

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**ADI WORLDLINK, LLC; SAMSUNG
ELECTRONICS AMERICA, INC. f/k/a SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC**

Respondents

and

CASE 07-CA-157722

**TIM CURRY, OZIAS FOSTER, ROYCE ELLISON,
MERVIN L. MCGIRT, CLARENCE COOK, KEVIN
ASTROP, Individuals**

Region 7 Charging Parties

and

CASE 20-CA-156284

**NATHAN NESBIT,
CHRIS CARETHERS, LAMAR HALL,
LEON TOWNSHED, STEVEN LE,
SEAN GOODSON, Individuals**

Region 20 Charging Parties

**RESPONDENT ADI WORLDLINK, LLC'S RESPONSE
TO NOTICE TO SHOW CAUSE**

COMES NOW Respondent Adi WorldLink, LLC ("WorldLink") who files this Response to the Notice to Show Cause issued by the Board on July 25, 2016¹ in support of its Motion for Summary Judgment (the "Motion") seeking dismissal of the Second Amended Consolidated Complaint ("Complaint") filed by the Regional Director of Region 7 in the above-entitled action and in opposition to the General Counsel's Cross Motion for Summary Judgment (the "Cross-Motion").²

¹ The Notice to Show Cause originally required a response filed with the Board no later than August 8, 2016. This deadline was extended until August 22, 2016 by an Order dated August 3, 2016.

² This Brief is filed solely on behalf of WorldLink. Nothing in this Motion should be construed as an admission or representation on behalf of Samsung Electronics America, Inc. f/k/a Samsung Telecommunications Americas, LLC ("Samsung"). WorldLink and Samsung are collectively referred to as "Respondents."

I. INTRODUCTION

The parties are in agreement that there are no factual issues warranting a hearing in this action. Charging Parties Tim Curry, Ozias Foster, Royce Ellison, Mervin L. McGirt, Clarence Cook, Kevin Astrop Nathan Nesbit, Chris Carethers, Lamar Hall, Leon Townsend, Steven Le, and Sean Goodson (collectively, "Charging Parties") consented to WorldLink's Labor Services Agreement (the "Agreement"). The Agreement is a binding arbitration agreement enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and the agreement must therefore be enforced according to its terms, including the class and collective action waiver provision. The Regional Director, based on the Board's reasoning in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (*D.R. Horton I*) and *Murphy Oil*, 361 NLRB No. 72 (2014) (*Murphy Oil I*), alleges the Agreements violate Section 8(a)(1) of the Act because they prohibit the Charging Parties from exercising Section 7 rights. *D.R. Horton I* and its progeny are wrong however, and WorldLink asks the Board to reconsider these decisions, grant WorldLink's Motion, and deny the General Counsel's Cross-Motion.

II. STATEMENT OF FACTS

The facts are straightforward and not in dispute. The Agreements, which were signed by Charging Parties, require both WorldLink and Charging Parties to arbitrate claims pursuant to the following provision in the section titled Arbitration/Waiver of Class Action:

Pursuant to the Federal Arbitration Act, I agree to use binding arbitration to resolve any dispute of any sort that I may have with either Employer and/or Client relating to or arising in any way from this Agreement, my employment or status as an independent contractor, or the termination of my employment or independent contractor relationship, including but not limited to claims for discrimination, harassment, breach of contract, fraudulent inducement, slander, libel, retaliation, and/or wrongful termination.

The party seeking Arbitration will initially pay the arbitrator and facility fees relating to the arbitration, subject to the provisions herein regarding multiple arbitrators and subject to the arbitrator(s)' authority to reallocate arbitrator fees as set forth herein.

The parties do not agree to class action treatment of any claim subject to this arbitration provision, and neither party may pursue any claims covered by this Agreement as a class representative or a member of a class.

(Exh. A, Complaint ¶ 6(a); Exh. B, Amended Answer to Complaint ["Answer"] ¶ 6(a).) WorldLink is engaged in interstate commerce and the Agreements are therefore covered by the FAA. (Exh. A, Complaint ¶¶ 2, 5(a); Exh. B, Answer ¶¶ 2, 5(a).) Moreover, the Agreement expressly invokes the FAA. (Exh. A, Complaint ¶ 6(a); Exh. B, Answer ¶ 6(a).)

On April 27, 2015, contrary to the terms of the Agreement, the Region 7 Charging Parties filed collective actions against Respondents with the American Arbitration Association ("AAA") in Case No. 01-15-0003-3446, alleging a violation of the Fair Labor Standards Act. (Exh. A, Complaint ¶ 9(a); Exh. B, Answer ¶ 9(a).) On May 6, 2015, the Region 20 Charging Parties filed collective actions against Respondents with AAA in Case No. 01-15-0003-4540, alleging a violation of the Fair Labor Standards Act. (Exh. A, Complaint ¶ 9(b); Exh. B, Answer ¶ 9(b).) On June 19, 2015, WorldLink filed a Joint Motion to Dismiss Collective Action Allegations and to Limit Proceeding to Individual Claims and Motion to Sever (the "Joint Motion to Dismiss") with AAA in Case Nos. 01-15-0003-3446 and 01-15-0003-4540. (Exh. A, Complaint ¶ 10; Exh. B, Answer ¶ 10.) The Joint Motion to Dismiss was granted in each case. (Exh. C, Rulings on the Joint Motion to Dismiss in Case Nos. 01-15-0003-3446 and 01-15-0003-4540.)

The Charging Parties located in Region 20 then filed Case 20-CA-156284 on July 16, 2015. The Charging Parties in Region 7 filed Case 07-CA-157722 on August 10, 2015. (Exh. A, Complaint ¶ 1; Exh. B, Answer ¶ 1.) On February 26, 2016, the Board filed an Order Consolidating Cases and the operative complaint, the Complaint. (Exh. A, Complaint.) On March 10, 2016, WorldLink filed its Answer to the Second Amended Consolidated Complaint. On April 11, 2016, WorldLink filed its operative answer, the Amended Answer to the Second Amended Consolidated Complaint. (Exh. B, Answer.)

In the Answer, WorldLink informed the Board that it revised the Agreements ("Revised Agreements") in November 2014, and denied that the Agreements or Revised Agreements violated the Act.³ The Revised Agreements expressly inform employees that their agreement to arbitrate disputes does not prohibit them from "filing of charges or claims with...the National Labor Relations Board..." (Exh. B, Answer ¶ 6.) WorldLink's Answer also denied that it violated the Act by filing the Joint Motion to Dismiss. (Exh. B, Answer ¶¶ 6, 13.)

³ Charging Parties' respective Agreements were not amended or modified during the course of the Charging Parties' respective employment by WorldLink; therefore, the Revised Agreements do not apply to Charging Parties.

III. LEGAL ARGUMENT

Where there are no factual issues warranting a hearing, it has long been the practice of the Board to grant Summary Judgment. *See Henderson Trumbell Supply Corp.*, 205 NLRB 245 (1973); *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973); *Tri-City Linen Supply*, 226 NLRB 669 (1976). As shown by the Complaint and Answer, there are no factual issues in dispute. The issues are purely legal questions: Has WorldLink violated the Act by maintaining and enforcing the Agreement under the FAA? As numerous federal courts have held, the answer is "no", WorldLink's Agreement is lawful. Although not dependent on the answer to the first legal question, a related inquiry is: Did WorldLink violate the Act when it defended itself against Charging Parties' collective action, that is, by filing the Joint Motion to Dismiss? Again, the answer is "no". Although filing an objectively baseless lawsuit in retaliation for employees' concerted activity is an unfair employment practice, employers can defend claims brought by employees, which includes filing motions like the Joint Motion to Dismiss. Summary judgment is warranted here, and must be granted in WorldLink's favor.

A. *The General Counsel's Cross-Motion should not be considered because it was not timely filed as required by Section 102.24 of the Board's Rules and Regulations.*

The General Counsel's Cross-Motion for Summary Judgment against WorldLink was filed on April 19, 2016. If the General Counsel wished to move for summary judgment, the deadline to do so was April 12, 2016 given the then scheduled hearing date of May 10, 2016. Having failed to do so, the General Counsel waived its ability to move for summary judgment because Section 102.24 states that "all motions for summary judgment or dismissal ***shall be filed with the Board no later than 28 days prior to the scheduled hearing***" and the hearing date was May 10, 2016. Because the Cross-Motion was not timely filed, it cannot be considered by the Board given the requirements of Section 102.24.

B. *Pursuant to FAA, the Agreements Can and Should Be Enforced.*

1. *As many federal appellate courts have held, the Board's D.R. Horton I framework for analyzing arbitration agreements is wrong and must be abandoned.*

D.R. Horton I and its progeny were wrongly decided. The Board's reasoning in *DR Horton I* and *Murphy Oil* has been rejected and discredited by virtually every court to have

considered the argument, including every U.S. Court of Appeals to have addressed it. *See, e.g., Murphy Oil USA, Inc. v. N.L.R.B.*, No. 14-60800, 808 F.3d 1013 (5th Cir. 2015) (*Murphy Oil II*);

D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 361 (5th Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 2013 U.S. App. LEXIS 16513, at **20-21 n.8 (2d Cir. Aug. 9, 2013); *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-874 (9th Cir. Cal. 2013).

2. The Agreements do not violate the Act because the FAA mandates the enforcement of arbitration agreements per their terms.

DR Horton I was wrongly decided because it fails to accommodate Congress's policies advanced in the FAA. The FAA encourages private alternative dispute resolution, especially focusing on informal, inexpensive, and bilateral arbitration. The FAA provides that, "[a] written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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. There is "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The Supreme Court, and virtually every other court confronted with the issue, has held that this liberal policy applies to class action waivers. *See, e.g., AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344-345 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (the agreement must affirmatively permit class actions in order for an arbitrator to preside over the case as a class action); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (FAA's mandate to enforce arbitration agreements was not "overridden by a contrary congressional command" because the statutes at issue made no mention of class arbitration).

In *Concepcion*, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of such an agreement on the availability of class wide arbitration. *Concepcion*, 563 U.S. at 351. The Court concluded the state law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and that it was therefore preempted by the FAA. *Id.* The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental

attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. *Concepcion*, applying longstanding Supreme Court precedent, including *Moses H. Cone*, 460 U.S. at 24-25, concluded the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms — including provisions that waive the right to pursue class or collective relief in arbitration. *Id.* at 333.

Following *D.R. Horton I*, the U.S. Supreme Court in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012), reaffirmed that arbitration agreements must be enforced "unless the FAA's mandate has been overridden by a contrary congressional command." Likewise, in *Italian Colors*, the U.S. Supreme Court again instructed that, "unless the FAA's mandate has been overridden by a contrary congressional command," courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes." 133 S. Ct. at 2309. And even more recently, the Supreme Court overturned a decision from the California Court of Appeals, which relied on state law to invalidate a class arbitration waiver provision. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015). The Court reasoned that California Court of Appeals did "not place arbitration contracts 'on equal footing with all other contracts.'" See *id.* (citing *Buckeye Check Cashing, Inc.*, 546 U.S. 440, 443 (2006)).

The Fifth Circuit overruled the Board's reasoning from *DR Horton I* and *Murphy Oil I*, which forms the basis of its claim against WorldLink, by following the Supreme Court's reasoning outlined above: "[n]either the NLRB's statutory text nor its legislative history contains a congressional command against the application of the FAA," and such a congressional command could also not be inferred. *D.R. Horton II*, 737 F.3d at 361; see *Murphy Oil*, 361 NLRB at 72. The Fifth Circuit found the Act cannot be read in isolation, but must also account for the "healthy regard for the federal policy favoring arbitration." See *D.R. Horton II*, 737 F.3d at 360 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26). The Fifth Circuit recognized "the effect of [the NLRB's] interpretation is to disfavor arbitration" and "requiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton II*, 737 F.3d at 360 (emphasis added). Arbitration has deep roots in labor-management relations. See *Blessing v. Freestone*, 520 U.S. 329, 343 (1997) ("[W]e discern[] in the structure of the [NLRB] the very specific right of employees to complete the collective-bargaining process and agree to an arbitration clause."). The Board's hostility to arbitration is unprecedented and its

reasoning from *D.R. Horton I* and *Murphy Oil I* has been discredited and rejected by virtually every court to have considered it.⁴

⁴ Indeed numerous Courts have recognized the Board's radical departure and have turned against its reasoning first provided in *DR Horton I*. See e.g., *Murphy Oil USA, Inc. v. N.L.R.B.*, No. 1460800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014) cert. denied, 134 S. Ct. 2886 (U.S. 2014); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Richards v. Ernst & Young*, 744 F.3d 1072 (9th Cir. 2013) rehearing denied January 21, 2014; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *O'Connor v. Uber Techs., Inc.*, No. 13-CV-03826-EMC, 2015 WL 8587879, at *9 (N.D. Cal. Dec. 10, 2015); *Levison v. MasTec, Inc.*, No. 8:15-CV-1547-T26AEP, 2015 WL 5021645, at *2 (M.D. Fla. Aug. 25, 2015); *Nanavati v. Adecco USA, Inc.*, 2015 U.S. Dist. LEXIS 85113 (N.D. Cal. June 30, 2015); *Patterson v. Raymours Furniture Co.*, 2015 U.S. Dist. LEXIS 40162 (S.D.N.Y. Mar. 27, 2015); *Brown v. Citicorp Credit Services*, 2015 U.S. Dist. LEXIS 39766, 24 Wage & Hour Cas. 2d (BNA) 1333 (D. Idaho Mar. 25, 2015); *Ortiz v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 140552 (E.D. Cal. Sept. 30, 2014); *Appelbaum v. AutoNation Inc.*, SACV 13-01927 JVS, 2014 WL 1396585 (C.D. Cal. Apr. 8, 2014); *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014); *Herrington v. Waterstone Mortgage Corp.*, 993 F. Supp. 2d 940, 941 (W.D. Wis. 2014); *Longnecker v. American Express Co.*, 2014 WL 2204810 (D. Ariz. May 28, 2014); *Green v. Zachary Industries, Inc.*, 2014 WL 1232413 (W.D. Va., March 25, 2014); *Hickey v. Brinker International Payroll Co., L.P.*, 2014 WL 622883 (D. Colo. Feb. 18, 2014); *Siy v. CashCall, Inc.*, 2014 WL 37879 (D. Nev. Jan. 6, 2014); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 U.S. Dist. LEXIS 129102 (S.D.N.Y. Sept. 9, 2013); *Morris v. Ernst & Young*, 2013 WL 3460052 (N.D. Cal., July 9, 2013); *Dixon v. NBCUniversal Media, LLC*, 2013 U.S. Dist. LEXIS 75313 (S.D.N.Y. May 28, 2013); *Ryan v. JPMorgan Chase & Co.*, 2013 U.S. Dist. LEXIS 24628, *9-10, 16 (S.D.N.Y. Feb. 21, 2013); *Torres v. United Healthcare Services, Inc.*, 2013 U.S. Dist. LEXIS 14200 (E.D.N.Y. Feb. 1, 2013); *Cohen v. UBS Financial Services, Inc.*, 2012 U.S. Dist. LEXIS 174700 (S.D.N.Y. Dec. 3, 2012); *LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012); *Tenet HealthSystem Philadelphia, Inc. v. Rooney*, 2012 U.S. Dist. LEXIS 116280 (E.D. Pa. Aug. 14, 2012); *Brown v. Trueblue, Inc.*, 2012 U.S. Dist. LEXIS 52811 (M.D. Pa. April 16, 2012); *Long v. BDP Int'l, Inc.*, 2013 U.S. Dist. LEXIS 9104 (S.D. Tex. Jan. 22, 2013); *Johnson v. TruGreen Limited Partnership*, 2012 U.S. Dist. LEXIS 188280 (W.D. Tex. Oct. 25, 2012); *Carey v. 24 Hour Fitness, USA, Inc.*, 2012 U.S. Dist. LEXIS 143879 (S.D. Tex. Oct. 4, 2012); *Jones v. JGC Dallas LLC*, 2012 U.S. Dist. LEXIS 133056 (N.D. Tex. Aug. 17, 2012); *Smith v. BT Conferencing, Inc.*, 2013 U.S. Dist. LEXIS 158362 (S.D. Ohio Nov. 5, 2013); *Sylvester v. Wintrust Fin. Corp.*, 2013 U.S. Dist. LEXIS 140381 (N.D. Ill. Sept. 30, 2013); *Delock v. Securitas Security Services USA, Inc.*, 883 F. Supp. 2d 784 (E.D. Ark. Aug. 1, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 U.S. Dist. LEXIS 90902 (D.Kan. July 2, 2012); *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 U.S. Dist. LEXIS 16442 (E.D. Tenn. Feb. 7, 2013); *Fimbly-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 U.S. Dist. LEXIS 166647 (N.D. Cal. Nov. 22, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865 (C.D. Cal. Feb. 5, 2013); *Andrus v. D.R. Horton, Inc.*, 2012 U.S. Dist. LEXIS 169687 (D. Nev. Nov. 5, 2012); *Cilluffo v. Central Refrigerated Services, Inc.*, 2012 WL 8523507 (C.D. Cal. September 24, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. April 13, 2012); *Coleman v. Jenny Craig, Inc.*, 2012 U.S. Dist. LEXIS 70789 (S.D. Cal. May 15, 2012); *Luchini v. Carmax, Inc.*, 2012 U.S. Dist. LEXIS 102198 (E.D. Cal. July 23, 2012); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113 (2015); *Fowler v. Carmax, Inc.*, 2015 Cal. App. Unpub. LEXIS 559, 24 Wage & Hour Cas. 2d (BNA) 786 (Cal. App. 2d Dist. Jan. 28, 2015); *Iskanian v. CLS Transportation Los Angeles*, 59 Cal. 4th 348 (Cal. 2014); *Teimouri v. Macy's Inc.*, 2013 WL 2006815 (Cal. Ct. App. 2013); *Fowler v. Carmax, Inc.*, 2013 WL 1208111 (Cal. Ct. App. 2013); *Outland v. Macy's Department Stores, Inc.*, 2013 WL 164419 (2013); *Leos v. Darden Rests.*, 2013 Cal. App. Unpub. LEXIS 3939 (June 4, 2013); *Brown v. Superior Court*, 2013 Cal. App. LEXIS 441 (2013); *Papudesi v. Northrup Grumman Corp.*, 2012 WL 5987550 (2012); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537 (2012); *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487 (2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012); *Nelsen (Lorena) v. Legacy Partners Residential, Inc.*, 2012 Cal. LEXIS 10188 (Case No. 204953, Cal. Oct. 31, 2012).

3. Section 7 does not protect the procedural right to bring or participate in class or collective actions in courts or arbitration.

In reaching its conclusion that Section 7 protects the right to bring or participate in a class or collective action, the Board in *D.R. Horton* relied on cases in which the Board ruled that the NLRA prohibits an employer from taking an adverse employment action against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer, whether individually or in concert with other employees. *See, e.g., Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *Le Madri Restaurant*, 331 NLRB 269, 275-78 (2000); *Mojave Elec. Coop.*, 327 NLRB 13, 18 (1998); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942).

WorldLink acknowledges that Section 7 prohibits employers from disciplining or retaliating against employees who knowingly, voluntarily, and affirmatively wish to engage in legal process to act concertedly. However, Section 7 does not and cannot reach into the judicial system to regulate the procedural manner in which such an action shall be litigated.⁵ Nor does Section 7 prevent an employee from accepting the benefits of a neutral individual arbitration system that replaces access to the judicial system and its procedural mechanisms, including class actions. None of the Board's pre-*D.R. Horton* authority supports the conclusion that the procedural right to bring or participate in a class or collective action is protected under Section 7.⁶ There is nothing in the NLRA's plain language or the Act's legislative history that indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions. As explained by the Supreme Court, "the term 'concerted [activity]' is not defined in the Act." *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984).

⁵ The ability to litigate on behalf of a class is merely a *procedural*, rather than *substantive* device provided by Rule 23 of the Federal Rules of Civil Procedure. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims"). *See also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013).

⁶ In fact, the previous General Counsel of the Board issued a July 16, 2010 memorandum concluding that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without *per se* violating the Act. (Exh. D, General Counsel Memorandum GC 10-06.) The memo carefully draws a distinction between prohibited employer discipline for seeking collective litigation and the employers' right to seek court enforcement of individual arbitration agreements, including a class action waiver. *Id.*

When the NLRA was enacted, neither Rule 23 of the Federal Rules of Civil Procedure nor the Fair Labor Standards Act existed. This is significant because the Senate Report accompanying the NLRA provided:

[the] bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair.

Sen. Rep. No. 573, 74th Cong., 1st Sess. 8 (1935). Because Congress never intended to guarantee individual employees a statutory right to bring or participate in class actions, there is no basis for concluding that Section 7 encompasses the right to partake in a class or collective action. Thus, there is no basis for concluding that the Agreement violated Section 7 of the NLRA.

C. *WorldLink Did Not Engage in Unlawful Behavior When It Filed the Joint Motion to Dismiss to Defend Itself against Charging Parties' Collective Actions.*

As the Fifth Circuit held in *Murphy Oil II*, an employer's motion to dismiss and to compel arbitration does not constitute unlawful labor practice. Specifically, the Fifth Circuit held that the employer did not violate Section 8(a)(1) because the motion to dismiss is a defensive maneuver rather than an offensive maneuver. *Murphy Oil II*, 808 F.3d at 1018. In so holding, the Fifth Circuit distinguished *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (*Bill Johnson's*), a case in which the employer initiated a lawsuit against employees after the employees filed charges with the NLRB and picketed outside the employer's restaurant. *Id.* Because filing a motion to dismiss and compel arbitration represented an employer's efforts to defend against an employee's claims, it cannot be deemed retaliatory. *Id.* The Fifth Circuit also noted that its decision in *D.R. Horton II* foreclosed any argument from the Board that an employer's enforcement of an agreement is unlawful simply because it required employees to individually arbitrate employment-related disputes. *Id.* Finally, the Court stated that the NLRB would be well-advised "to strike a more respectful balance between its views and those of circuit courts reviewing its orders." *Id.*

Nonetheless, as in *Murphy Oil II*, the Board issued a charge against WorldLink for defending itself by filing the Joint Motion to Dismiss in response to the Claimants' collective actions. It is clear under *Murphy Oil II* that WorldLink's defensive maneuver was not retaliatory and therefore does not constitute an unlawful labor practice. Moreover, as the Fifth Circuit

clearly signaled, the Board would be "well-advised" to respect the views of the circuit courts and to cease prosecution of employers, like WorldLink, for defending against their employee's claims. Accordingly, summary judgment is warranted in favor of WorldLink.

D. *The Seventh Circuit erred in finding that the procedural rights provided in the NLRA trump the FAA's requirement to arbitrate.*

In *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit found that health care software company Epic Systems unlawfully required employees to agree to bring any wage-and-hour claims against the company only through individual arbitration by barring collective arbitration or collective action in any other forum. The Seventh Circuit upheld a district court's order finding that the arbitration agreement "violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, *et seq.*, and is also unenforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*" *Id.* at 1151. The Seventh Circuit reasoned that "other concerted activities," though undefined in Section 7 of the NLRA, have been interpreted to include "resort to administrative and judicial forums" including collective and class action lawsuits. *Id.* at 1152.

The Seventh Circuit's decision, however, is legally flawed and has been criticized by at least one other federal court. In *Bekele v. Lyft, Inc.*, No. CV 15-11650-FDS, 2016 WL 4203412 (D. Mass. Aug. 9, 2016), the court was required to determine if an arbitration agreement could be enforced despite the NLRA's prohibition on unlawful practices impeding concerted activities. The court found no barrier to enforcement of the arbitration provision and criticized the *Lewis* decision. The court stated:

The holding in *Lewis* rests on the following syllogism:

1. Under the FAA, general contract defenses that would make any contract unenforceable also would make arbitration provisions unenforceable;
2. One well-established contract defense is illegality;
3. It is illegal under Section 8(a)(1) of the NLRA to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7] of the NLRA";
4. Collective legal adjudication is a non-waivable, substantive right under the "other concerted activities" language of Section 7 of the NLRA; and
5. Therefore, an arbitration provision waiving that right is unenforceable under the FAA.

Id. at *18. The *Bekele* court explained that there was a critical misstep by *Lewis* in the fourth step. *Id.* That is, the "other concerted activities" language of Section 7 does not make collective legal adjudication a non-waivable, substantive right.

The language of "other concerted activities" in Section 7 is to be interpreted in accordance with the principles requiring that unambiguous language be interpreted in the specific context in which the language is used and the broader context of the statute as a whole. *Id.* at *19 (citing *Yates v. United States*, 135 S.Ct. 1074, 1081–82 (2015)). The court noted that Section 7 "enumerates three specific rights (to self-organization; to form, join, or assist labor organizations; and to bargain collectively through representatives of their own choosing) followed by a general phrase" which is therefore "subject to the long-established canon of statutory construction known as *ejusdem generis* ('of the same kind or class')." *Id.* "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted). *See also Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction[,] the general words [other concerted activities] are confined to the class [of preceding specific words] and **may not be used to enlarge it.**") (emphasis added).

As the court in *Bekele* explained, "under the *ejusdem generis* canon, the term 'other concerted activities' thus must be interpreted to mean other concerted activities of a similar type as the three enumerated activities. That would include, for example, such collective employee actions as picketing or organizing boycotts. . . . It would not, however, include an employee's ability to bring a class-action lawsuit under Fed. R. Civ. P. 23, which is of a different class or character than the enumerated rights." *Bekele*, 2016 WL 4203412 at *20.

Neither of the two explicit exceptions to the *ejusdem generis* canon apply to the instant case. First, the *ejusdem generis* principle "cannot be employed to "obscure and defeat the [otherwise clear] intent and purpose of Congress." *United States v. Alpers*, 338 U.S. 680, 682 (1950). However, as the *Bekele* court found, it is far from clear that Congress's intent in enacting the NLRA was to prevent an employee from freely waiving his right to bring a Rule 23 class action, a right that did not exist when the NLRA was enacted. *Bekele*, 2016 WL 4203412 at *20. Indeed, the *express* collective action provided for in the FLSA has consistently been held to be a

procedural right that is waivable. *See, e.g., Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir.), cert. denied, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014).

Second, the *ejusdem generis* canon cannot "render general words meaningless." *Alpers*, 338 U.S. at 682. As the Bekele court noted, "the application of the *ejusdem generis* canon to the NLRA does not render the general phrase 'other concerted activities' meaningless [or] superfluous" because it provides protection for "collective employee activities—such as labor picketing and boycotts—that are not enumerated in Section 7's specific list." *Bekele*, 2016 WL 4203412 at *20.

As in *Bekele*, WorldLink's enforcement of the waiver of any class/collective action in the arbitration agreements at issue is not unlawful under the NLRA and is therefore enforceable under the FAA. For these reasons, the Motion should be granted and the Cross-Motion should be denied.

IV. CONCLUSION

For the foregoing reasons, WorldLink respectfully requests that the Board grant its Motion for Summary Judgment and deny the General Counsel's Cross-Motion for Summary Judgment.

DATED: August 22, 2016

JEFFER MANGELS BUTLER & MITCHELL LLP
NILAY U. VORA

By: 

NILAY U. VORA

Attorney for Respondent Adi WorldLink LLC dba
WorldLink

CERTIFICATE OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, California, I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Jeffer Mangels Butler & Mitchell LLP, 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067.

On August 22, 2016, I served the attached **RESPONDENT ADI WORLDLINK, LLC'S RESPONSE TO NOTICE TO SHOW CAUSE** on the parties listed below by:

 X electronic transmission, I transmitted the aforementioned document(s) as PDF attachment(s) to the electronic notification address(es) below. The transmission originated from my electronic notification address, which is dn2@imbm.com, and was reported as complete and without error.

Patricia Fedewa
National Labor Relations Board, Region Seven
Patrick V. McNamara Building
477 Michigan Avenue, Room 300
Detroit, MI 48226-2543
Email: Patricia.Fedewa@NLRB.gov

Mark E. Zelek
Derek J. Dilberian
Morgan Lewis and Bockius LLP
5300 Southeast Financial Center
200 South Biscayne Blvd.
Miami, FL 33131
Email: derek.dilberian@morganlewis.com

Hessam Parzivand, Esq.
The Parzivand Law Firm
10701 Corporate Drive, Suite 185
Stafford, TX 77477
Email: hp@parzfirm.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 22, 2016 at Los Angeles, California.

 Dianne Shorte
(Type or Print Name)

 Dianne Shorte
(Signature)