

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

DARDEN RESTAURANTS, INC.;
GMRI, INC.;
YARD HOUSE USA, INC.;
YARD HOUSE NORTHRIDGE, LLC
Respondents

and

FILIBERTO MARTINEZ, an Individual
Charging Party

Case 31-CA-158487

CHARGING PARTY FILIBERTO MARTINEZ'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This case is before the Honorable Joel P. Biblowitz, Administrative Law Judge pursuant to the Complaint and Notice of Hearing (“Complaint”) that issued on February 26, 2016. The Complaint alleges several violations of Section 8(a)(1) of the National Labor Relations Act (“Act” or “NLRA”) against Darden Restaurants, Inc. (“Darden” herein); GMRI, Inc.; Yard House USA, Inc.; and Yard House Northridge, LLC (collectively “Respondents”).

The Complaint alleges that the Respondents violated Section 8(a)(1) of the Act by: (1) maintaining and enforcing mandatory Dispute Resolution Process (“DRP”) to preclude employees from pursuing claims on a class or representative basis in both judicial or arbitral forums; and (2) maintaining the Agreements that employees would reasonably conclude preclude them from engaging in conduct protected by Section 7 of the Act, and that interfere with employees’ access to the National Labor Relations Board (“Board” or “NLRB”) and its processes.

On June 29, 2016, the Counsel for the General Counsel (“General Counsel”), the Respondents, and Charging Party Filiberto Martinez (“Martinez”) submitted a Joint Motion and Submission of Stipulation of Facts and Exhibits to the Administrative Law judge (“Joint Motion”). On June 29, 2016, an order granting the Joint Motion was issued. In this order, August 3, 2016, was set as the due date for filing briefs on the merits of the case, which was subsequently continued to August 10, 2016.

The facts of this case are not in dispute as they pertain to: (1) the language of the provisions of the DRP, which the Respondents Yard House Northridge, Respondent Yard House USA, and Respondent GMRI admits they have maintained for employees; and (2) all

Respondents' successful efforts to apply and enforce the DRP to preclude employees from resolving employment disputes through collective or class actions.

Charging Party writes separately to clarify his belief that all Respondents are all properly named not just for their enforcement of the DRP, but also their status as a "single employer."

II. ISSUES PRESENTED

Without waiving objections to the materiality or relevance based on the factual stipulations, the Parties agreed and stipulated to seven issues presented in this matter.

Complainant writes separately to further expound on the following issue:

4. Whether Respondent Darden or Respondent Yard House USA are proper parties to this matter.

III. STATEMENT OF FACTS

Respondents through their direct and indirect ownership of various subsidiaries has a place of business in Los Angeles, California, where it has been engaged in operating public restaurants selling food and beverages; has derived gross revenues in excess of \$500,000 and has purchased and received for its California location, goods valued in excess of \$5,000 directly from points outside the State of California; and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stipulated Facts 4-7). Yard House Northridge, LLC is a wholly owned subsidiary of Yard House USA, Inc., which is in turn a wholly owned subsidiary of GMRI, Inc., which is in turn a wholly owned subsidiary of Darden Restaurants, Inc. (Joint Exhibit R, Declaration of Anthony G. Morrow ("Morrow Decl.")).

Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI have required employees, including the Charging Party, to submit employment related and compensation related disputes to arbitration. The terms of the agreement are described in the

Dispute Resolution Process (DRP), Exhibit M. The DRP states that examples of legal claims covered by the DRP include, but are not limited to: claims that arise out of the Civil Rights Act of 1964, Americans With Disabilities Act, Fair Labor Standards Act, Age Discrimination in Employment Act, and Family Medical Leave Act. (Stipulated Fact 9; Joint Exhibit M, page 2.)

Darden and its Director of Dispute Resolution and Human Resource Compliance was the Declarant (Melissa Ingalsbe) who explained DRP, entered it into evidence supporting Respondents' compelling arbitration and ultimately maintains the records of those who sign the agreements for arbitration program as well as personnel files, like those of Mr. Martinez. (Joint Exhibit R, Declaration of Melissa Ingalsbe ("Ingalsbe Decl.") at 2-4. Seemingly, all of Respondents' employee records are maintained by Darden, whose Litigation Department serves as the Custodian of Records for requests for such files. (See Joint Exhibit Y)

On or about May 7, 2015, Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI, acting jointly, filed a Notice of Removal of Action Pursuant to 28 U.S.C. Sections 1332, 1441, and 1446, Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal., herein the U.S.D.C.) (Stipulated Fact 17; Joint Exhibit Q.)

On or about May 8, 2015, Respondents, acting jointly, submitted a Motion to Compel Binding Arbitration; Memorandum of Points and Authorities to the U.S.D.C. (Stipulated Fact 18; Joint Exhibit R.). On or about June 4, 2015, Mr. Martinez submitted his Opposition to Respondents' Motion to Compel Arbitration to the U.S.D.C. (Stipulated Fact 19; Joint Exhibit S.)

On or about June 5, 2015, Respondents, acting jointly again, submitted its Reply to the U.S.D.C. (Stipulated Fact 20; Joint Exhibit T.)

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IV. ARGUMENT

A. Respondents Violated Sections 7 and 8(a)(1) of the NLRA

The Respondents have violated Sections 7 and 8(a)(1) of the NLRA by attempting to prohibit him from prosecuting a class wide claim for wage and hour violations on behalf of himself and other putative class members. Section 7 of the NLRA vests employees with the substantive right to engage in specific concerted activity. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158.

To determine whether a policy violates Section 8(a)(1), the NLRB will first determine whether the rule explicitly restricts activities protected by Section 7. *Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (DC Cir. 2007). If it does, the rule is unlawful. If, however, the rule does not explicitly restrict protected activity, one of the following conditions should be met: (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. *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 6, 2012) at 5; *Lutheran Heritage Village- Livonia*, 343 NLRB 646 (2004).

D.R. Horton, Inc. applies to the charge at hand. In *D.R. Horton*, the employer required employees to execute an arbitration agreement as a condition of employment. The arbitration agreement provided that "all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived." Put differently, the employees were forced to waive class and/or collective claims in both arbitration and litigation proceedings. The NLRB held that requiring employees as a condition of employment to waive the filing of class action or other joint or collective claims regarding wages, hours, or working conditions in any

forum, arbitral or judicial, interfered with the employee's right to engage in concerted activities as protected by Section 7. *id.* at 1. The NLRB further held that its decision was not mandating class arbitration, which could potentially run contrary to *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010), but rather that it was holding that employers may not, consistent with the NLRA, require arbitration without leaving a judicial forum open for class and collective claims. *id.* at 8-12. Finally, the NLRB distinguished *Concepcion* by noting that *Concepcion* involved conflict between the Federal Arbitration Act and state law, thus triggering preemption under the Supremacy Clause, whereas here, two only potentially conflicting federal statutes raises no such concern. *id.*

In the instant case, the Respondents have thoroughly indicated their steadfast intent to enforce the arbitration agreement individually as evidenced by their opposition of the proposal to arbitrate on a class-wide basis and their petition to compel arbitration asking for dismissal of the class claims. Mr. Martinez joins the Brief of Counsel for the General Counsel to the extent it is not otherwise inconsistent with his arguments herein.

B. Respondents, as Parents and Subsidiaries, Act as a Single Employer

The Respondents act as a single employer under applicable precedent. To determine whether two or more business entities comprise a single employer, the courts have applied the four factors set out in *Radio & Television Broadcast Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965) (per curiam): (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership. See *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1981). No one of these factors is controlling, nor need all of them be present. Single employer status

ultimately depends on “all the circumstances of the case” and is marked by an absence of an “arm's length relationship found among unintegrated companies.” *Local 627, International Union of Operating Engineers v. NLRB*, 518 F.2d 1040, 1045-46 (D.C.Cir.1975), *aff'd on this issue sub nom. South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976). *Accord Soule Glass & Glazing Co. v. NLRB*, 652 F.2d at 1075; *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979). Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level. *Soule Glass & Glazing Co.*, 652 F.2d at 1075; *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir.1964), *cert. denied*, 379 U.S. 961, 85 S.Ct. 649, 13 L.Ed.2d 556 (1965).

The Board has similarly used the same four factor test in their own decisions, having started the Court's review of that test from appeals of their own actions. See *Denart Coal Co.*, 315 NLRB 850, 851 (1994), *enfd.* 71 F.3d 486 (4th Cir. 1995). The Board similarly agrees that no single factor is controlling and all factors need not be present. See *Three Sisters Sportswear*, 312 NLRB 853, 861 (1993), and cases cited there, *enfd. mem.* 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996).

The Board and the courts have specifically applied this concept to a parent company through its subsidiary in *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18 (1st Cir.1983) (finding parent corporation, as a single employer with its subsidiary, liable for its subsidiary's violation of the Act by failing to bargain in good faith regarding its closure). In *Penntech* the employees in question actually sought to enforce their collective bargaining agreement's arbitration agreement against both their direct employer and their employer's parent company. In applying the

appropriate test to cases like the current matter and *Penntech*, the four following factors are considered:

1. *Interrelation of Operations*

For the first factor of the test the board looks to the interrelation in operations between the subsidiaries and their parent. In *Penntech* the companies were manufacturers, so the court stressed that the subsidiary's products were sold by the parent to the public as the parent's products. 706 F.2d at 25. However, the court also stressed that while parent and subsidiary maintained separate payrolls and bank accounts, and filed separate tax returns, the Parent's computers were used to process subsidiary's payroll and employee wage statements. *Id.* The court found similar factors important in *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1305 (9th Cir.1979) (same customers; central preparation of payroll). Here, it is clear that as the parent company, Darden, represents itself as the head of the Yard House brand using the Darden letterhead and maintaining the records as the custodian of records "on behalf of Darden Restaurants, Inc., its subsidiaries, affiliates and related entities" which included the entirety of Mr. Martinez's personnel file, pay records and time records. *See* Exhibit Y. More so, Darden Restaurants, Inc. maintained the time and payroll records as part of a PeopleSoft HRMS program that if viewed as a paystub, lists only Darden Restaurants, Inc. as a potential employer. *id.*

2. *Common Management*

For evidence of common management the board looks to shared officers and directors in the "top-level management" of the entities, particularly a shared president. *Penntech*, 706 F.2d at 25-26. Here, there is no dispute as Darden and the other charged parties have stated a scheme of interrelation where, rather than having an independent board of directors, Darden is acting as a parent that makes decisions for each of the subsidiaries who are wholly owned and have no

board of directors or independent shareholders. See Exhibit R., Declaration of Anthony G. Morrow (“Morrow decl.”) at 2.

3. *Centralized Control of Labor Relations*

The third factor does not necessarily look to day-to-day labor matters being handled at the local level, which is not dispositive. “A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries.’ ” *Soule Glass & Glazing Co.*, 652 F.2d at 1075, quoting *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1043 (8th Cir.1976). In *Penntech* the court looked to the facts specific to the union bargaining issue in that case, namely changes in the collective bargaining agreement, announcement of a mill shutdown, and meeting with the union representatives. *Penntech*, 706 F.2d at 26. The court also looked to how those with questions were instructed to contact the parent company’s attorneys. *Id.* Specifically, the *Penntech* court found that the parent company “both possessed and exercised control over critical matters at the policy level, including the present and apparent means to exercise its clout’ in labor relations matters.” *Id.* (citing *Soule Glass & Glazing Co.*, 652 F.2d at 1075).

Here, Darden Restaurants, Inc. (“Darden”) is dictating the policy at the highest level of the parent subsidiary relationship. Darden and its Director of Dispute Resolution and Human Resource Compliance explained the DRP, and maintains the records of those who sign the agreement to use their arbitration program (and waive collective action). See Exhibit R, Ingalsbe Decl.. The DRP also clearly states the name Darden across the top document, with no mention of GMRI or Yard House. See Exhibit R., Ingalsbe Decl., Exh. A. More so, Darden administers the dispute resolution program, so even if GMRI is just utilizing it as an option offered by Darden it still allows Darden to “both possess[] and exercise[] control over critical matters at the

policy level, including the present and apparent means to exercise its clout' in labor relations matters." *Penntech*, 706 F.2d at 26 (citing *Soule Glass & Glazing Co.*, 652 F.2d at 1075).

4. Common Ownership

There is no dispute as to Common Ownership in this case. In *Penntech* the record reflected that "Penntech owned 100% of the stock in T.P., and T.P. was a 100% stockholder of Kennebec." *Penntech*, 706 F.2d at 26. Darden has admitted this same common ownership of the remaining respondents. Exh. R., Morrow Decl. at 2.

IV. CONCLUSION

In sum, there is substantial evidence in the record considered as a whole supporting a finding that Darden and its wholly-owned subsidiaries constitute a single employer under the Act. *See also NLRB v. Big Bear Supermarkets No. 3*, 640 F.2d 924, 930 (9th Cir.), *cert. denied*, 449 U.S. 919, 101 S.Ct. 318, 66 L.Ed.2d 147 (1980); *NLRB v. Master Slack*, 618 F.2d 6, 7, 8 (6th Cir.1980). As such, all of the Respondents are proper parties to this matter.

DATED: August 10, 2016

Respectfully submitted,

MATERN LAW GROUP, PC

By:



MATTHEW J. MATERN
TAGORE SUBRAMANIAM
DANIEL J. BASS
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FILIBERTO MARTINEZ

STATEMENT OF SERVICE

Darden Restaurants, et. al., Case 31-CA-158487

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 1230 Rosecrans Boulevard, Suite 200, Manhattan Beach, California 90266.

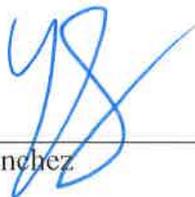
On August 10, 2016, I served the following document or documents:

**NOTICE OF JOINDER OF CHARGING PARTY FILIBERTO MARTINEZ’S BRIEF TO
THE ADMINISTRATIVE LAW JUDGE**

By e-mail or electronic transmission. I caused the documents to be sent from my e-mail address of ysanchez@maternlawgroup.com to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Anthony L. Martin Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 3800 Howard Hughes Parkway, Suite 1500 Las Vegas, Nevada 89169 Anthony.martin@ogletreedekins.com (702) 369-6801	Eric Brooks Counsel for the General Counsel National Labor Relations Board, Region 2 26 Federal Plaza, Room 3614 New York, New York 10278 Eric.brooks@nrb.gov (212) 264-0319
Hon. Joel P. Biblowitz, Associate Chief Administrative Law Judge National Labor Relations Board Division of Judges 120 West 45 th Street, 11 th Floor New York, New York 10036-5503 <i>Uploaded into NLRB e-file and transmitted by email to joel.biblowitz@nrb.gov</i>	

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 10, 2016 at Manhattan Beach, California.



Yasmin Sanchez