

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

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

**and**

**Case 21-CA-152170**

**JOANNA ROSALES, an individual**

**RESPONDENTS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondents IIG WIRELESS, INC. f/k/a UNLIMITED PCS, INC. ("IIG") and UPCS CA RESOURCES, INC. ("UPCS") (collectively, "Respondents"), through counsel and pursuant to the National Labor Relations Board's (the "Board") Rules 102.46 et. seq., file the following Reply brief in support of their Exceptions to the decision of Administrative Law Judge ("ALJ") Jeffrey D. Wedekind dated April 14, 2016.

**I. THE GENERAL COUNSEL FAILED TO ACKNOWLEDGE OR DISTINGUISH  
THE CASE LAW OUTLINED BY RESPONDENTS**

The Parties acknowledge that this case resembles a line of cases headlined by *D.R. Horton, Inc.* 357 NLRB 184 (2012) and *Murphy Oil USA, Inc.* 361 NLRB 72 (2014). The General Counsel's Answering Brief to Respondents' Exceptions Brief is limited to the argument that since the United States Supreme Court has not yet overturned Board precedent, it must remain valid. See *Pathmark Stores*, 342 NLRB 378, 378 fn.1 (2004). The Board is in essence creating a self-fulfilling legal doctrine regarding arbitration agreements as it has regularly lost before Circuit Courts of Appeal. By not appealing any such decisions, it is implicitly insulating itself from having to reverse decisions such as *D.R. Horton, Inc.* and

*Murphy Oil*. Additionally, the authority for the Board to not overturn a decision absent United States Supreme Court intervention is not civil appellate law precedent, but instead the Board's own precedent.

The General Counsel argues that courts have not universally rejected *D.R. Horton* and *Murphy Oil*. The General Counsel states that "courts have not been uniform" in their application of these landmark cases, including the 7<sup>th</sup> Circuit's recent holding under those specific facts. *Lewis v. Epic Systems Corp.* No. 15-2997, slip. Op. at 1-2, 14-19 (7<sup>th</sup> Cir. May 26, 2016). However, as outlined in Respondents opening brief, more than twenty-five federal district courts, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, the Ninth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have all provided negative treatment of the Board's decisions in *D.R. Horton* and *Murphy Oil*. The California Supreme Court has also provided negative treatment to the decision. Recognizing the outcome before the Ninth Circuit based on its precedent, Respondents maintain that the Board should overturn the ALJ's ruling and limit the reversal to those jurisdictions where Circuit Courts of Appeal have reversed findings in *D.R. Horton*, *Murphy Oil* and its progeny.

## **II. ROSALES DID NOT FILE A PUTATIVE CLASS ACTION COMPLAINT BEFORE A JUDICIAL FORUM**

Contrary to the ALJ's assertion, Rosales Joanna Rosales ("Rosales"), voluntarily did not and has not filed a class action complaint in any judicial forum. Rather, Rosales affirmatively decided to file a putative class action before JAMS, an arbitration service, based on the arbitration agreement. Rosales's only filed action in a judicial forum is a representative claim under the California Labor Code's Private Attorneys General Act ("PAGA"). Respondents have not sought to bar the PAGA action and, in fact, the PAGA action is pending before the Superior Court.

As such, Respondents did not and have not sought to preclude a class action in a judicial forum, either by the terms of the arbitration agreement (since there is no express class action waiver) or as applied (since there is no putative class action complaint in a judicial forum). Under

*D.R. Horton*, this does not violate the NLRA. Nor will Respondents preclude a class action against Rosales as the Parties have reached a global settlement of any and all claims between them. Accordingly, the ALJ's order should be reversed.

### **III. D.R. HORTON HELD THAT INSISTING ON INDIVIDUAL ARBITRAL PROCEEDINGS IS NOT A RESTRICTION ON CONCERTED ACTIVITY**

Despite Rosales' decision not to file a putative class action in Superior Court and instead file a PAGA Action, the General Counsel argues that Respondents have violated the NLRA. The General Counsel points out that Respondents have insisted on individual arbitration by filing (1) a Cross-Complaint to require individual arbitration of the class arbitration demand and (2) a Motion to Stay the PAGA action pending in Superior Court. At worst, Respondents have required Rosales to arbitrate her *Labor Code* claims individually and stay her PAGA Action until her individual claims were arbitrated.

Notably, the General Counsel fails to address Respondents argument that *D.R. Horton* permits an employer to require individual arbitration. *D.R. Horton* states that the NLRB does not "mandate class arbitration." See *D.R. Horton*, at p. 2288, Section II. C. *D.R. Horton* goes on the state that NLRA rights are preserved where a judicial forum for class and collective action is left open. In pertinent part, *D.R. Horton* held that:

"We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we only hold that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. **So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration.** Employers remain free to insist that arbitral proceedings be conducted on an individual basis."

See *D.R. Horton*, at p. 2288, Section II. C.

The General Counsel also ignores *D.R. Horton*, which stated: "[N]othing in our holding here requires the Respondent or any other employer to permit, participate in or be bound by a class-wide or collective arbitration proceeding." See *D.R. Horton*, at p. 2288, Section II.

C. Therefore, “all forums, arbitral and judicial” must be precluded before a violation of NLRA rights can be found. The General Counsel ignores this specific language from *D.R. Horton* and instead states that the standard is “judicial or arbitral.” *D.R. Horton’s* refusal to require that all employers arbitrate on a class action basis is consistent with US Supreme Court precedent.<sup>1</sup>

Here, and distinguishable from the line of *D.R. Horton* cases, Respondents’ arbitration agreement does not contain an express class action waiver. Therefore, on its face, the arbitration agreement does not preclude a class action in a judicial forum.

Further, Respondents have merely “insist[ed] that arbitral proceedings be conducted on an individual basis” in conformance with *D.R. Horton. Id.* For example, Rosales has been able to pursue her PAGA Action on a representative basis. Any “stay” of that action was at the discretion of the trial court to control its own proceedings and did not preclude or bar any collective action. Further, Rosales voluntarily decided not to file a class action complaint in a judicial forum, and instead filed a class action in an arbitral forum. Therefore, as applied, Respondents have not sought to preclude a class action in a judicial forum. Additionally, given the global settlement between the parties, Respondents will not seek to preclude Rosales from pursuing a class action in a judicial forum either.

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<sup>1</sup> As recognized by the United States Supreme Court and the California Supreme Court, the shift from individual bilateral arbitration to class arbitration “**fundamentally changes** the nature of the arbitration proceeding and significantly expands its scope.” *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 686 (*Stolt-Nielsen*); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011). Therefore, “it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit their disputes to an arbitrator.” *Id.*

**IV. RESPONDENTS' ACTIONS TO ENFORCE INDIVIDUAL ARBITRATION ARE PROTECTED UNDER THE FIRST AMENDMENT'S PETITION CLAUSE AND PERMITTED UNDER THE FAA AND US SUPREME COURT PRECEDENT.**

The General Counsel argues that “Respondents efforts to preclude class or collective legal actions ... to compel individual arbitration fall within the unlawful-objective exception in *Bill Johnson's*.” The General Counsel provides no support for this conclusory statement, which fails for at least two reasons.

First, as outlined above, *D.R. Horton* held that an employer may require individual arbitration without violating the NLRA. Indeed, Respondents are merely upholding the FAA. “[T]he FAA’s purpose is to give preference (instead of mere equality) to arbitrator provisions.” *Mortenson v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1160 (9<sup>th</sup> Cir. 2013). The FAA reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 563, U.S. 333, 339 (2011). Arbitration agreements must be enforced “...according to their terms.” *Id.* Here, Respondents’ actions were supported by United States Supreme Court precedent, California Supreme Court precedent, and the FAA. It is difficult to imagine (and the General Counsel does not indicate) how Respondents had an unlawful-objective simply by arguing that class arbitration is not permitted under binding authority.

Second, the General Counsel provides no legitimate basis for the proposition that seeking a stay of the PAGA Action before the Superior Court (which was agreed to by Judge Thierry Colaw) is an unlawful-objective. Respondents’ motion to stay was supported by binding legal precedent and statutory authority. Other than conclusory allegations, the General Counsel provides no support for classifying Respondents actions as “illegal under federal law.” Accordingly, the General Counsel’s position is unpersuasive and Respondents’ request that Judge Wedekind’s Order be overturned.

**V. THE COMPLAINT IS TIME-BARRED BY SECTION 10(b) OF THE NLRA**

As outlined in Respondents' Exceptions Brief, the ALJ should have found that Rosales' Charge was untimely. The General Counsel argues that Board precedent allows Rosales to bring her Charge beyond the six month statute of limitations set forth in Section 10(b). However, that precedent is distinguishable.

Notably, the General Counsel fails to acknowledge that the Cross-Complaint for Declaratory and Injunctive Relief filed on January 14, 2015 was not a violation of the NLRA that would permit the six month period to be tolled. Again, *D.R. Horton* stated: “[N]othing in our holding here requires the Respondent or any other employer to permit, participate in or be bound by a class-wide or collective **arbitration** proceeding... Employers remain free to insist that arbitral proceedings be conducted on an individual basis.” *See D.R. Horton, at p. 2288, Section II. C.* That is precisely what Respondents did here. Respondents filed the Cross-Complaint to “insist that arbitral proceedings be conducted on an individual basis.” *Id.* Per *D.R. Horton*, the Cross-Complaint is not enforcement of an unlawful provision in violation of the NLRA that would extend or toll the statute of limitations. Respondents therefore request that the Board dismiss Rosales' Charge as untimely.

**VI. REVOCATION OF GENERAL COUNSEL MEMORANDUM GC 10-06 VIOLATES THE ADMINISTRATIVE PROCEDURES ACT**

The General Counsel does not address Respondents' argument regarding GC 10-06. GC 10-06 held that class action waivers (or their equivalents) are not *per se* violative of the NLRA. Yet, GC 10-06 was revoked without following appropriate procedures in violation of the Administrative Procedures Act.

The United States Supreme Court recently affirmed that administrative rulemaking, and the procedures that must be followed, are important. In *Encino MotorCars, LLC v. Navarro*, 579 U.S. \_\_\_\_\_, (June 20, 2016), the Supreme Court found that agencies are “free to change their existing policies, but in explaining its changed position, an agency must be cognizant that

longstanding policies may have ‘engendered serious reliance interest that must be taken into account.’” The Supreme Court went to hold that an “unexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” (citations omitted) *Id.* In *Navarro*, the Supreme Court held that “deference is not warranted where [a] regulation is ‘procedurally defective.’” *Id.*

Here, the NLRB changed its longstanding policy permitting class action waivers when it revoked GC 10-06. Under *Navarro*, the NLRB’s actions were “arbitrary and capricious” when it failed to comply with the Administrative Procedures Act. Therefore, the Board must reverse the ALJ’s decision.

## VII. CONCLUSION

Respondents respectfully request that the Board grant its exceptions to the ALJ’s findings based on the arguments set forth in their opening and reply briefs.

Respectfully submitted,

Dated: June 23, 2016

Respondents

By: 

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**JOANNA ROSALES, an individual**

**CERTIFICATE OF SERVICE**

I hereby certify that on June 23, 2016, I e-filed the foregoing **RESPONDENTS' REPLY IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** using the Board's e-filing system, and immediately thereafter served it by electronic mail upon the following:

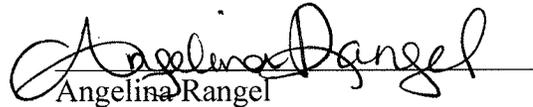
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Dated this 23rd day of June, 2016, at Irvine, California.

  
Angelina Rangel