, para. 11; Jt. Exh. 6.)

C. Respondents’ Enforcement of the Mandatory Mutual Arbitration Agreement to Preclude Employment-Related Class or Collective Actions in All Forums

On October 2, 2014, Rosales filed a demand for arbitration before JAMS, an arbitration service, on behalf of herself and a class of “similarly situated and aggrieved employees,” against

the Respondents, for wage-and-hour and other violations under the California Labor Code. (Jt. Exh. 1, para. 13; Jt. Exh. 7; JD 2:26.)

On November 4, 2014, the Respondents sent letters to both JAMS and Rosales' attorney, formally objecting to Rosales' demand for arbitration. In these letters, the Respondents asserted that Rosales' demand "seeks a collective arbitration where none is authorized by the underlying arbitration agreement." IIG also specifically asserted that because the MAA was "silent" as to class or collective arbitration, "it is resigned to individual arbitration." (Jt. Exh. 1 paras. 14, 15; Jt. Exhs. 8, 9.)

On November 17, 2014, Rosales filed a class-action or representative-action complaint against the Respondents in the Superior Court of California, County of Orange (Superior Court), asserting wage-and-hour and other claims under the California Labor Code (*Rosales v. UPCS CA Resources, Inc., et al.*, Case No. 30-2014-00756943-CU-OE-CXC). (Jt. Exh. 1, para. 16; Jt. Exh. 10; JD 2:34-36.) In this complaint, Rosales specifically sought relief on behalf of herself and all other similarly situated employees. (Jt. Exh. 1, para. 16; Jt. Exh. 10.) On November 19, 2014, Rosales amended the complaint against the Respondents to reflect a representative action under the California Labor Code's Private Attorneys General Act (PAGA). (Jt. Exh. 1, para. 17; Jt. Exh. 11; JD 2:37-39.)

On January 14, 2015, the Respondents filed a cross-complaint for declaratory and injunctive relief in the Superior Court case, seeking: (1) a declaration that the MAA prohibits class or representative arbitration of disputes subject to the MAA; (2) an order enjoining Rosales from proceeding with collective arbitration against the Respondents; (3) a declaration that the MAA reserves for the Superior Court jurisdiction over all questions concerning whether the MAA prevents class arbitration of disputes subject to the MAA; and (4) an order enjoining

Rosales from seeking any determination or seeking to enforce any determination from the arbitrator that the MAA provides the opportunity for collective resolution of any dispute subject to the MAA. (Jt. Exh. 1, para. 20; Jt. Exh. 12; JD 2:41-3:2.)

On June 8, 2015, the Respondents also filed a motion for stay of the Superior Court action and all discovery in that case. (Jt. Exh. 1, para. 21; Jt. Exh. 13; JD 3:4-5.)

On June 16, 2015, Rosales filed a petition to compel arbitration of the Respondents' cross-complaint, seeking: (1) an order referring the question of arbitrating the class claims to the arbitrator to decide; (2) in the event the Superior Court made a determination regarding whether class arbitration is permissible under the terms of the MAA, an order compelling arbitration of the class claims challenged in the cross-complaint; and (3) an order staying the cross-complaint pending arbitration. (Jt. Exh. 1, para. 22; Jt. Exh. 14; JD 3:7-12.)

On June 23, 2015, the Respondents filed a motion for judgment on the pleadings in the Superior Court case. (Jt. Exh. 1, para. 23; Jt. Exh. 15; JD 3:14-15.) A week later, on July 1, 2015, the Respondents filed an opposition to Rosales' petition to compel arbitration of the cross-complaint. (Jt. Exh. 1, para. 24; Jt. Exh. 16; JD 3:15-16.)

On July 7, 2015, Rosales filed a reply in support of her petition to compel arbitration of the cross-complaint. (Jt. Exh. 1, para. 25; Jt. Exh. 17; JD 3:18-19.) She also filed an opposition to the Respondents' motion for stay of the action on July 10, 2015, and an opposition to the Respondents' motion for judgment on the pleadings on July 13, 2015. (Jt. Exh. 1, paras. 26-27; Jt. Exhs. 18, 19; JD 3:19-20.)

On July 14, 2015, the Superior Court issued a minute order denying Rosales' petition to compel arbitration of the Respondents' cross-complaint. (Jt. Exh. 1, para. 28; Jt. Exh. 20; JD 3:22-23.) In its minute order, the Superior Court held, among other things, that the "subject

arbitration agreement is silent on the availability of class/representative arbitration – thus requiring [Rosales] to arbitrate her individual claims, only, pursuant to [*Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684-85 (2010)].” (Jt. Exh. 1, para. 28; Jt. Exh. 20; JD 3:23-26.)

On July 16, 2015, Rosales filed a notice of appeal of the Superior Court’s order denying her petition to compel arbitration of the cross-complaint. (Jt. Exh. 1, para. 29; Jt. Exh. 21; JD 3:32-33.)

On July 17, 2015, the Respondents filed a reply memorandum in support of their motion for a stay of the action and all discovery, and a reply memorandum in support of their motion for judgment on the pleadings. (Jt. Exh. 1, paras. 30-31; Jt. Exhs. 22, 23.)

On July 28, 2015, the Superior Court granted the Respondents’ motion for a stay of the PAGA action and formal discovery. (Jt. Exh. 1, para. 32, Jt. Exh. 24; JD 3:28-29.) However, the Superior Court stayed the Respondents’ motion for judgment on the pleadings, pending the outcome of the appeal process. (Jt. Exh. 1, para. 32; Jt. Exh. 24; JD 3:29-30.)

On October 31, 2015, Rosales filed an opening brief in support of her appeal with the California Court of Appeal, Fourth Appellate District, Division 3 (Case G052269). (Jt. Exh. 1, para. 33; Jt. Exh. 25; JD 3:33-35.) On December 17, 2015, the Respondents filed a brief in response. (Jt. Exh. 1, para. 34; Jt. Exh. 26; JD 3:35-36.)

III. ARGUMENT

A. Judge Wedekind Correctly Held That the Respondents Maintained and Enforced the Mutual Arbitration Agreement to Prevent Rosales From Pursuing Claims on a Class or Representative Basis in All Forums, Arbitral or Judicial

Judge Wedekind correctly held that the Respondents unlawfully maintained and enforced a mandatory Mutual Arbitration Agreement (MAA) to preclude employees from pursuing

employment-related claims on a class or representative basis in all forums, judicial or arbitral. (JD 5:38-43.)

Section 7 of the NLRA, provides, in relevant part, that employees have the right to “engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection...” 29 U.S.C. § 157. It is well settled that “mutual aid or protection” includes employees’ efforts to “improve terms and conditions of employment or otherwise improve their lot through channels outside the immediate employee-employer relationship.” *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 2 (2012) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978)), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013). Thus, the Board has held that an employer violates Section 8(a)(1) of the NLRA when it requires employees, as a condition of employment, to sign an agreement that precludes them from filing joint, class, or collective claims against the employer addressing their wages, hours, or other working conditions, in all forums, arbitral or judicial. *D.R. Horton*, above, slip op. at 1; *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2-3 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). In *D.R. Horton* and *Murphy Oil*, the Board held that the right to engage in collective action, including collective legal action, is not merely a procedural right, but “is the core substantive right protected by the NLRB and is the foundation on which the [NLRA] and Federal labor policy rest.” *D.R. Horton*, above, slip op. at 12; *Murphy Oil*, above, slip op. at 2.

The Respondents except to Judge Wedekind’s ruling on the basis that there is “no evidence that the [MAA] was not signed voluntarily.” However, the language of the MAA itself makes it clear that it is a mandatory condition of Rosales’ and other employees’ employment. The MAA provides, in part, that “[a]s a condition of employment, employees **must** also agree to use the arbitration forum.” (Emphasis added.) The MAA further provides that employees need

not even sign the MAA in order for it to bind them: “[IIG’s] agreement to use binding arbitration is confirmed by this statement; your agreement is confirmed by your signature below or **by your acceptance or continuation of employment upon notice of this policy.**” (Emphasis added.) Judge Wedekind therefore properly treated the MAA as a mandatory arbitration agreement. (JD 4:25-28.)

Despite the clear language on the face of the MAA itself, the Respondents argue that the MAA was optional and that employees and employment applicants were not adversely affected for refusing to sign the MAA. However, even if the MAA is optional, the Board has repeatedly held that arbitration agreements are unlawful when such agreements require employees to prospectively waive their Section 7 rights to engage in concerted activity. See, e.g., *Bloomington’s, Inc.*, 363 NLRB No. 172, slip op. at 3-4 (2016) (holding that even assuming an arbitration agreement’s “opt-out” provision renders the agreement voluntary, the agreement is nevertheless unlawful because employees prospectively waive their Section 7 rights); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) (rejecting employer’s argument that its arbitration agreement is made lawful by inserting a provision stating “SIGNING THIS AGREEMENT IS OPTIONAL”) (emphasis in original); *Nijjar Realty, Inc.*, 363 NLRB No. 38, slip op. at 2 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5-8 (2015).

As a mandatory rule imposed on Rosales and other employees as a condition of hiring or continued employment, the MAA was properly treated by Judge Wedekind as the Board treats other unilaterally implemented workplace rules. *D.R. Horton*, 356 NLRB No. 184, slip op. at 5. In evaluating whether an employer violated Section 8(a)(1) of the NLRA, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Id.* (citing *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed.Appx. 527 (D.C. Cir. 2007)).

Under *Lutheran Heritage Village*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If the rule does not, the finding of a violation depends on a showing of one of the following: “(1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village*, above, at 646-47.

In the present case, the MAA is silent regarding whether employees specifically have the right to file class or collective actions. However, under *Lutheran Heritage Village*'s third prong, an employer violates the NLRA by arguing that the “only fair reading of the [arbitration agreement] is that the parties contemplated only individual arbitration,” thereby applying the agreement to restrict Section 7 rights. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3-5 (2015) (holding that employers, in defending a collective employment lawsuit, unlawfully applied an arbitration agreement in federal district court by arguing that class or collective arbitration was not permitted); *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015); *SF Markets, LLC*, 363 NLRB No. 146, slip op. at 2 (2016). Therefore, the Respondents violated Section 8(a)(1) of the NLRA when they enforced the MAA to restrict the exercise of employees' Section 7 rights by filing a cross-complaint against Rosales on January 14, 2015, seeking a declaration from the Superior Court prohibiting class or representative arbitration of disputes subject to the MAA and an order enjoining Rosales from proceeding with collective arbitration against the Respondents.

The Respondents also applied the MAA to restrict Rosales' and other employees' Section 7 right to pursue class or collective legal action by their other actions, including by filing a motion for stay of Rosales' action and all discovery, a motion for judgment on the pleadings, and

an opposition to Rosales' appeal of the Superior Court's rulings. It is undisputed that the Respondents interpreted the MAA as requiring individual arbitration of all disputes covered by the MAA.

The Respondents argue that Judge Wedekind misapplied *D.R. Horton* and *Murphy Oil* because the MAA's terms do not preclude Rosales' collective PAGA claims and the Respondents did not apply the MAA to preclude Rosales' PAGA claims. The argument that Respondents did not violate the NLRA because they only sought to enforce individual arbitration of Rosales' class or collective claims but not her PAGA claims should be rejected. The Respondents ignore the fact that they sought, successfully, an order from the Superior Court requiring Rosales to arbitrate all of her *non*-PAGA class or representative claims on an individual basis and have her PAGA claims stayed pending resolution of the individual arbitration. The present case is no different from *Nijjar Realty*, in which a trial court severed and stayed the plaintiff employee's PAGA claims and compelled arbitration of his other class claims on an individual basis. *Nijjar Realty, Inc.*, 363 NLRB No. 38, slip op. at 1, 5 (2015) (affirming administrative law judge's decision finding that employer violated the Act by maintaining and enforcing an agreement compelling individual arbitration of the employee's non-PAGA claims).

Accordingly, Judge Wedekind's decision finding that the Respondents unlawfully maintained and enforced the MAA in order to preclude class or collective actions in all forums, whether arbitral or judicial, should be affirmed.

B. Judge Wedekind Correctly Held That the Respondents Maintained a Mutual Arbitration Agreement That Would Reasonably Be Construed to Prohibit Employees From Engaging in Conduct Protected by Section 7 of the Act and That Interferes With Their Access to the Board and Its Processes

Judge Wedekind correctly rejected the Respondents' contention that the "overall context of [the MAA] is directed at civil litigation, not administrative charges," and held that the MAA

maintained by the Respondents would reasonably be construed by employees to prohibit filing unfair labor practice charges with the Board or otherwise accessing the Board's processes. (JD 4:1-13; 5:34-36.)

In *Countrywide Financial*, the Board found that employees would understand an arbitration agreement to prohibit them from accessing the Board's processes because the agreement's broad terms encompassed "all claims and controversies," including those for "violation of any federal...statute,...regulation, or public policy," and did not specifically exclude administrative proceedings before the Board. *Countrywide Financial*, 362 NLRB No. 165, slip op. at 2-3. See also *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015) (affirming an administrative law judge's finding that a mandatory arbitration policy would reasonably be construed by employees to prohibit filing charges with the Board because it excluded only employment issues involving workers compensation, unemployment insurance claims, or any benefit plan with its own arbitration procedure); *Brinker International Payroll Co. L.P.*, 363 NLRB No. 54, slip op. at 1 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 1 (2015).

The Respondents claim that an employee would construe the MAA to cover only civil litigation or disputes between the Respondents and the employee, and that a Board charge is not such a dispute. As Judge Wedekind correctly determined, however, the language of the MAA is not significantly or substantially different from the provisions found unlawful in other *D.R. Horton* cases. (JD 4:1-13.) The MAA provides that "**any dispute or controversy** between us arising in any way related to my employment with the Company, shall be submitted to and determined by binding arbitration under the California Arbitration Act." (Emphasis added.) Since the MAA purports to broadly cover "any dispute or controversy," and does not exclude

administrative proceedings, an employee would reasonably construe the MAA to prohibit filing Board charges, which clearly encompass disputes between an employer and employees.

Furthermore, although the MAA states that “binding arbitration rather than litigation provides an effective means for resolving issues...,” the MAA fails to define “litigation,” and the Board’s processes involve litigation in both federal court and administrative proceedings.

In addition, to the extent that there is ambiguity in the scope of an employer’s rules, the Board construes the ambiguity against the drafter. *Supply Technologies, LLC*, 356 NLRB No. 38, slip op. at 3 (2012) (citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998)). See also *Bloomington’s*, 363 NLRB No. 172, slip op. at 5 (quoting *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) (“Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.”)); *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 2 (2016) (holding that an arbitration agreement which informed employees that they can file a Board charge was nevertheless unlawful because of the agreement’s ambiguity); *Flyte Time Worldwide*, 363 NLRB No. 107, slip op. at 1 fn. 4 (2016); *Amex Card Services Co.*, 363 NLRB No. 40, slip op. at 2-3 (2015).

C. Judge Wedekind Properly Applied Board Precedent in Concluding that the Mutual Arbitration Agreement Violated the NLRA

The Respondents’ exceptions arguing that Judge Wedekind’s decision improperly applied the Board’s holdings in *D.R. Horton* and *Murphy Oil* should be rejected. The Board’s consistent policy for itself is to determine whether to acquiesce in the contrary views of a U.S. Circuit Court of Appeals or whether to adhere to its previous holding until the U.S. Supreme Court has ruled otherwise. *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 and cited cases (2004).

Furthermore, the Board is “not required to acquiesce in adverse decisions of the Federal courts in

subsequent proceedings not involving the same parties.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 2 fn. 17 (citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005); *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066-67 (7th Cir. 1988)). The Board has consistently adhered to its decisions in *D.R. Horton* and *Murphy Oil* in numerous subsequent cases and is not bound by the Fifth Circuit decisions denying enforcement in those cases.²

The Respondents also incorrectly assert in their exceptions that the federal district and appellate courts have demonstrated “universal disdain” towards the Board’s rulings in *D.R. Horton* and *Murphy Oil*, although the courts have not been uniform in their application of these cases. See, e.g., *Lewis v. Epic Systems Corp.*, No. 15-2997, slip op. at 1-2, 14-19 (7th Cir. May 26, 2016) (holding that the employer’s arbitration agreement violated the NLRA because it did not permit collective arbitration or collective action in any other forum, rejecting the Fifth Circuit’s reasoning and conclusion in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013)); *Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019, slip op. at 8-17 (C.D.Cal. Jan. 22, 2016) (expressly endorsing the Board’s reasoning in *D.R. Horton* and *Murphy Oil* in declining to enforce the employer’s mandatory individual arbitration agreement in a California wage-and-hour case).³

The Respondents further except to Judge Wedekind’s decision on the basis that “numerous administrative law judges have made findings contrary to the one made by [Judge Wedekind] on the issue of whether a mandatory arbitration agreement violates the NLRA despite the FAA.” However, the Respondents misleadingly cite just one decision by an administrative

² The Board is similarly not bound by the Eight Circuit decision partially denying enforcement in *Cellular Sales of Missouri, LLC v. NLRB*, No. 15-1860 (8th Cir. June 2, 2016).

³ An appeal is pending before the U.S. Court of Appeals for the Ninth Circuit, filed on February 22, 2016 (Case No. 16-55260). Contrary to the Respondents’ exception arguing that Judge Wedekind improperly relied on *Totten* in his decision, Judge Wedekind merely cited the case to refute the Respondents’ assertion that all federal district and appellate courts have rejected *D.R. Horton* and *Murphy Oil*. (JD 4:15-23.)

law judge, *Haynes Building Services*, failing to note that the decision was reversed, in relevant part, by the Board. See *Haynes Building Services, LLC*, 363 NLRB No. 125 (2016) (reversing the judge and finding that the employer violated the NLRA by maintaining and threatening to enforce an arbitration agreement in a matter that required employees to waive their right to collective action in all forums). Judge Wedekind therefore did not err in applying *D.R. Horton*, *Murphy Oil*, and other Board decisions to the present matter, as these cases represent valid Board precedent and are the correct legal standard to apply.

D. *D.R. Horton* and *Murphy Oil* Do Not Conflict with the Federal Arbitration Act or the First Amendment

The Respondents' exceptions arguing that Judge Wedekind's decision disregarded the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq., and U.S. Supreme Court decisions such as *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), should be rejected.

The Board in *D.R. Horton* found that neither *Stolt-Nielsen* nor *AT&T Mobility* are controlling authority, as these cases involved neither the waiver of rights protected by the NLRA nor even employment agreements. *D.R. Horton*, 357 NLRB No. 184, slip op. at 16. *Stolt-Nielsen* involved a class antitrust claim, and *AT&T Mobility* involved a consumer contract of adhesion. *Id.* The Board also previously considered and rejected arguments that other cases cited by the Respondents are controlling, including *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) (involving federal antitrust law, with no provision comparable to Section 7 of the NLRA), as those cases relate exclusively to non-NLRA legal rights. *Murphy Oil*, 361 NLRB No. 72, slip op. at 21 fn. 87.

The present case does not present a conflict between the NLRA and the FAA because, as the Board explained in *D.R. Horton*, "holding that an employer violates the NLRA by requiring

employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” *D.R. Horton*, above, slip op. at 15. Furthermore, Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part upon any ‘grounds as exist at law or equity for the revocation of any contract.’” *Id.*, slip op. at 14. As the Board noted, “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA” and against public policy is enforceable. *Id.*

The Respondents also argue that their cross-complaint and other legal actions taken to enforce individual arbitration of Rosales’ class or representative claims are protected under the First Amendment’s petition clause, citing *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). However, as the Board in *Murphy Oil* noted, the Supreme Court in *Bill Johnson’s* identified two situations in which lawsuits enjoy no such constitutional protections: when the action is beyond a state court’s jurisdiction because of federal preemption, and when the action “has an objective that is illegal under federal law.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 27. Here, the Respondents’ efforts to preclude class or collective legal actions by interpreting and enforcing the MAA in state court to compel individual arbitration fall within the unlawful-objective exception in *Bill Johnson’s*.

Similarly, the Board has repeatedly held that the Supreme Court’s opinion in *BE & K Construction* “did not alter the Board’s authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice.” *Dilling Mechanical Contractors, Inc.*, 357 NLRB No. 56, slip op. at 3 (2011); *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 179, slip op. at 3 fn. 7 (2011), enf’d. 547 Fed.Appx. 812 (9th Cir. 2013), and 357

NLRB No. 160, slip op. at 3 (2011), enfd. 547 Fed.Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Association of Greater New York Incorporated*, 345 NLRB 538, 540 fn. 7 (2005); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

Accordingly, ALJ Wedekind properly found that the Respondents' arguments are contrary to Board precedent, and the Respondents' exceptions should be disregarded.

E. The Complaint is Not Barred by Section 10(b) of the NLRA

The Respondents' exception arguing that Rosales failed to bring her charge within the six-month statute of limitations period under Section 10(b) of the NLRA should be rejected. The Board has repeatedly held that a violation may be found where an unlawful provision has been maintained or enforced within six months of the charge, regardless of when the provision became effective or was first acknowledged by or enforced against the employee. See, e.g., *Bloomington's*, 363 NLRB No. 172, slip op. at 1 fn. 1; *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 3 (2016); *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 1 fn. 1 (2016); *PJ Cheese*, 362 NLRB No. 177, slip op. at 1, 3 fn. 9; *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 1 fn. 6.

The Respondents filed the cross-complaint for declaratory and injunctive relief against Rosales on January 14, 2015, and the initial charge in this matter was filed and served on May 13 and 14, 2015, respectively, less than six months later. (JD 1 fn. 2.) Accordingly, Judge Wedekind properly found that the Respondents continued to maintain the MAA and seek enforcement of the MAA's arbitration provision, through the January 14, 2015 cross-complaint and various subsequent motions and pleadings in the Superior Court action, within the six-month statute of limitations period prescribed by Section 10(b) of the NLRA. (JD 4:36-5:10.)

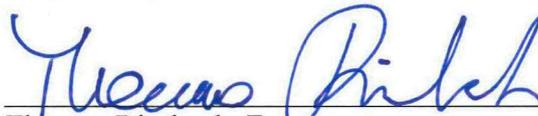
F. General Counsel Memorandum GC 10-06 is Not Binding

The Respondents cite General Counsel Memorandum GC 10-06 (GC Memo 10-06) for its exception arguing that class-action waivers in employment agreements are not per se violations of the NLRA. The Respondents argue that the revocation of GC Memo 10-06 violates the Administrative Procedures Act, but fail to provide any basis for that assertion. The Board has already rejected the construction of the NLRA advanced in GC Memo 10-06. *D.R. Horton*, 357 NLRB No. 184, slip op. at 6-7. Furthermore, the Board has repeatedly held that policies set out in the General Counsel's Casehandling Manual and other internal pronouncements are not binding on the Board, or even the General Counsel himself. *Id.*, slip op. at 6 fn. 15; *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 553 fn. 4 (2007); *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996).

IV. CONCLUSION

For the reasons described above, it is respectfully requested that the Respondents' exceptions be rejected and that Judge Wedekind's decision be affirmed and his recommended order adopted.

Respectfully submitted,



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DATED at Los Angeles, California, this 9th day of June, 2016.

STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Answering Brief to the Respondents' Exceptions to the Administrative Law Judge's Recommended Decision and Order** in Case 21-CA-152170 was submitted by E-filing to the Executive Secretary of the National Labor Relations Board on June 9, 2016. The following parties were served with a copy of the same documents by electronic mail:

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